

Members

Barnes H. Ellis, Chair
Shaun S. McCrea, Vice-Chair
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, May 10, 2007 Meeting
9 a.m. to 1 p.m.

Room B-30 Public Services Building
155 N. First Ave.
Hillsboro, Oregon 97134

AGENDA

- | | |
|--|-----------------------------------|
| 1. Action Item: Approval of the Minutes of PDSC's March 8, 2007 Meeting
<i>(Attachment 1)</i> | Barnes Ellis |
| 2. Presentations on Public Defense Delivery in Washington County
<i>(Attachment 2)</i> | Invited guests & audience members |
| 3. Progress Report from Morris, Olson re Gilliam, Hood River, Sherman, Wasco and Wheeler Counties
<i>(Attachment 3)</i> | Jack Morris |
| 4 OPDS's Monthly Report | OPDS's Management team |

Lunch will be provided at the end of the meeting for Commission members and others who ordered lunches in advance.

PDSC's next meeting is scheduled for Thursday June 14, 2007 from 9:00 a.m. to 1:00 p.m. at the Inn of the Seventh Mountain in Bend, Oregon, in conjunction with the OCDLA annual conference.

Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION

OFFICIAL MINUTES

March 8, 2007

Room 103, Oregon State Library
250 Winter Street, NE
Salem, Oregon 97301-3950

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 February 8, 2007 meeting

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

019 Chair Ellis noted the resignation of Commissioner James M. Brown and expressed appreciation for his years of service on the Commission.

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

034 -
[Tape 1; Side B] 001 Rebecca Duncan described how the Legal Services Division handles death penalty cases. She discussed the differences between death penalty cases and other criminal appeals, the considerations affecting the assignment of counsel in these cases, the need to work closely

with trial counsel and post conviction counsel during transition, the status of the death penalty cases currently in the office, and new best practices regarding the number of appellate attorneys assigned to each case and the appropriate amount of contact with the client.

015 – 084 Death Penalty contractor Richard Wolf talked about access to clients on death row and the need for timely assignment of post conviction relief counsel.

096 –
[Tape 2; Side A]
223 Ingrid Swenson described the structure and content of the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, and Commission members, OPDS staff and guests then discussed the identification of the “responsible agency”, the assignment of counsel in death penalty cases, the composition of defense teams, the need for more mitigation specialists and post conviction counsel, and training for death penalty attorneys

Agenda Item No. 3 Amendment to the Compensation Plan

226 – 244 Kathryn Aylward outlined a proposed amendment to the compensation plan to add two new positions – Human Resource Analyst 1 and Human Resource Analyst 2. She explained that the Contract and Business Services Division already had an employee who was performing the human resource function but whose existing designation did not accurately describe her responsibilities. She noted that the amendment would have no budget impact.

244 - 248 **MOTION:** Mike Greenfield moved to approve the compensation plan amendment; John Potter seconded the motion; hearing no objection, the motion carried. **VOTE: 5-0**

Agenda Item No. 4 OPDS’s Monthly Report

248 -
[Tape 2; Side B] 154 Ingrid Swenson reported on the initial hearing in the Public Safety Subcommittee of the Joint Ways and Means Committee on the Public Defense Services Commission’s 2007-2009 budget request and on SB 411 which would increase compensation for juvenile dependency representation. Rebecca Duncan discussed three legislative proposals submitted by the Legal Services Division. Jim Hennings and Greg Hazarabedian discussed the progress of United States Senate Bill No. 4022 which would create a loan forgiveness program for public defenders and district attorneys. Ingrid Swenson and Rebecca Duncan reported on their participation in attorney recruitment fairs. Olcott Thompson updated the Commission on the status of the litigation between the Marion County Association of Defenders and two former members of the consortium and also discussed the difficulty finding post conviction relief counsel in death penalty cases. Ingrid Swenson described the amendments which had been made to the Commission’s Affirmative Action Plan and Rebecca Duncan discussed steps that had been taken to continue to reduce the appellate backlog.

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

PUBLIC DEFENSE SERVICES COMMISSION

UNOFFICIAL EDITED TRANSCRIPT

Thursday, March 8, 2007
Room 103, **Oregon State Library**
250 Winter St. NE
Salem, Oregon 97301-3950

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

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

TAPE 1, SIDE A

[The meeting was called to order at 9:09 a.m.]

Agenda Item No. 1 Minutes of the February meeting

003 Chair Ellis The first item on the agenda is approval of the minutes of February 8, 2007. Are there any additions or corrections to the summary minutes or the official minutes?

MOTION: Mike Greenfield moved to approve the minutes; John Potter seconded the motion; hearing no objection, the motion carried.

VOTE 5-0.

007 Chair Ellis On the transcript I had a couple of changes. Page 7, line 470, the word "fairs" should be "fares" and on Page 20, line 188, I think the word "defenders" should be "offenders." Other than that I thought they were fine and again, I find them very helpful.

015 I. Swenson Mr. Chair, I do have one correction. Rich Wolf let me know that on page 35, the comment at line 153 is actually his rather than Dennis Balske's. That entire paragraph should be attributed to Rich Wolf.

Agenda Item No. 2 Delivery of Services in Death Penalty cases, cont'd

019 Chair Ellis Alright. I do want to note for the record that since our last meeting, I received a copy a letter from Commissioner Brown to Chief Justice De Muniz tendering his resignation, which the Chief Justice has accepted. I think all of us are very appreciative of Jim Brown's service on this Commission and we regret his decision to resign. I am sure the Chief will find a good

replacement, but I did want to acknowledge that he has been an outstanding contributor. The next item on the agency is the Delivery of Services in Death Penalty cases. We had, I thought, a very interesting meeting at Portland State a month ago on this subject. We are here as sort of the second installment. Ingrid, do you want to introduce the people who you have lined up?

034 I. Swenson Certainly, Mr. Chair. Today, the only piece that you haven't heard about is appellate representation in death penalty cases and that was just because we didn't have time to get to it at the last meeting. Both Becky and Pete are here to talk about that today. Then, if this is the way you wish to proceed, once that presentation has been made, Kathryn and I can answer any questions that you might have and that I didn't address in the draft report. If there are questions for Kathryn and me on costs or other aspects of representation in these cases, then I would propose that we review those issues one by one.

044 Chair Ellis Alright. Becky and Peter, you are the designated presenters.

046 B. Duncan Yes, Mr. Chair. I will be doing the death penalty presentation this morning. What I am here to do is to provide some background information about how our office handles these cases, describing the filings that we make in the cases, the timelines that we are working under and the current cases that we have in the office. Then I can respond to any questions the Commission has. Obviously, the death penalty cases in our office are different from the direct appeal cases that we have in many ways. First, obviously, these cases have automatic and direct review in the Oregon Supreme Court. We do not have to file a notice of appeal. The case is automatically noticed to the court and you go directly to the Supreme Court; you don't go through the Court of Appeals. The cases are more difficult and more complex than our direct appeals in several ways. First, there is the length of these cases in terms of the transcript. These cases have thousands of pages, even the cases we are getting that just involve the penalty stage. The transcripts are thousands of pages long which takes a significant amount of time to review. The issues involved can be complex and unique so we need to have death penalty experienced attorneys in these cases. The death penalty cases are more involved than a direct appeal case because of the number of issues that they present and because of the number of issues that we must raise in these cases. Obviously, we would want to raise every possible issue whether it is preserved or unpreserved. We have two attorneys in our office who have handled several cases, Robin Jones and Eric Johansen. I spoke with them and they said that, at a minimum, the number of assignments of error they would raise in a death penalty case is in the 20s, so these cases have numerous assignments of error. The assignments, of course, can relate to what we might call standard criminal issues and then death penalty unique issues. What is important to know about the standard issues that come up is that, whether it is a motion to suppress because of the bad search or involuntary statements or an issue about the admissibility of evidence, because these death penalty cases go straight to the Oregon Supreme Court, all of these standard criminal issues like motions to suppress, have to be litigated at the highest level because that is what will be setting precedent for the Oregon Court of Appeals and the lower state courts. Basically these death penalty cases can involve several (inaudible) with Supreme Court cases which cause them to be more demanding and involved than our regular cases. The death penalty cases have some unique issues relating to the qualification for the death penalty, the constitutionality of the death penalty statute, and the admissibility of evidence in the penalty phase. So the issues involved are more numerous; we have to litigate it at the highest level; and they have some unique issues. With respect to the filings that our office makes in these cases, there are usually more filings in death penalty cases than in regular cases. Just to give you a very quick outline of the process of the case, we get the transcript in, and under current Oregon Rules of Appellate Procedure we have 180 days from the time that the transcript comes in within which to file our appellant's brief. We file the opening brief and the state has 180 days to file their response brief. We generally will file a reply brief to the state's response brief. We have 90 days to do that. The case proceeds to oral argument. After oral argument, when the opinion issues, we will always explore the possibility of writing a petition for reconsideration and

often file a petition for reconsideration provided that we have a basis under the statute for doing so. If we don't prevail at that point in the Oregon courts, then we file a petition for certiorari in the United States Supreme Court and then if we don't prevail there the case comes back to Oregon and we help the defendant by guiding him to the post conviction relief process and helping him prepare an initial post conviction relief petition and then making sure that counsel gets appointed. So, in the death penalty cases there are a couple of filings that we make routinely in these cases that are in addition to those filed in direct appeals. Reply briefs are almost always done; petitions for reconsideration are often done; petitions for certiorari are always done; and then we have the PCR transition.

- 111 Chair Ellis Do you handle the appeal from denial of PCR?
- 112 B. Duncan No, we do not.
- 113 Chair Ellis Who does that?
- 113 B. Duncan The appellate panel would do that.
- 116 K. Aylward Private attorneys before the appellate panel was created.
- 117 Chair Ellis But to get to the federal habeas, do they have to go through an appeal from denial of a PCR?
- 120 P. Gartlan Yes, Mr. Chair it has to go through the direct appeal and through the post conviction relief process and then it goes into federal habeas.
- 124 Chair Ellis That is the point in the process that I was asking about. PCR is denied, do they have to appeal that, and have cert denied on that, before they get to the federal habeas?
- 128 P. Gartlan No.
- 128 O. Thompson Mr. Chair, Olcott Thompson. To preserve their remedies in federal court they have to exhaust the PCR process, which means they have to appeal.
- 129 Chair Ellis That is what I thought.
- 130 Audience Excuse me Mr. Chair. They have to present the issue to highest state court.
- 133 P. Gartlan State court, not U.S. Supreme Court.
- 133 Chair Ellis Becky, you used two words that were very significant. You said on the appeals, in the death area, you raise all issues preserved or unpreserved. My question is, on the unpreserved issues are you finding problems there? Are death penalty trial lawyers, some of them, not raising below, the issues in a way that you think they should?
- 140 B. Duncan I do have to say, Mr. Chair, that Robin Jones and Eric Johansen and Meredith Allen are the attorneys who are currently handling death penalty cases in our office and I have not reviewed the transcripts in these cases. I know that we do raise unpreserved issues. I know that with respect to several of the issues that we raised in recent cases, the Oregon Supreme Court has declined review on the ground that they were unpreserved, but as far.... I know we have issues that we raise that are unpreserved.
- 150 Chair Ellis No one in this room likes that word "unpreserved". It is just fraught with problems, so my question is, are we doing all we can do at the LSD level to stay in touch with the trial lawyers who are handling the death penalty cases, to do everything we can to make sure they are aware. I know these are very hard issues, maybe that is the word, but they are not self-evident to an ordinary practitioner. You have to really be on top of your game to know about

them. Are we doing all we can to try to get to the trial level lawyers to advise them “Here are some issues that may be in your case, watch for them, be sure to preserve them,” because it just seems to me that our system ought to do that.

- 165 B. Duncan I don't think that we are doing all that we can, in particular with the outreach to the death penalty providers at the trial level. We don't have a system in place where we make sure that we communicate all the errors that we identify on appeal.
- 171 Chair Ellis How can we do better on that? In terms of numbers of cases, it couldn't be that big a number. In terms of the number of trial level lawyers it is not that big a number.
- 173 B. Duncan No. I think our office could, for example, connect with the death penalty trial bar at, for example, OCDLA's October annual death penalty seminar if there are death penalty specific issues that we are not seeing preserved, that we think should be preserved. We could certainly reach out to the trial level providers at the annual death penalty CLE. As far as unpreserved issues regarding regular criminal issues, the suppression issues, routine issues, our office does reach out to the trial bar, in general, through CLE presentations throughout the year through both the Oregon State Bar and OCDLA. On those types of non-death penalty specific issues, we are out at CLEs. We could certainly increase our communication with death penalty practitioners and specifically at the OCDLA death penalty conference and improve our personal connections with them.
- 191 Chair Ellis If there are unpreserved errors, that is a big part of what the PCR process is about and it just seems to be preventable.
- 194 B. Duncan It certainly can be frustrating for appellate attorneys to see a good issue not raised or not raised well enough for the appellate courts so that we can research and brief it.
- 199 Chair Ellis I would really like to see the practice institutionalized more than just speaking at CLEs. It is a very small number of death penalty trials that occur. They are big trials but there are few of them. I just know that we ought to be doing everything that we can to make sure that these issues get properly raised.
- 206 I. Swenson Mr. Chair, I really think that having Matt Rubenstein in the position of the resource attorney can help to coordinate those efforts.
- 209 Chair Ellis Exactly the kind of thing that we were hoping for.
- 210 B. Duncan I think it would be interesting, either at different stages of the briefing or after the opinion comes down, and certain issues are briefed for preservation purposes, to have members of the death penalty community and resource center come together and talk about what issues were raised in these cases and what issues were not raised.
- 217 Chair Ellis On the other side of the process, the PCR piece, you indicated that your office does facilitate getting that process started? How much do we do to help the PCR attorney identify issues?
- 223 B. Duncan I can speak generally. When the case goes to PCR and the PCR attorney is appointed our office, or course, makes all the materials that we have available to the new attorney. Robin Jones is currently handling death penalty cases and when she reviews the case, she identifies for the client, after reviewing the transcript, all of the issues that she has seen in the case and all of the issues that she believes she can raise on direct appeal. If there is something that she doesn't think she can raise on direct appeal, but that could possibly be a post conviction relief claim, she identifies those issues as well to the client. So there is written documentation of potential PCR issues that she has already recorded and that information is available to the PCR attorney as well. I don't have specific information about other people's practice in handing off the case.

- 240 Chair Ellis Given what we were told last month, and I think I have come to understand, that in the federal system there are lots of traps for the unwary, that if it wasn't handled correctly in the state's system, you can't raise those issues in the federal habeas piece. Shouldn't we be doing more to alert our PCR lawyers as to what potential issues are and make sure the defendant isn't denied that possible issue later in habeas?
- 249 B. Duncan I think it would be helpful when a case is transferred from direct appeal to PCR for the direct appeal attorney to always sit down with the PCR attorney and talk about the case.
- 253 Chair Ellis This is again something you picture Matt helping with.
- 254 I. Swenson Not necessarily in this situation just because, well of course he would be there to assist any lawyer who thought that they needed that, but this really is a one-on-one situation involving that specific case.
- 257 Chair Ellis Right.
- 258 I. Swenson I think that probably happens routinely. It is one of the obligations that attorneys, post conviction attorneys including appellate lawyers, have under the guidelines --to help the client through the next stage of the process.
- 261 P. Levy Mr. Chair, under the ABA Standards that we are using as both a guide and a yard stick for our own work, it is one of the duties of counsel to facilitate the transfer to successor counsel.
- 265 Chair Ellis I assume that. I am just trying to make sure that we are doing it.
- 266 B. Duncan I don't know if those meetings are happening in person. I do believe Eric Johansen, who is the only attorney in our office that has a case at that stage right now, is in contact with the post conviction attorney when he is transferring the case. I don't know if he is sitting down with him for a meeting, but I know that he has had phone conversations with him. I think we can make the process more formal and make it clear that a meeting is required when the cases are transferred between our office and post conviction counsel.
- 277 G. Hazarabedian Mr. Chair, if I might, along those lines I think the communication between trial counsel and appellate counsel, when that handoff is happening, is also real crucial and some of my former colleagues in the capital defense bar, I have heard anecdotally over years past, are not satisfied with the amount of time the appellate lawyer was able to give the trial lawyer to discuss the appellate issues and potential PCR issues. I don't know the current state of that, but I would just say that in the past I have heard a little bit of concern that that process wasn't as full as it might be, along with some of the other things that you talked about.
- 287 Chair Ellis I would think that from the point of view of the appellate lawyer handling one of these cases that is the conversation that I would have every incentive to want to have in depth. Any comment?
- 291 B. Duncan As far as what is happening in our cases so far? No, I don't know if there have been problems but I agree that there should be those communications between sending counsel and receiving, both with cases coming into our office and when the cases leave our office. That is something that we could establish as a standard practice in our office. I think that it is dependent on the particular attorney sending the case.
- 300 Chair Ellis But I thought you said there are only two, I thought you said, of our LSD lawyers that are active in death penalty cases.

- 301 B. Duncan We have Eric Johansen who has had numerous death penalty cases and he is currently not taking them, and then we have Robin Jones who has three active death penalty cases right now. I don't know how Eric received the cases, what he did. I don't know how much contact Robin Jones had with the trial attorneys in her three particular cases.
- 309 Chair Ellis You said in your opening comments you wanted to talk about volume. I don't think we have gotten there yet.
- 311 B. Duncan Sure. I wanted to tell the Commission about the current number of cases we have in the office. We have three open cases. They are all being handled by Robin Jones. One of them is *State v. Bowen* and in February the petition for certiorari was pending but that has been denied. That case is at the stage where it will be being handed off to post conviction counsel. Robin also has a case, *State v. Zweigart* that has been argued in the Supreme Court and we are waiting an opinion. She has another case, *State v. Davis*, that she has briefed and we are waiting on the state's response. So those are the three active cases that we have right now. I would like to let the Commission know how our practice in staffing these cases has changed. Several years ago we had a death penalty team. We had a set number of three attorneys or so in our office who would handle all of the death penalty cases. When a death penalty case came in, it would be assigned to one of them. They would already be working on a death penalty case. What happened with this is that it created a backlog because you would be working on a case and then receive a new case, and that case would wait until you were finished with the existing case. Because of our concerns about backlog, because of our concerns about delay on the case, and because of our concerns about the fatigue that was happening when an attorney would basically accrue more and more death penalty clients, we decided to change our staffing on these cases. We had eliminated the backlog by letting the people who were on the death penalty team, including Eric Johansen, finish their existing cases and we are now going to a process where an attorney like Robin Jones will handle a few death penalty cases and then rotate out of receiving those cases. The reason for that is we want to ensure that our death penalty attorneys do not, basically, become fatigued. We use their expertise as much as we can, but we don't overuse them and another attorney can start working on the brief right away. That obviously was essential, given that we now have a six-month timeline from when the transcript comes in until we have to file the opening brief.
- 349 Chair Ellis Where does that come from?
- 350 B. Duncan That is Oregon Rule of Appellate Procedure 12.10 and that requirement is just a few years old.
- 353 Chair Ellis Specific to death penalty cases?
- 353 B. Duncan Specific to death penalty cases. Six months for us to file our opening brief and the same six months for the state to file its respondent's brief. When that rule was put in place it was very disruptive for us because we had death penalty cases waiting and then we got new ones and we had to complete everything within six months. So we did have to bring on new attorneys to handle the cases that were not on the death penalty team. That included Robin and it also included Rankin Johnson who was in our office at the time but has since gone into private practice. What we do now, what we envision doing going forward, is having people rotate through handling these cases using the death penalty qualified attorneys in our office. We are using Eric Johansen as a resource since he has significant experience, but he is not inclined to take additional cases.
- 370 Chair Ellis Is that his choice?
- 370 B. Duncan Yes.
- 371 Chair Ellis Burnout?

- 371 B. Duncan He handled several of these cases and is willing to serve as a resource for us, but does not want to be counsel on any more death penalty cases because of the fatigue and just the demands of these cases. He is serving us well handling regular, direct appeal cases now. He is available as a resource. Robin Jones is serving as our current death penalty attorney on our three active cases, but we are also bringing on new people. One of our attorneys, Meredith Allen, has been working with Robin on one of these cases so that she will be – well, she is briefing discreet issues and the idea is that she will gain some experience in the death penalty area before becoming lead counsel on a death penalty case. We are also asking one of our more senior attorneys, Shawn Wiley, to do the same thing, to be able to handle discreet issues in a death penalty case and attend death penalty trainings before taking on the lead counsel role. So we are trying to grow the number of attorneys in our office who handle death penalty cases. Talking with Robin and Eric, we think it would be good to have six or so attorneys in the office who would be available to take these cases so that we could have different pairs of attorneys take each case, with one being a primary and the other being a backup attorney. We think it is useful for supporting the primary attorney through the case and also making sure that all of the issues are identified, briefed, and discussed, and provide as much support as possible.
- 403 Chair Ellis Can you estimate the percentage of LSD’s total costs that is devoted to death penalty? It sounds like there are 27 or so lawyers –
- 406 B. Duncan Right.
- 407 Chair Ellis It sounds like one and half FTE devoted to death penalty?
- 408 B. Duncan When we had a death penalty team, we had three attorneys working full-time on death penalty cases. That was when we had a backlog. In the past two years, I think it was two years, with Robin Jones on; she has been basically full-time death penalty.
- 414 Chair Ellis So it is somewhere between eight and 10 percent of the entire effort at LSD?
- 415 B. Duncan Yes and that is with a kind of manageable inflow of these cases. The timing has been such that Robin has been able to handle three cases in sequence without too much overlap in the cases. If there is a large number – if we were to get just one or two more death penalty cases, what that does is, when a death penalty case comes it takes away an attorney from regular, direct appeals for a minimum of six months for the briefing alone, and that is just the initial briefing. They are full time unavailable at that stage. Then they are partially unavailable for the rest of the case -- for the reply brief and the argument and the petition for certiorari.
- 431 Chair Ellis This is an area, though, that you can see a glut coming. As you sit here today can you indicate in the next, say two years, do you expect more demand, the same demand, reduced demand?
- 439 K. Aylward We have been watching the new, aggravated murder cases, and it has been really steady. From an historic high of 40 cases a year, it is now, in the last five or six years, been between 20 and 25 a year. I don’t expect to see an increase or decrease.
- 445 Chair Ellis If it doesn’t lead to a death sentence then your regular lawyers would handle the case?
- 447 B. Duncan Right. So, if it remains steady we will probably have one full-time attorney handling these cases as we have had in the last couple of years.
- 450 Chair Ellis I had the impression from Bill Long that this glut, this number of 18 or so current convicted persons, that there was going to be an increase in demand for our services at the appellate level from them. I can’t remember quite what, but I had the feeling that we were looking at an –

462 I. Swenson I think, Mr. Chair, he was talking about post conviction appeals.

464 Chair Ellis Right.

465 I. Swenson He didn't know whether this office handled them or not. That was where he expected to see an increase and I think he was talking about 2012 or something like that, where people would actually be approaching execution.

470 B. Duncan The convergence would be the people who are going through the appeal process right now, at a faster rate than perhaps the older group, that those people are going to approach execution at the same time that the people who have been slow going through the process. They are all going to converge at the same time around 2012, because the current cases are going to catch up with the people who have gone through slowly. The increase, I think, in the demand on OPDS's resources, will be at the post conviction stage and post conviction appeals for the people who have moved slowly through the system. I believe the Attorney General has indicated that they intend to have more of the post conviction trials in these capital cases.

487 Chair Ellis They told us that last month.

487 B. Duncan OPDS will have demands at the trial level and then those will proceed to post conviction.

490 Chair Ellis Kathryn, I know at the budget presentation to the E-Board, we made a point that a lot of our expense that we needed extra funding for came from the backlog of capital cases. How long do we see that happening?

497 K. Aylward I actually think that it may have crested. I'm hoping. I know it is still going up but looking at new filings, as I said before, there were as many as 40 a year and now we are down to 25, so we are still feeling the impact of a large caseload because all the cases are still at some level in the system, with the exception of two or four which are now in the federal system. I am thinking it is going to get a little bit worse and then it is probably going to get better. I am hoping it is.

508 Chair Ellis It does seem to me, and you know it is probably not up to us to get into the ultimate issue on this, whether the death penalty is a good thing or bad thing politically, but it does seem to me that the public and the legislature ought to be given good information about the cost, and the cost is very high. Are we able to somehow, at least, break out the costs that our part of the system is incurring, specific to death penalty, and publish that in some fashion so that both the voters and the legislators know?

524 K. Aylward Yes, I think the problem is that again, there are so few cases where we can say what the total cost was, because it is still racking up costs. The few that we have go back as far as '88 or '89, so are data is not great. We know it is at least this much money.

533 Chair Ellis If you do it on a specific case, I understand that, but we certainly ought to be able to capture it for a specific time period, per year or biennium. I just don't know, I haven't seen that data broken out in a way that really communicates this is what we are having to incur because of the –

543 K. Aylward For expenditures from the Public Defense Services accounts, all of our spreadsheets and our tracking, do separate aggravated murder costs, both at the trial level and for post conviction relief, and appeal of post conviction relief. I don't think in our budget with Legal Services Division we have ever divided it by any kind of case type. That would be the component that isn't isolated.

551 Chair Ellis Would that be hard to do?

551 K. Aylward We have done it before in terms of estimates, in term of the costs. I think for fiscal impact statements we use the figure of about \$80,000 for death sentence appeals. We just did that very crudely in terms of if it taking six months and this is the cost of an employee. As you say, it is 1/27th of our total – it is a really rough estimate but it is about \$80 or \$85,000.

561 Chair Ellis That actually strikes me as low.

562 K. Aylward It is actually not far off what the AG’s office, in fact Ingrid just provided some information that came from the AG’s office that states something like 776 attorney hours on a direct capital appeal. It is comparable to the time that they spend in terms of hours.

570 Chair Ellis Becky, you said there was this six month timeline on the direct appeal? Is there a similar timeline on the PCR appeal?

576 B. Duncan I don’t know for sure whether that rule also applies to the appeals for the post conviction.

579 Chair Ellis Does your same specialist, Robin or formerly Eric, do the PCR appeal?

581 B. Duncan No. They are not done by our office.

591 Chair Ellis Those are done through the appellate panel? Are we getting the benefit of death penalty specialists at the appellate panel?

596 K. Aylward I think there are either two or four who have done PCR appeals.

601 P. Gartlan There is a death qualified list of appellate attorneys, so somebody who is qualified to do direct appeal in a death penalty case is also qualified to do the post conviction appeals.

608 Chair Ellis Right.

608 P. Gartlan The post conviction appeal goes to the trial court, then to the Court of Appeals, then to the Oregon Supreme Court. A direct appeal goes right from the trial court to the Supreme Court.

612 Chair Ellis Right. Anything you guys see that we could do better on the appellate side.

617 B. Duncan We have been talking about best practices and things that we would like to do to improve our representation. We are always interested in improving it and we have made improvements by eliminating the backlog, changing the staffing to eliminate fatigue. There are things that have come up when we have been looking at the ABA guidelines that have caused us to look at how we handle the cases. I think, as we discussed this morning, we can improve how we transition the case from the trial attorney to our office and from our office to the PCR attorney. There are also other things that we can do to comply with the ABA guidelines. The ABA guidelines can be read to require two attorneys in a death penalty case. There is a question whether that requirement should apply to appeals, but Pete did look at other states, including Washington, California and Illinois to see if two attorneys are assigned to death penalty appeals. In California, they are not. One attorney is assigned but a second attorney can be brought in on a case-by-case, day-by-day basis. In Illinois, the primary attorney is appointed and then there is a backup attorney who doesn’t necessarily read the full transcript but is there to assess the case and is also charged with the case in way to ensure that they provide support for the first attorney. What our office would like to do is to follow the Illinois model so that we have, as we started to with our most recent case, a primary attorney who is responsible for the case, but then a backup attorney who is also invested in the case, who can work on select portions, can explore issues and brief discreet issues in the case. Also, they will serve not only as support for the client and for the primary attorney, but will also ensure that if a person already has experience that person can maintain and increase their experience.

If the person is new, it can be a training and learning opportunity that will help us grow our pool of attorneys. Those are specific areas that we can and want to improve on. Another issue which came up at last month's meeting, and was also raised by the ABA guidelines concerns client contact. Our client contact has varied with the particular attorney handling the case. It has varied both in terms of its frequency and the nature of it, whether it is primarily by letter, by phone or by visit or a combination of those things. Obviously, on appeal, the need for client contact is different than it is at the trial level because we are not gathering evidence for the direct appeal, although there is some evidence gathering that we might have to do to preserve evidence for future events. But it is less important to preparing the direct appeal to have the client contact. It doesn't compare with what is necessary at the trial level. That said, we recognize the value of having frequent client contact and good client relations with all of our clients, but especially the death penalty clients. Obviously it is important to establish good working relationships so that the client understands what our role is, and what issues can be raised, how we are handling the case. It is important to improve our representation of our client, and if you have a good relationship with your client, I think that you are more personally invested in the case and that can improve your representation. It is important to maintain a good relationship so we are aware of the client's mental health status and their ability to participate in their case at the appellate level. It also can facilitate communications so that if there are issues that may not be relevant to direct appeal, but important to later challenges, that the client can communicate those to our attorney. For example, in a recent case, Robin Jones had a situation come up where it became apparent that evidence that would be necessary in a retrial was degrading. She discovered this and had to take steps, file a motion to make sure that the evidence was properly preserved at the law enforcement agency. There are some things that we have to do that are not directly related to the direct appeal, but necessary for preserving the client's later claims and interests in the event that there is a retrial. Obviously, having a good working relationship with our clients is important. We want to look at the area and make sure that we are doing all that we can, all that is necessary, to facilitate that contact, whether it is through phone or letter.

TAPE 1; SIDE B

- 001 B. Duncan We want to make sure that we are doing all that we can.
- 002 I. Swenson Mr. Chair, just one additional comment. The defendant is probably the most vulnerable at that stage to despair and just sort of deciding that there is no point in going forward. They have lost at the trial level, and they are used to, in most cases, having frequent and supportive contact from their legal team. When that team is no longer in the picture and there is an appellate lawyer there, it is necessary to make sure that they are not leaving the client in a void, so we have been talking about ways of assisting with that. One thing is to look at having an assistant to the lawyer, an investigator, or somebody particularly skilled in client contact, maintain regular contact with each of those clients.
- 012 Chair Ellis Any other questions for Becky? Thank you.
- 015 R. Wolf Mr. Chair, I have a few brief comments if I might. For the record, Rich Wolf, a death penalty contractor. Just on the last topic, I would say that the death row inmates at the Oregon State Penitentiary are probably the easiest clients to reach by telephone. They have a cordless telephone that they have on death row. You can call a direct number. From Salem it is a local call. They take the phone down to the inmate's cell and you can have a conversation of virtually any length with your client. It is very easy to maintain contact by telephone with the death row inmates. The other topic I wanted to talk about was the successor attorney issue and while I don't want to minimize the importance of communication between the trial counsel and the appellate counsel, I think the much more important component, and it has come up just this week -- Ingrid and I have talked about it -- is the passing of the case from direct appeal to post conviction. The reason it is important is because under the Anti-Terrorism and Effective Death Penalty Act of 1996, the clock for filing a federal habeas corpus petition begins when the appellate judgment issues. In the case of a death sentenced

inmate, once the Oregon Supreme Court issues the appellate judgment and the petition for cert is filed, it is when that petition for cert is denied that that one year clock begins to run. The Federal Defender's Office has made it very clear that they need as much of that year as possible in which to investigate and file the petition. The reason being that the AEDPA one-year deadline is also a statute of limitations, so unlike state post conviction where you can freely amend a petition, you cannot amend – you can't add claims to a federal habeas corpus petition after the one-year period, so the Federal Defender's Office is responsible for fully investigating and fully filing their petition within that one-year period.

- 042 Chair Ellis I thought they first had to have gone through state PCR?
- 044 R. Wolf Yes, but you don't stop that clock until you file the state PCR. You have two years to file a state petition for post conviction. If you wait more than a year to file that petition then you will never get into federal court.
- 048 Chair Ellis This is new to me. State PCR is a two-year window. Federal habeas is a one-year window and federal habeas gets filed and then sits while....
- 051 R. Wolf No. What you need to do is to toll the AEDPA time clock. You need to file a petition in state court for post conviction relief that will stop the clock.
- 054 Chair Ellis So the one-year gets tolled?
- 056 R. Wolf Right, but if you let the time run between when the appellate judgment issues and the cert is denied, if you let that time run until a year, you are never going to be able to get into federal court. The problem is, PDSC traditionally cannot, will not, appoint counsel until a *pro se* petition for state post conviction relief is filed. It is usually dependant upon the inmate to bring the first petition for post conviction relief.
- 063 Chair Ellis I thought I understood from Becky that our LSD lawyers do manage that process and assist the prisoner in filing the *pro se* state PCR case.
- 066 B. Duncan That was Eric Johansen who has had the cases at this stage so far, and his practice was to go out to the penitentiary and meet with the inmate and go through the claims and make sure that the inmate's initial PCR –
- 070 Chair Ellis This is what you are concerned about?
- 071 R. Wolf Right. My view is that while the cert petition is pending before the Supreme Court of the United States, there ought to be a state post conviction petition being drafted, because the odds of the cert petition being granted are not so good. The petition ought to be getting drafted so that the day after cert is denied, the state post conviction can be filed and you only lose a day toward your one-year federal habeas.
- 077 Chair Ellis What is the practice on that?
- 077 B. Duncan I think the practice was to do the post conviction petition after cert had been denied, but I think it could be changed to start the packet once cert is filed.
- 080 C. Lazenby What is the timeline between cert denial and...
- 081 B. Duncan I think it is less than a month.
- 081 P. Gartlan Usually less than a month.
- 083 I. Swenson The case Rich and I are dealing with didn't have LSD on the appeal.

- 084 R. Wolf It had another odd quirk in that it has been remanded for merger of sentence so the federal AEDPA clock is really running from the denial of cert but he can't really file state post conviction because he doesn't have a formal, final judgment in the state court. It is sort of an odd loophole that he has fallen into. Those are the things that I wanted to address.
- 090 Chair Ellis Any other comments or questions? Thanks Becky and Pete. I hope you recover your speaking ability. It is tough in your line of work to not have a voice. Ingrid, do you and Kathryn want to comment on the topic?
- 096 I. Swenson If I may, Mr. Chair, I have prepared a draft for Commission members. As it points out, fortunately the ABA Standards would be an excellent set of standards for the state. They contain basically two sets of provisions, about how the state agency which is in charge of this function should manage its function, and then the performance standards for individual lawyers in these cases. As we go through those, there are some areas in which I think Oregon is in complete compliance and performing appropriately. There are others where there are decisions to be made and directions to be taken in order to come into compliance with the standards. Now, the standards are intended to be mandatory and, as I pointed out, the courts are generally looking to these standards as the measure of what is expected of lawyers in death penalty cases. The courts have referred most often to the need for adequate mitigation investigation, but, occasionally, to other parts of the standards as well. For all those reasons, I think we would be wise to comply with these standards as best we can. The first thing we need is a plan and if we are able to work our way through the various provisions of the standards, I think what we will end up with in the end is probably a plan for the delivery of representation services in death penalty cases. The first issue has to do with identifying a responsible agency and, of course, the functions which are outlined for that agency are largely being performed at this point by the Contract and Business Services Division. I know Kathryn is of the opinion that the Public Defense Services Commission itself might be the responsible agency and we may want to consider whether that is the case, because the recommendation certainly is that you have trial or appellate full-time death penalty lawyers as part of the organization that is overseeing these standards and their implementation.
- 128 Chair Ellis They are really using as a model something like Colorado has, aren't they?
- 130 I. Swenson I think so.
- 131 Chair Ellis The FTE state employee defender office that does both trial and appellate?
- 132 I. Swenson It seems like it.
- 132 Chair Ellis My memory is that very few states have that.
- 133 I. Swenson I think that is correct Mr. Chair and in the commentary to the black letter portions of the standards, they do acknowledge that every state has a different delivery system. Some things will work in some states and not in others. We are on the other end of the spectrum, where we have so large of a percentage of our cases being handled by private attorneys.
- 139 Chair Ellis We are not way at the other end of the spectrum because we have a state contract administrator and they have county systems.
- 140 I. Swenson That is correct. And we do have our Legal Services Division with full-time state employees. But I think if we combine the two divisions and use the resources that are available through our Legal Services Division for some of the functions that are required, we can make it work. We avoid conflicts of interest by not having the Legal Services Division do case assignment and that sort of thing, so there are some pieces of it that simply couldn't occur within that office. Among the functions set out for the responsible agency, there are a couple that we are

not yet performing. One of them is the direct assignment of counsel in each case. As the Commission is probably aware, for the most part --Kathryn can talk more about this and Billy is the analyst currently assigned to this task -- when a death penalty case arises the court ordinarily contacts us and we look through our contractors to see who among them is available to take a case. If none of them are, then we look to a list of private bar attorneys who are certified and who have been approved for appointment in these cases, and we make a recommendation, at least, to the trial court. Kathryn is it ever the case that we say "You must accept this attorney?"

- 163 K. Aylward I think things have gotten to the point now where it is extremely difficult for us to find attorneys for these cases. The court understands and if they have contacted us and we can find one name to give them they are happy. Originally, we used to give the judge a name and the judge would say "Got anybody else?" and so we would give them two or three names. Now, everybody understands that if you can find someone, you are doing well. The exception is perhaps in those counties where the judge doesn't contact our office. But there are still some places where a judge will say "I know, I'll give this case to so and so" and the so and so might not be someone that we are terribly comfortable with. I think, to a large extent, we manage to insert ourselves in that process, but there are surprises from time to time.
- 175 I. Swenson Chapter 151 certainly permits us to adopt a policy on this issue, so our policy could be stricter than it is. What we obviously want to avoid is a situation where judges, for inappropriate reasons, choose not to have a particular attorney on a case. We try to avoid the situation where the judge says "I just don't like that lawyer". But when we were able to give them choices it was usually a matter of saying "Here are three well-qualified lawyers." But there are issues that the judge may be aware of that we are not, in terms of the defendant and the defendant's needs, that might cause the court to prefer to appoint one attorney over another. Ideally, and the standards talk about this, it is not a rigid appointment system that you put in place where the next person on the list has to take the case, because there needs to be a match between the attorney and the client to the extent that you are able to do that. It is kind of a mixed bag, because at that stage of the case the judge has more information about the case and the defendant then we do in terms of matching the defendant with an appropriate lawyer, but that can be part of the discussion we have with the court about what the court perceives to be the needs in a particular case.
- 195 K. Aylward Actually, I don't think we have ever done it, but we could take the position that if a court appointed an attorney we had not determined to be qualified, we simply wouldn't pay. We would say to the court "You can appoint anybody you want, but we are only going to pay the people on this list." Fortunately, so far, when we have had those surprises where the court has just appointed someone without contacting our office, it has been someone who was qualified and could accept the case as far as we were concerned.
- 204 Chair Ellis So let me understand this creation of a legal representation plan. Is it your thought that we would generate a document called the Oregon Death Penalty Defense Representation Plan and what we are talking now is how to characterize or place the responsibility within our structure?
- 212 I. Swenson Yes, exactly, Mr. Chair. It is not mandatory that we have such a plan. I think it is advisable and then everybody knows what the rules are and if we have such a plan, people can challenge it if there are portions of it that they don't agree with.
- 214 Chair Ellis What was the thought? You thought earlier that PDSC might be the agency, and I'm thinking why it isn't it OPDS that is the agency?
- 217 I. Swenson That is a tough call.
- 218 Chair Ellis I'm looking at it here and there may be one of us that has had some experience ...

- 219 K. Aylward No, no, no, it is just a schematic oddity. PDSC is the name of our agency. We are the Public Defense Services Commission. It created an office which is a little bit of LSD and a little of CBS, but the agency is PDSC.
- 223 Chair Ellis So when you talk about that it is not this side of the table.
- 223 K. Aylward But it is significant because what we are saying when we are saying PDSC is that it might be an LSD lawyer who looks at a brief and decides whether someone is qualified for death penalty cases on the panel. It might be a CBS person who looks at their billing records and decides to pay a bill, and it might be something paid out of the account like the Matt Rubenstein contact where that person is then providing some component.
- 230 Chair Ellis Is this something that Paul, in his general counsel role, could cross division lines and do appropriately?
- 231 I. Swenson He certainly is already doing that, which is good.
- 234 Chair Ellis I recognize he is a CBS person.
- 236 I. Swenson The function could be located in the general counsel part of the office. I think that is a possibility. The contracting piece and the certification of lawyers clearly has to be in the Contract and Business Services Division. They are the ones that monitor the availability and the eligibility of lawyers. We can work on an outline if you like, Mr. Chair, with the different possible ways of organizing and placing the plan under the supervision of some particular part of the office if you think that would be appropriate.
- 245 Chair Ellis One of the things the ABA Standards call for is the quality monitoring and as you phrase it here its where you respond to complaints, but we don't affirmatively monitor. Do you see a way to bridge that gap?
- 253 I. Swenson I think we absolutely need to do that and I think we have realized that ourselves in connection with approving the list of private bar attorneys. We need good information about the lawyers who are doing the job now and about the lawyers who are applying to do that kind of work. I think it is available. Judge Barron sent me a letter in which he said he concurred in the remarks he had heard about not simply letting people list references because that wasn't fair to judges. And even judges who agree to be references don't necessarily enthusiastically endorse the abilities of the lawyer. I think some kind of regular survey instrument would be appropriate and maybe we start it in the death penalty area and simply contact all of the judges who have had this attorney appear in their courtroom. In some cases, we could talk to co-counsel, particularly in closed cases, and to district attorneys. I think they provide important input. I think we can address that and I think we need to undertake to do to routine surveys, because even lawyers who have been excellent providers in the past, aren't necessarily going to continue to do that quality of work. People get burned out and for various reasons cease to perform as well as they once did.
- 279 Chair Ellis I think that is a general truth. Do you want to keep going here?
- 280 I. Swenson Well, let's see -- the composition of the defense teams. And the question I raised there was whether or not the expectation should be that in every case, at a minimum, there are two lawyers, a mitigator, an investigator and a mental health expert. We certainly have lawyers who take on more of these tasks themselves than other lawyers and some lawyers who delay use of mitigation investigation until months into the case, which doesn't seem appropriate. We leave a lot of discretion with the lead defense attorney. Once they are in place, we allow them to call the shots about what is needed. However, whenever a lead counsel doesn't have a mitigator, it is potentially a matter for concern. If we created the expectation that you as

lead counsel need to have your team in place and your team must include the following or at least an explanation about why you don't need to have each of those team members. With respect to co-counsel as I pointed out, under current law and practice what occurs is lead counsel asks for the assistance of co-counsel in discreet increments of time. I am not so sure that that is a bad idea. Instead of just assigning that attorney full-time to work with lead counsel, we require lead counsel to justify the use of co-counsel in the hope that this will assist the lead counsel in identifying the issues and clarifying what the role of each counsel is going to be instead of creating a relationship where the work of the two counsel may be overlapping. I hope it is a device that makes the practice more efficient, but I don't know if it discourages people from developing the kind of relationships they need to have a strong team. Maybe, since Rich is sitting right there, he can give us his thoughts.

- 320 R. Wolf I think it is good to do it in increments. I think it forces co-counsel to keep better records -- you know, "I'm almost out of hours, you need to authorize more hours for me." I am not so sure that the incremental appointment of co-counsel really helps to develop the different roles between lead and co-counsel. I think that is really the product of just talking with co-counsel. Some co-counsel have greater strengths and weaknesses than others. Some co-counsel may be better at relating to the client. Some may be better at handling legal issues and have very marginal client skills, client relation skills. It really depends on who you have and who the defendant is before you can determine how best to use your co-counsel. That has been my experience. I don't think it is a bad idea where you appoint them 200 hours at a time.
- 337 Chair Ellis Between you can you make sure I understand what is involved with the qualified mitigator. That is a word that was used a lot last month. I think I have an idea, but will you spell it out for me more?
- 340 I. Swenson Well, Rich can certainly do it. An experienced investigator, ordinarily, who has done general criminal investigations for a significant period of time for the most part, and then this person specializes in issues relating to the mitigation in the penalty phase. It usually has very little to do with the investigation of the event.
- 348 Chair Ellis It has a lot to do with the (inaudible).
- 348 I. Swenson Although I suspect that the development of a relationship with the victim's family would also ordinarily be conducted by a mitigator as well.
- 351 R. Wolf Well, my experience has been while there are a few former factual investigators who have become good mitigators, the mitigation specialists that I have found to be the best are the ones with LCSW, Licensed Criminal Social Worker, degrees. They are really social workers. They are really important in the sense that they are with the client a lot, handling a lot of matters with the client, getting the client to open up about things that they wouldn't normally want to talk about, who can then go investigate with that client's family and develop what are the mitigation elements in your case. It has virtually nothing to do with any of the facts of the case and it is really all about getting to understand that client and what has made that client who they are at this point in their life.
- 367 Chair Ellis Doesn't this really cry out for us finding, I don't what the number is, one or two, really qualified specialists and making them available to the various teams instead of doing it randomly. This does seem to be a pretty specialized, unique job.
- 373 I. Swenson Mr. Chair, I would certainly agree and I think most of the attorneys identify mitigators with whom they work most effectively and try to find time in their schedules to do it, but it does seem appropriate for a contract and Kathryn had already made the decision that that would be an appropriate direction to go to find mitigators. We might find additional people willing to do the work if they were offered a contract. They would then, at least, have an assured income and steady amount of work. It seems like a logical direction to go.

- 387 C. Lazenby Is there any way we could develop criteria or some sort of system where we could then grow the number of available, qualified, mitigation investigators? It sounds like there are two or three people that everybody agrees are qualified. I am just asking, do you think it is possible that we have the capability to develop a system where you potentially grow the number of qualified folks out there to do this work?
- 393 I. Swenson It seems like we absolutely need to do that. It is very difficult for lawyers to find people to do that work in a timely way.
- 397 Chair Ellis This is the kind of thing where I don't see why we feel constrained that we have to find them already in Oregon. There must be people around the country that we could recruit.
- 400 R. Wolf Many of them are located outside the state right now, but the problem is you really want people that are local to the case because it is important. They work intensively with the client.
- 404 Chair Ellis What I am suggesting is like we did with the Executive Director search, we go national, why don't we think in terms of finding the best person out there and attracting them to Oregon with a contract.
- 406 G. Hazarabedian Mr. Chair, if I might. One of the complicated factors is that not only is it hard to get people from out-of-state to come to Oregon to work for \$34 an hour, but there are very good mitigators in the State of Oregon who are taking work in Idaho, for example, and other places, because it is a chance to get fairly paid for their skills. If anything, we are losing people from Oregon to our neighboring states, because the neighboring states can pay so much more.
- 418 Chair Ellis If we do it on a contract basis...
- 418 G. Hazarabedian If we do it on a contract basis or hourly rate, but being a mitigator isn't jurisdiction specific like being a lawyer, for example. There is work in the federal system. There is a lot of work for talented mitigators and most of it pays more than what we can pay here. I think a contract or somehow increasing the hourly rate would be a big part of getting more talent here.
- 424 C. Lazenby Mr. Chair, one of the hats I put on my rather large head is I am also general counsel at Portland State which has one of the nation's best graduate schools of social work, and especially clinical social work, so it might be proper for me to help facilitate a conversation between Ingrid and some people from GSSW to have a conversation about potentially seeing if they can develop some aspect of their graduate program. It is really a nationally recognized social work school.
- 432 I. Swenson That would be wonderful. Duane McCabe and others have been advocating for something like that, a course of study to qualify as mitigators. It should be a fairly attractive profession in so many ways. It is certainly a helping profession. People work independently but are part of a committed team as well. There isn't a good reason why we shouldn't be able to increase the number of mitigators.
- 442 Chair Ellis I sense consensus. The topic at the top of page 6, distributed with the materials, was a letter from Olcott Thompson. You want to comment on this subject of the quality of PCR representation?
- 454 I. Swenson Yes, Mr. Chair. The Commission is well aware this has been an area of concern, generally. Of course we have our policy package that if approved would allow us to create a four FTE post conviction unit either within LSD or parallel to LSD, and certainly if that occurred, we would be interested in including death penalty qualified lawyers as at least a part of that project. The PCR practice is not, for whatever reason, a particularly attractive one especially among criminal defense lawyers. It is not something that they are beating down the doors to

do. It doesn't make them particularly popular with their colleagues, I suppose. They see themselves in a different role.

- 474 Chair Ellis Just because they always say that trial counsel is incompetent?
- 475 I. Swenson I think that is part of the picture. In death penalty cases we struggle mightily to find a lawyer who is available in a timely way. We are struggling now with one case and potentially a second one coming up very quickly where we need counsel to get involved as soon as possible. We contacted most of our contractors to determine exactly who, among them, is available to take this on. I was just talking with Kathryn about availability of PCR counsel in death penalty cases.
- 490 K. Aylward That would be unavailability.
- 490 I. Swenson It is very difficult. MCAD used to get a good portion of those, if not all of them, because of the fact that they were here in Salem. They were our contractor in the area where the cases were filed. They are taking fewer of them. And, at this point as I understand it, in every case, we are doing an individual search for available counsel. Is that correct Kathryn?
- 500 K. Aylward That is correct and it is generally not just a search it is actually trying to convince people – “Are you sure? What if we could delay it a little bit, and what if this trial gets rescheduled?” We are really working the system to get coverage.
- 506 Chair Ellis Is Dennis Balske doing this work now?
- 507 R. Wolf At 55 bucks an hour? He won't touch it for that amount.
- 509 I. Swenson So we can certainly look at contracts for PCR providers. Maybe we need to be recruiting specifically for post conviction death penalty contractors.
- 515 K. Aylward I think the problem is in the mechanics. If I can't find someone at \$55 then I want to be able to say “Will more money make the difference?” Well, because we can't just say that I am going to pay you \$75 but you are still at \$55. If it is an hourly rate you have to raise the guidelines rate for everybody. You can't pick and choose. The way we get around that is to say “How about if we have a contract with you?” and then we establish a rate under the contract. I think, and maybe I am moving on to the next topic, but in a way I want to know if that is okay. I feel like if I am lucky enough to find someone and talk them into it and say “\$80; How about \$85; How about a contract; How about a guaranteed monthly income” and they finally say “Yes.” I want to be able to say “Great, here is a contract.” But then I'm thinking have I then sidestepped the whole competitive request for proposals kind of approach. It would be nice to have some guidance along those lines because we don't have enough money to wave a wand and say “All of you people currently working at \$55, it is now going to be \$75” and if we get funding provided for that, then great! That will buy us some time. At the moment I am just stuck. I don't know of any other way to continue to provide the services.
- 543 J. Hennings Mr. Chair. Peter Ozanne a number of years ago asked me to make a proposal, which MPD did, and then we were thanked for the proposal and told that we were about triple of what we were imaging it would take. Your general counsel worked on that proposal based upon his experience in Indiana because, quite frankly, our experience in general on post conviction was very, very weak, almost nonexistent as to what was required. We put a proposal together about what was required including investigation, including working the case. Post conviction obviously gets into the competence of the trial attorney but it also should get into a number of other things. That was the reason that the appellate office was created. When Ashenbrenner started the office that was the reason for it and he basically cleaned out the penitentiary on post conviction type matters. I worked in that office at that time so I have some idea how to

do post conviction appropriately. Basically it comes down to money. You can't turn this into silk unless you got enough money in order to pay attorneys and their staff appropriately to do the job to do post conviction. Otherwise, we are always going to have a bandage and until the Commission can come up with that money, Kathryn is going to be in the situation that she can't give you a guarantee on all the post conviction cases that appropriate work is being done, because she doesn't have the money in order to buy it.

- 579 K. Aylward That proposal that MPD put together wasn't for death penalty.
- 580 J. Hennings No, it wasn't for death penalty.
- 581 K. Aylward It was just run of the mill post conviction relief and I trust that your figures accurately represented the amount of work that was necessary, and it came in about two and a half to three times as much as we are paying now.
- 585 I. Swenson Mr. Chair, this is an important discussion and I think it should be part of our August discussion about allocation of whatever funds the legislature appropriates for public defense. It has to be one of the most important things that we need to address, but until we know what that picture looks like it is a little hard for the Commission to be asked to consider an increase in rates. In the meantime, it would be useful to Kathryn, I think, to have the permission of the Commission to selectively contract as we are able, to take advantage of whatever opportunities we are able to create, with the understanding that every two years we are going to issue an RFP for all of this work, so that lawyers who are interested can always apply, but when there is a particular individual who is available and qualified, we would like to be able to take advantage of that without going through that process.
- 607 Chair Ellis Have we had any indication whether there is legislative support for our package.
- 610 I. Swenson For our post conviction package specifically? Well, no. It is mentioned along with all of our packages in meetings with legislators and we certainly explain the desperateness of the need there. Has it aroused a great deal of legislative sympathy? We have not been effective in doing that at this point. The juvenile pieces of our proposal have been well received and there is a lot of legislative support for improving the quality of juvenile representation at this point, but less for criminal representation and I sense not a great deal of interest in the post conviction cases.
- 627 Chair Ellis Would there be room to kind of push the death penalty PCR piece as sort of the entering wedge?
- 630 I. Swenson Well, I think...
- 634 Chair Ellis The proposal we have is for four FTE and they do PCR generally, including death penalty?
- 638 I. Swenson When we get to the next stage in the budget process I think Tim Sylwester's testimony at our last meeting will be very helpful -- just the concept he was describing, which was, you know, everybody has an interest in doing these things properly at the state level because the federal level is a very expensive one for the State of Oregon. They prefer to avoid that and to do that you have to do the post conviction well in the state courts. He articulated that well and I think the AG's office would stand by that.
- 656 O. Thompson Mr. Chair, one overlay is that the one-year statute of limitations in federal court is only effective provided the state has, and I don't remember what the magic words are, but they have to have a good post conviction habeas process for death penalty cases. If they don't, there is no statute of limitations in federal habeas.
- 667 I. Swenson It is probably pretty hard to fall below that threshold.

- 668 O. Thompson That may be, but there is a threshold there and I don't remember what the magic language is and I don't think anybody has fallen below in any state.
- 573 I. Swenson Maybe Matt knows?
- 574 M. Rubenstein We are counting on being held to that one-year statute. You want to do the post conviction very well ...
- 579 Chair Ellis Or so badly ..
- 580 M. Rubenstein That is the reality. You want to try the case at trial, that is where we want to do the best job and then we want to do the PCR very well. The worst situation is to do it half-way.
- 587 I. Swenson Frankly, when the legislature has hearings on whether to abolish representation in post conviction cases, it is the Attorney General's Office who generally persuades them not to do that because then it opens up all of those cases to possible...
- 693 R. Wolf evidentiary hearings in federal court.
- 695 J. Potter Kathryn is asking us to address her dilemma of post conviction in death penalty cases. Is this not a dilemma that we have also had in other kinds of cases, like Measure 11 cases, where you might not be able to find lawyers to do it, or in some areas, you end up having to do a contract that is higher, maybe even death penalty trial level, that is higher than the \$55 rate and you end up paying death penalty lawyers under contract. What is the difference in this particular circumstance?
- 708 K. Aylward Well, there has always been some kind of quirk when I have done it in the past that you could point to and say "Oh, well that person is uniquely qualified to do this." The example was Frank Stoller who was being paid hourly to work on a client's direct appeal. The client had a second case in which he filed a post conviction relief petition and when we contacted Mr. Stoeller and said "Well, can't you take this case too? It is the same client, do both of them." He said "I can't work full-time at \$55. I'll do it if you give me a contract." In that case we could say it was appropriate to award this contract because he was uniquely qualified to meet that demand. I didn't feel like there were other people out there saying "Hey, how come I didn't get the contract?" There was a second time when there were similar circumstances. I think I am at the point now where I don't want to have to come up with a special set of circumstances. I want to go find a great attorney who has no idea that maybe under a contract they would get more than \$55 an hour doing PCR. Matt was unaware that there was a way for us to contract for his services. I think we are all surprised. I suppose the Commission would say why don't you just sling out a quick RFP and then your bases are covered?
- 750 J. Potter But even if we did that, and it sounds like you would tell us we could do that, and that ...[end of tape]

TAPE 2; SIDE A

- 002 J. Potter we run out of money, whatever the budget number is, and we tell the legislature we couldn't get the services for less, and isn't that the standard...
- 003 K. Aylward Yes.
- 003 J. Potter We couldn't get anybody to do this work at whatever this number, so we had to pay this number.

- 005 K. Aylward My concern is if you do some kind of RFP and just say “Send me bids”, there is no reason to bid because they think “\$55! I am not interested.” If you put out a request for a proposal that says “I’ll pay you \$90 bucks an hour, submit a bid” and then we will pick the best among those, then the other poor guys that are working at \$55 an hour are going to riot. Unless we are prepared to actually say that we can no longer do this, I feel like we have to at least chip away at it a little less transparently just to keep things going.
- 012 S. McCrea I am looking at what is documented at pages 6 and 7, and in that second paragraph it says “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 and will decline to take the case. It is difficult to find somebody who is available to take the case” and then it goes on through page 7. It appears that we had it documented that people aren’t willing to take the cases at \$55 an hour. I recognize there are people who are doing it for \$55 an hour. I don’t have an answer to that, but as one of the members of the Commission, I am agreeing with John that I think that we are at the point where we are not getting the quality of representation at \$55, and we have people who aren’t willing to do it or can’t do it at that and we need to change that.
- 024 M. Greenfield I think the cleanest way to do it is to have a RFP which establishes a list of attorneys who are pre-qualified at some standard, with the provision that you are able then from that list to enter into negotiations, so you wouldn’t necessarily have an RFP with an hourly rate in it. You would have an RFP that said if you are on a list of qualified providers for this service, you are eligible to negotiate with us for specific cases. I think that is a little bit cleaner. What you are asking for is the ability to continue to finesse the system.
- 032 K. Aylward No. I want to be free from having to finesse the system.
- 033 M. Greenfield The danger is that you contract with somebody at a rate that is higher than the understood rate and somebody raises an objection. It is a tough spot to be in and you’re wanting the blessing of the Commission to continue to do what you are doing or to do something else?
- 039 I. Swenson We can certainly always use the RFP process when the opportunity is there. I think there are situations in which, as with Mr. Stoller, we need to have the freedom to take advantage of a unique set of circumstances to bring on board a particularly qualified lawyer.
- 042 M. Greenfield Are you not free to do it under your “Olly olly oxen free” provision. So the risk is really some other provider saying “If I had known that you were going to pay this much money, I would have been interested in doing it and I never had the opportunity.”
- 048 Chair Ellis I always thought the expression was “Olly olly income free.” Where did the oxen come from?
- 049 M. Greenfield This is pre-conservative politics.
- 050 Chair Ellis Back to the legislative increase, it does seem to me that if we are not getting any kind of good response on what we really want, which is four FTE for PCR generally, I would be quite willing to have you open up with Robin or whomever a proposal to at least do an FTE on death penalty PCR. And if that is not selling because Ways & Means is allergic to more FTE positions, then in the contracting budget you contract for a death penalty PCR specialist. I am sitting here listening to really good lawyers say that we are at risk of plummeting in a way that has obviously horrible consequences. I don’t want to be there. We shouldn’t be there. Any other thoughts on this point? We are about to take a break for about 10 minutes.
- 070 Chair Ellis Alright, we were up to 6.1, the workload piece.
- 076 I. Swenson Mr. Chair, as I noted, and I believe this to be true but Rich or others can correct me if it is not, our understanding was that we never assign a new case to one of our contractors without their

feeling that they can take it on at that stage. We may put a little pressure on them to take them when they can, but I don't think we ever have asked somebody to do it when they have said that they could not. I think, for the most part, even though our contracts essentially indicate that two cases at a time is the limit and contractors can't exceed it without our permission, I think two that were actively being litigated would certainly be enough. As you know there are various stages of the process and as they get toward the latter stages sometimes they can take on a third and sometimes occasionally more than three cases.

- 090 R. Wolf On the workload topic, I just wanted to add what Becky said that the AG's office has always had more than one attorney handling capital cases. I don't know of a case where they haven't, and sometimes more than two.
- 096 I. Swenson We talked a little bit about the concern that the private bar attorneys may occasionally take on more than we think is appropriate. Again, there is clearly a need for additional compensation for the hourly attorneys. Judge Barron sent me some remarks in addition to the things that he brought to your attention last month, and emphasized again that he thinks increased compensation is critically important, particularly in death penalty cases, and a general sense that there is almost a crisis in terms of having enough attorneys to do the work. He understands that OPDS will make lawyers available but he would like lawyers from within the community rather than coming from a distance as they often have to do. He understands that it is tied to increased compensation. I have talked with him in general about some of the strategies that the Commission outlined in its 2005 retreat about outlying communities and ways that we can assist in attracting lawyers. We haven't specifically addressed the problems in his county. That is part of what we need to do in August.
- 118 Chair Ellis You had a policy issue under 8.1 on training, and I would have to say that I don't think that we are the right people to put on training, if that was your question.
- 121 I. Swenson It is. Now I think LSD can do some training in this area and they do. They have at least two CLE sessions per year. I think they invite lawyers from outside the office to participate, certainly the appellate panel lawyers, I know. Their CLE sessions don't often focus on death penalty cases. I think our state has moved forward in terms of the quality of training that is available through OCDLA and the Bar and the Federal Defender's Office. The Federal Defender, this year again, will be sponsoring a one-day death penalty seminar and they invite the state attorneys to participate in that. I understand that it is not a profitable enterprise for OCDLA and there is a need for additional training and resources. Obviously, we would like people to be able to participate in as much training as possible and OCDLA has limited capacity to meet that demand. Our hope is that Matt Rubenstein can look at this -- we have a lot of hopes for him -- that he can examine the issue a little more closely and think how we can supplement what training is there, how we take advantage of national trainings so that the information that is provided at those can be shared with the other lawyers. Maybe we have regular sessions among Oregon death penalty lawyers which amount to nothing more than sharing information from national conferences and things of that sort. We have some work to do but probably having us provide those trainings isn't the most appropriate way to go about it.
- 150 J. Potter I should also mention, Ingrid, that the OCDLA Board of Directors has a long-standing policy on death penalty programs, saying that we will continue to do them and we will do more without the economic benefit. They do not need to generate income for OCDLA. We know that going in. They are smaller and more intense. They cost more. But you have a limited pool of people that come to them. We are certainly happy that Matt is going to be involved and will coordinate and throw resources at additional training with Matt as a spearhead person too.
- 161 K. Aylward But it seems like that should be our responsibility. We should be saying to our contractors that we expect you to attend X number of courses and here is the funding to make that

possible. It just doesn't seem right to me that OCDLA should be doing it for free when it is something that we want our contractors to do then we ought to be funding it.

- 164 J. Potter The board is not saying for free, they are just saying that it is not a revenue generator. I agree with you Kathryn. It is a function of the state in training these lawyers and it is part of the expense of the death penalty case.
- 168 R. Wolf On that topic, I found out since the last meeting that with respect to the \$50,000 grant, only six other states applied for that money as well. I don't know how that affects our chances of getting it but we will know around August.
- 173 J. Potter And if it is successful, that is clearly seed money that would help to develop additional trainings or a different method of delivering training services, and once again we will work with Matt to help deliver that.
- 177 I. Swenson The appropriation aspect, has that...
- 178 R. Wolf That I don't know about. The person I communicated with was the NACDL – National Association of Criminal Defense Lawyers -- coordinator that was appointed under the original appropriation of funds. Although I wrote the contact person at the U.S. Department of Justice twice, I never got an answer from her about whether the money has been appropriated.
- 184 I. Swenson If that is approved it would be a good source of training funds. One thing we didn't talk about, and I just skipped over, was training for mitigators and investigators and whether we need to do something additionally there. I would appreciate, again, Rich's thoughts on that because of course the investigators' association and OCDLA provide trainings for investigators. Do they deal with death penalty issues?
- 192 R. Wolf The death penalty seminars that we put on tend to usually have one, usually not more than one, topic that is of particular interest to the mitigation specialist. I think it is a great idea if we can develop an actual program through PSU or somewhere for a basic training and attracting people into that, then of course I think it would be important - I think OCDLA could do a little better job of maybe adding a few more topics to the death penalty curriculum that would be of specific interest to the mitigation folks, but whether that would be at the death penalty seminar or in the investigation seminar, I am not sure.
- 205 Chair Ellis Any other issues that you think we ought to address?
- 208 I. Swenson Mr. Chair, on page 10, I think we have dealt with that issue about the relationship with the client and I'll include whatever the appellate division is considering there. I think that covers most of it.
- 216 Chair Ellis Is the next step on this piece the drafting of this plan for legal representation?
- 218 I. Swenson Yes. If you are in agreement that that is an appropriate approach to take I would propose to do that for your May meeting. We planned not to meet in April, but for May I would like to prepare such a document.
- 223 Chair Ellis That is how I envisioned it. Any questions or comments from the draft? Thank you. I really thought this was a good start. The next item is Kathryn with an amendment to the compensation plan.

Agenda Item No. 3

Amendment to the Compensation Plan

- 226 K. Aylward Behind the green tabbed divider. Our original compensation plan that the Commission adopted when we separated from Judicial and sort of reformed ourselves, listed a number of

positions we thought we would need. What I am adding to the classifications here are Human Resource Analyst 1 and 2. We actually have an employee who is performing the human resource function for the office and the appropriate classification for her would be Human Resource Analyst 2, so I would like to have that be an official position so that we can put her in it. The 1's are in there just because every time I have a 2 DAS says "How come you have a 2 and not a 1", so that is why we have a 1, planning for the future. If we get our eight FTEs, our sixteen FTEs, we will definitely need more human resources staff.

- 240 Chair Ellis There is no budget impact?
- 241 K. Aylward No. It is just adding an appropriate designation.
- 243 Chair Ellis Mike you are our resident expert of these sorts of things.
- 243 M. Greenfield Anything that would pacify DAS has got to be good.
- 244 Chair Ellis Was that a motion?
- 244 M. Greenfield Yes.

MOTION: Mike Greenfield moved to approve the compensation plan; John Potter seconded the motion; hearing no objection, the motion carried: **VOTE 5-0.**

Agenda Item No. 4 OPDS's Monthly Report

- 248 Chair Ellis Ingrid, do you want to make your report? I know there are several subtopics here.
- 250 I. Swenson Thank you Mr. Chair. As far as the budget is concerned, our Chair and I appeared before the Public Safety Subcommittee of Ways & Means on January 22, to do what they call an overview. They have different approaches for different sized agencies and the Judicial Department and we were in a category where we gave an overview and then later, approximately the week of the 15th of April, we will make a more detailed presentation of our budget and a work session would then probably be set sometime late in the session when the final figures are on the table. Our Chair basically bragged about his Commission members and who they were and discussed the history of the Commission and its efforts to improve quality, its review of delivery systems, the site visit process, and then we talked about the big picture about our budget needs and those issues were basically that we need a supplemental appropriation to cover the 2005-07 budget deficit, and we can talk about that more specifically if you want, but we are still looking for the same amount, with an increase because of some additional costs. They had approved the \$7.8 million that we needed so now we need approximately another one. The other issues that we talked to the Subcommittee about were basically an adjustment which we would like to see made and which the Legislative Fiscal Office is recommending, so that we begin to use a different adjustment for inflation than we have been using. It would allow us to include, as part of our essential budget, a more realistic estimate of the increased costs, which are more personnel costs than supplies and services costs. If we were to do that then in future budgets we wouldn't have to face this issue every time. A 3.1 percent increase for inflation doesn't begin to cover the actual cost of human services. We are also looking for an adjustment in the Legal Services Division's budget similar to the Department of Justice's adjustment. We look at ourselves as doing such similar work that we ought to use the same caseload adjustment. That is approximately a two million dollar figure. The inflationary adjustment would be about a seven million dollar increase to our essential budget. We talked about our policy packages very briefly. This wasn't time for in depth discussion. I think we had a half an hour at the most for this initial presentation. I think it was well received. I did talk to a couple of the Subcommittee members afterwards and I had spoken to all of them except one beforehand. I think they are generally supportive of our need for increased funding. Of course, at that stage,

it is easy to be supportive without attaching any numbers to it. I think we might have discussed this at an earlier time, but basically the Governor's office recommended a sum of approximately \$10.8 million dollars beyond our essential budget level. With respect to Judicial Branch agency budgets they don't specify where that money should go. We have had informal conversations with the Governor's staff which certainly helped us identify the pieces of our policy package that were particularly appealing to them. The next step will be this public hearing and it will probably last a couple of days. We will get a two hour slot of time in the afternoon before the Subcommittee, so we will probably be there a couple of days and I will be contacting most of you individually to talk about that part of the process. I just wanted to briefly tell you about the dependency workgroup. I think I have described it before, but there is a group of four legislators, Senator Brown, Senator Kruse, Representative Krieger and Representative Schaufler, two Democrats, two Republicans, two House members, two Senate members, who put together a working group to address the lack of quality representation in juvenile dependency cases. Last session they convened what is called a sensitive review committee to look at a particular case which was controversial for many reasons. They examined the activities of the agency, they examined the court proceedings and the representation provided to both sides in that case. They added up the cost of representation for the state in the case as a whole and for the family. The state cost was, I believe, \$112,000 for the entire case. The total for the representation of all family members at all levels of the case was \$18,000. At least to some legislators that seemed like so stark a contrast that a pay increase just had to be part of the picture if they expected better representation. The case involved a child being removed, not placed with an eligible relative, rights being terminated and the Court of Appeals reversing that decision, so that this family was in chaos for several years. They looked to the representation in the dependency case at the trial level and thought, "You know, if this had been better maybe we would never have gotten here." Some of the actions taken by the agency were clearly questionable and those are being addressed in separate statutory proposals. In any case, this group of legislators has met many times and they have really bonded with each other on this issue and they are determined not to let go of it. They are promoting it among their colleagues and will be meeting the co-chairs of Ways & Means early next week to see if they can persuade them to support this package of bills. I have been informed that the amount that they intend to include in SB 411, which would increase funding to PDSC for juvenile dependency representation, is twenty-three million dollars. It would be a separate appropriation directed toward this particular area of practice. When Kathryn and I met with them they asked for some options in terms of funding and it appeared, well it is quite clear, that they decided they would like to reduce caseloads by 20 percent for juvenile dependency and increase compensation by 25 percent. They recognize the need to do both in order to address this issue. In addition, they are potentially seeking to have us create a juvenile resource center for attorneys statewide. This piece could be staffed by OPDS or we could contract for that, but the idea would be to create a resource center so attorneys handling these cases have all the benefits of some of the contract offices like the Juvenile Rights Project which provides support and information and resources to children's attorneys. We'll see where that goes. I think Senator Brown would probably say that this is one of her highest legislative priorities. She understands the need in other areas of public defense but feels that this is an appropriate place to make an initial strong effort to get legislators to recognize the need for increased compensation. Unless there are other questions about the budget I didn't have anything further to present.

396 J. Potter

I just had a question. I just happened to step in and hear Senator Brown talking to the OCDLA folks moments ago in response to a question about will there be parity for public defenders and prosecutors and part of the response was "I'm pretty sure that we will make steps toward parity, but we will not achieve parity." I've heard, and I'm sure you've heard as well, that legislators are telling not us to expect the whole pie, but are offering out hope that there is some more money coming into the system.

406 I. Swenson

Yes, I have heard the same. LSD has some news to report.

409 B. Duncan

We have three bills and they were before the House Judiciary Committee last week, Monday. Two of the bills were fairly straightforward housekeeping measures. One changes the statute to make it clear that after an appeal is completed in the Oregon appellate courts, but is going to the United States Supreme Court, that that person need not file the petition for cert until the case has come back down from the Supreme Court. The statute was a little unclear about that and that bill has gone from the House with the House's recommendation and we are waiting for it to go to the Senate side. We also have another housekeeping bill in the House which would eliminate the requirement, after determining that someone was eligible for court-appointed counsel at the trial level, to separately determine that the person was eligible for preparation of a transcript at state expense. We have eliminated that second requirement on the assumption that if the person is indigent enough to qualify for court-appointed counsel that the person should receive a transcript at state expense. So we did some cleaning up of the statutory language there. We are seeking a change to the procedure by which decisions of the Board of Parole are appealed. It is complicated. Right now in these judicial reviews of Parole Board actions we have to file what is called a motion for leave to proceed, basically identifying a substantial question of law, asking the Court of Appeals to determine that there is a substantial question of law, before the case proceeds to briefing. The interesting issue in this statutory scheme is that after a case is briefed the Attorney General representing the board can argue, through a motion for summary affirmance, that the case doesn't present a substantial question of law, so there seems to be some duplication in the system. We have prepared a bill, and are seeking to eliminate the requirement that we file a motion for leave to proceed in every case identifying a substantial question of law. That creates work for us. We want to go straight to the briefing and, if the Attorney General believes that a particular case doesn't present such a question, then the Attorney General in those cases can file a motion for summary affirmance. We think that that will save our office time and money. Our data, which is corroborated by the Attorney General's data and the court's data, indicates that approximately two-thirds of these cases are going through this motion practice and these cases are nevertheless going to briefing. We see it as a waste of time and resources. It causes delay in that it takes approximately four months after we file the motion for it to be resolved and then we are given leave to proceed to briefing. So, there are financial costs to the motion practice and the cost of delay. The Board of Parole and the court were neutral on the bill. We were the only party speaking in favor of the bill. The representative of the board did come forward and say that the bill would cost his agency more money. The hearing ended with a public hearing and it has not gone to work session. We do not know what the status of that bill will eventually be. However, the Parole Board also has a bill which was heard the next day before Senate Judiciary and it concerns the procedure for murder review hearings. It is quite possible that we will be working with the Board of Parole to resolve both their bill and our bill. Our office is also testifying on a Department of Justice bill which would make a substantive change to the criminal law about what elements of a crime require a culpable mental state.

487 I. Swenson

I need to let the Commission know that I have heard from several legislators about Becky's testimony and how persuasive she has been and they really appreciate it when she or the office can provide input on bills such as the Department of Justice bill. Kathryn, similarly, gets high marks; in fact she gets thank you notes from legislators she goes to visit. Maybe we could, Mr. Chair, ask Jim Hennings and Greg to comment on the loan forgiveness legislation. They have both been very actively involved in that and handed out some materials this morning on the latest status of Senate Bill 4022.

503 J. Hennings

Greg actually has participated at the national level at the ACCD and I have forgotten what that

505 G. Hazarabedian

American Council of Chief Defenders.

506 J. Hennings

.... and has been very well received and that was a major issue with them and has been a major issue with Greg. I want to report that my board also has become very interested in this

issue. I included with the material a letter that Susan Mandiberg from my board had written and which the entire board had signed that was read into evidence at the senate hearing. They have personally contacted every member of the Oregon delegation. Unfortunately, we still only have Senator Smith signed on as a formal co-sponsor of the legislation. This is farther than we have ever gotten before. I think this was the fourth time the proposal was presented. It got very, very strong support. There were some minor amendments. The biggest one that would have impact in Oregon is that it is limited to full-time defenders. It is combined so that it is both a defender and a prosecutor bill so that if we can get it through the House and the Senate, it probably will have enough votes that it won't be subject to a veto. The big issue then is going to be getting it funded. It should come up in the Senate within the next month and there is a companion that is ready to go on the House side and we understand that that will go very, very quickly. I urge this Commission to continue its support, push its support, especially with the Oregon delegation, to get this passed and to get it funded. \$25 million is the original funding. It pays school loans up to \$10,000 a year, up to a total of \$60,000. It would be required that the recipient work for a Public Defender's Office for at least three years or pay back the money if you left earlier than that. I can tell you that it would make a major difference in our ability to recruit people and our ability to retain people. Elsewhere, there are numbers in your package about the decrease in retention -- how quickly people are leaving our offices. It would also have a major impact on the other goal you are looking at, which is minority recruitment and minority retention. Included in the package is something we did not provide the Senate but Susan Mandiberg had, indicating where people who are in the first five years of practice in my office are in terms of their gross salary related to the amount of money they are paying on school debts. The highest is someone who spends forth-two percent of her gross salary to repay school debts. The average is about eight percent. There is not very much left for anyone to live on if you take that out and you take taxes out. That is part of the reason that we can't hang on to people.

- 576 Chair Ellis For the record, on behalf of the Commission, I did write both senators about five months ago and again about one month ago. It would help if you would keep us posted because I think you are closer to the process.
- 582 J. Hennings I would suggest that potentially the Commission might want to commend Senator Smith for his effort and push for him to continue that.
- 585 G. Hazarabedian I would also add, Mr. Chair, that there was an issue that came up. All along the bill had included FTE government public defenders and full-time non-profit defenders and somewhat late in the game a question arose as to whether full-time non-profit defenders, as we have in the Oregon public defender system should continue to be included in bill. I was requested to get a letter from Oregon, and your executive director furnished a very appropriate letter in real short order, which, along with letters from defense offices in the other parts of the country helped to stop that talk in its track.
- 599 J. Hennings The other thing that came up late was whether or not juvenile law counted ...
- 603 G. Hazarabedian Juvenile and mental commitments
- 603 J. Hennings Juvenile and mental commitments. And most public defender offices do those as well but they are quasi civil, not criminal. That was one of the amendments and probably a very helpful one to make it clear that that type of work that public defenders do is included.
- 610 Chair Ellis There was one amendment described in the email exchange and let me see if I can find it.
- 625 J. Hennings One of the things that will have to be followed up on if this gets passed and gets funded is that it is going to be up to the Justice Department to put the rules together. The good news is the rules have to be the same for prosecutors and defenders. The bad news is that it is the Justice Department putting those rules together.

- 635 G. Hazarabedian The feelings of the American Council of Chief Defenders has been that, rather than get bogged down in the minutiae of who exactly is covered and who is not covered and how the mechanics of the scheme ought to work, we should jump on the wagon that has the most horses pulling it and then come back later and sort things out.
- 640 Chair Ellis Any of the Oregon House Delegation that you think needs help?
- 634 J. Hennings Since none of them have signed on as co-sponsors on the House side, it would be nice if they would do so. As I said, my board has personally contacted, because of who they are and where they come from, personally contacted all of them without a great deal of success at this point. I don't know if it is just a lack of interest or what. It would seem to me that our delegation ought to at least be willing to sign on as sponsors.
- 653 Chair Ellis When it gets to the House side will you keep us posted.?
- 657 G. Hazarabedian Absolutely. Having heard what Jim just said, I haven't heard that any of the Oregon delegation would oppose the measure substantively.
- 660 I. Swenson Maybe we could submit a joint letter with the ODDA to support it.
- 662 J. Hennings That would be a great idea. It is very good news and has the potential for major impact on the operation of both of our offices and other offices in the state.
- 670 Chair Ellis Where I see it having terrific impact is, there are a lot of really good, young lawyers who don't come into defense, such as your office, don't go into it at all. This would be a big, big plus there. We have a couple of other topics here.
- 677 I. Swenson If we have time, Mr. Chair -- we have until noon --we could report on recruitment and maybe we should pause a minute. Olcott Thompson is here and you will recall that there was some discussion at the last meeting about representation by certain MCAD lawyers in death penalty PCR cases. I have provided a copy of a letter to our chair that Mr. Thompson prepared in response to that testimony. I wonder if you have additional comments that you wish to make. Perhaps Mr. Thompson could also update us on the status of the litigation involving MCAD.
- 690 O. Thompson Certainly. The easier one is probably the litigation. We were in mediation with lawsuits ...
- 704 Chair Ellis This is Judge Lipscomb?
- 704 O. Thompson Judge Lipscomb and Sam Hall. At least conceptually they are resolved except that the lawyer part and the paperwork haven't been completed.
- 709 I. Swenson Do I understand correctly that the terms of the settlement may never be made public?
- 712 O. Thompson That is correct. It is confidential.
- 712 I. Swenson Any other information that you can share with us at this point.
- 715 O. Thompson It is tentative and I would rather not because one of them is real touchy and may fall apart any minute.
- 718 Chair Ellis On a scale of 1 – 10 with 10 being very good and one being awful, is MCAD happy with this?
- 721 O. Thompson With you?
- 722 Chair Ellis With the settlement.

722 O. Thompson It depends on who you are talking to. We had a board meeting to discuss things that the board had to do. I would say we are going to end up at about five, six or seven.

727 Chair Ellis More happy than not, but not ecstatic?

728 O. Thompson Well, we would have been ecstatic if it had never been filed. In my view, particularly on the death penalty post conviction work, and I was thinking about it over the last couple of days, MCAD probably has about half a dozen lawyers who are death penalty qualified. In the process that Kathryn described to you, trying to get lawyers to do death penalty post conviction work, MCAD has already done that before we have to go to Kathryn and say "Please can you help us." The reality is those folks are already doing a case, probably, either direct or post conviction and they can't do another one. They don't want to do it at the rates we can pay them, which is more than \$55 an hour but it is long, hard work and realistically -- and this is more from my years of post conviction work, not death penalty cases -- the more serious the case the better the lawyers generally are. Those folks will cooperate. They are happy to help. "If I goofed up let me know. Here is my file. Anything I can do I will help you with." Files from OPDS Legal Services Division are generally full of ideas. They didn't used to be. Years ago they didn't want to help either. But now, "Here is my file" and they generally have what Becky described as ideas. "This was an idea; this was an idea; and no this isn't going to work." There is correspondence back and forth between the attorney and the client saying that "No, you can't do this here. You can do it in post conviction but you can't do it here" for all the various reasons. [end of tape]

TAPE 2; SIDE B

002 O. Thompson If post conviction is to be done right it takes a lot of work, it is rewarding, and I enjoy it. It takes a lot of lot of work and the clients, on the whole, are frustrated if it is taking me this long already. They are real upset and all the problems you have with a trial level client are increased with a post conviction client. They have gripes and it is usually about their previous lawyer beforehand because that is the easiest person to point to.

009 Chair Ellis Or the only person.

010 O. Thompson Frequently, yes. Unfortunately in Marion County, in my view, the judges have bought the Attorney General's position that the only things that can be raised in post conviction are errors of the trial counsel. I think the errors of the court can be raised in limited circumstances. But it is incredibly difficult and oftentimes you start out with an adversarial relationship with your client. Funding will help a lot because you are going to attract people who are willing to spend the time to do it. If you are scrambling to make money and survive at \$55 an hour and you can do a trial level case at \$55 an hour, why not just do that?

020 Chair Ellis We understand the problem.

021 O. Thompson I know you do.

021 Chair Ellis Thank you very much.

021 O. Thompson Thank you.

021 I. Swenson Quickly I would like to report on some recruitment efforts. OCDLA put together a very nice set of gatherings at the three law schools. They offered pizza and beverages and invited some of the providers to come and make a presentation to the law students. I attended a couple of those and I thought they were wonderful. It was a chance for people who were potentially interested in a career in criminal defense to hear a little bit about what that means and to hear from people like John and other practitioners about the support that is available for them and I

think that was good. Becky and I participated in the Northwest Public Service Career Fair. I planned to go to the session in Seattle but it turned out there were no people there who wanted to be interviewed, so I didn't participate in that one, but we did at Lewis and Clark. We interviewed six people. There were some wonderful applicants and among them some highly qualified minority applicants. We have openings so we could talk to them about that and ask them to keep us in mind once they have taken the bar. On the whole, I thought it was very successful. Becky, you also attended the ...

- 039 B. Duncan Right. The week before the career fair I went to the Opportunities among Oregon Minority Recruitment Fair that was held at Lewis and Clark. I had an opportunity to meet with minority law students to talk about public defense.
- 045 Chair Ellis While we are on the topic of the career paths of people who come into defense, Jim do you want to ...
- 046 J. Hennings I have an interesting announcement. The Governor recently appointed four circuit court judges in Multnomah County. It is fairly interesting that two of them were female, one was Asian-Korean and one was Black. The other distinction is that all four of them are alumni of MPD. The presiding judge has now officially recognized that it is a prerequisite to be a judge in Multnomah County that you have had to work in the PD office. Thirty-five percent of the bench in Multnomah County are alumni of MPD. No other office that I was able to contact has heard of more than one of their alumni being appointed a judgeship in the same day, let alone four.
- 058 Chair Ellis They are all tough sentencers.
- 059 J. Hennings The real problem is we are running out of judges we can try cases to.
- 060 Chair Ellis They don't recuse do they?
- 061 J. Hennings No.
- 061 C. Lazenby They are doing civil cases for the first six months or so, so the conflicts can fall off.
- 062 J. Hennings I know Tom Ryan has been assigned to family court. He was in charge of our juvenile division for a number of years. I think he will be an excellent addition out there. The four are very, very good lawyers. Very good people. They are going to represent us very, very well.
- 067 Chair Ellis I think we should congratulate you because you were involved in the original hiring of every one of those. I think it does speak very well for both the defense bar generally and our court system. That is terrific.
- 071 I. Swenson Mr. Chair, two other things if I could. Further on the recruitment issue, OCDLA is working on some of these issues and we certainly want to coordinate with them, but we need to create a statewide database for openings in PD offices and get the message out to other states and law schools about what is here and what is available. When Becky and I attended these recruitment fairs, we realized we needed a piece of literature. Other people there had beautifully designed materials which described who they were and what they did. OPDS needs to create some kind of a brochure. I mean it is obviously different because we are just going to describe the structure of public defense in Oregon and then refer people to OCDLA or some other place to find out information about particular openings. I think we need to develop something we can send to out-of-state law schools describing our situation in Oregon, and inviting them to consider practicing in this state. We need to follow up on that. Quickly if I may, I would like to describe a couple of changes to our Affirmative Action plan. We will need to report back to you more fully on what we are doing, but maybe not today. The last time you saw our plan it was a draft that was submitted to you as part of our original

budget presentation. This time around we needed to include a six-year plan which we hadn't done before. The earlier format required only that the agency report progress made in the last two years and then talk about what it planned to do in the next biennium. One thing that we hadn't really addressed in the previous plan was our effort to work with our contractors to help them make progress in the same area. Our plan related only to what we as an agency expected to do, hoped to do, and planned to do in terms of increasing diversity, but we didn't really talk about the contractors. We have now added that item. As you know, Angel Lopez chaired a diversity task force which put together some proposals which he presented to you in October. Angel indicates that he thinks at this point that it needs to be OPDS, not an independent task force, that goes forward on this part of it, which is fine. We had a Contractor Advisory Group meeting, I think it was in January, at which we discussed the need to move forward. As you will recall we were going to do a survey of all the providers so that we had a baseline in terms of where we are to begin with and then look at strategies to work on improving diversity within our contractor offices. We agreed to schedule a meeting of the Contractors Advisory Group to focus on that issue in particular. I haven't scheduled it. I hope to be able to do that shortly after our budget hearings, so probably late April will be the appropriate time to do that. After that, in May, I hope to be able to report some more progress.

- 126 B. Duncan We are happy to report that the backlog continues to go down. The backlog is the number of cases in our office that are over 210 days old in which the opening brief has yet to be filed. Right now it is at an all time low and we intend to continue to reduce it. We have hired two new attorneys. We are also setting up caseloads for attorneys who are coming into the office so that their caseloads are structured so that they are able to file a brief in the case before it reaches that age; they are not digging out from anything. It is easier for them to just see what is next and then not have to take any extensions on their cases. We have several attorneys in the office who are in that position and able to file their cases without taking the standard extension that our office gets. We are really pleased with the trend and we are working with individual attorneys in the office to relieve their backlogs. A lot of the backlog has been in parole cases and that lingers. We have re-staffed those cases and that should relieve the backlog in these cases too. We are also expanding the appellate panel, which has increased our ability to send cases out of the office when we take in more, in a particular month, than we have the capacity to do within the time that we want to do them.
- 147 Chair Ellis Is the AG crying ouch yet?
- 148 G. Hazarabedian Uncle.
- 148 B. Duncan The work that our office does and also the work that we send out hits the Attorney General. They are feeling the pinch of our backlog reduction efforts.
- 151 Chair Ellis Good. Pour it own. Any other business? John, I understand you are the host for our lunch opportunity.
- 154 J. Potter Yes. The chief justice is going to speak in two minutes next door. There is lunch available that Laura Anson has gone out to get that OCDLA is paying for. Is it outside? We were going to put it here.
- 161 Chair Ellis Perfect. I would entertain a motion to adjourn.

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

Meeting adjourned.

Attachment 2

**OPDS's Preliminary Report to the Public Defense Services
Commission on Service Delivery in Washington County
(May 10, 2007)**

Introduction

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

Foremost among those strategies is PDSC's service delivery planning process, which is designed to evaluate and improve the operation of local public defense delivery systems. During 2004, 2005 and 2006, the Commission completed investigations of the local public defense systems in Benton, Clatsop, Lane, Lincoln, Linn, Multnomah, Marion, Klamath, Yamhill, Hood River, Wasco, Gilliam and Sherman Counties. It also developed Service Delivery Plans in each of those counties to improve the operation of their public defense systems and the quality of the legal services provided by those systems.

This report includes the results of the Office of Public Defense Services' (OPDS) preliminary investigation into the conditions of Washington County's public defense system and will eventually include the comments and discussion that occur during PDSC's public meeting in Washington County on Thursday, May 10, 2007 in Room B-30 of the Public Services Building. The final version of this report will contain PDSC's service delivery plan for Washington County.

PDSC's Service Delivery Planning Process

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

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

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

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

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

Background and Context to the Service Delivery Planning Process

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

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

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

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

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

OPDS has also formed a Quality Assurance Task Force of contractors to develop an evaluation or assessment process for all public defense contractors. Beginning with the largest contractors in the state, this process is aimed at improving the internal operations and management practices of those offices and the quality of the legal services they provide. In 2004, site teams of volunteer public defense managers and lawyers have visited the largest contractors in Deschutes, Clackamas and Washington Counties and prepared reports assessing the quality of their operations and services and recommending changes and improvements. In 2005, the site teams visited contractors in Douglas, Jackson, Multnomah and Umatilla Counties. In 2006, teams have visited all of the the juvenile contractors in Multnomah and Lane Counties and criminal and juvenile contractors in Linn and Lincoln Counties. In 2007 site teams have visited the sole juvenile contractor in Clackamas County and the largest contract office in the state in Multnomah County.

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

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

In 2007 the PDSC undertook to review the delivery of public defense services in death penalty cases. A final plan for providing services in these cases is being prepared for review by the Commission in June of 2007.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

³ Id.

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

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

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

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

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

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

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

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

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

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

OPDS's Preliminary Investigation in Washington County

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

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

On May 10, 2007 from 9:00 a.m. to 1:00 p.m., PDSC will hold a public meeting in Room B-30 of the Public Services Building in Hillsboro, Oregon. The purpose of that meeting will be to (a) consider the results of OPDS's investigation in the county as reported in the preliminary draft report, (b) receive testimony and comments from judges, the Commission's local contractors, prosecutors and other justice officials and interested citizens regarding the quality of the county's public defense system and services, and (c) identify and analyze the issues that should be addressed in the Commission's Service Delivery Plan for Washington County.

This preliminary draft report is intended to provide a framework to guide the Commission's discussions about the condition of Washington County's public defense system and services, and the range of policy options available to the Commission – from concluding that no changes are needed in the county to significantly restructuring the county's delivery system. This preliminary draft is also intended to offer guidance to PDSC's invited guests at its May 10th meeting, as well as the Commission's contractors, public officials, justice professionals and other citizens who might be interested in this planning process, about the kind of information and comments that would assist the Commission in improving Washington County's public defense delivery system.

In the final analysis, the level of engagement and the quality of the input from all of the stakeholders in Washington County's justice system could turn out to be the single most important factor contributing to the quality of the final version of

OPDS's report to the Commission and its Service Delivery Plan for Washington County. Accordingly, OPDS invites written comments from any interested public official or private citizen no later than May 9, 2007 to:

Ingrid Swenson
Executive Director
Public Defense Services Commission
1320 Capitol Street NE, Suite 200
Salem, Oregon 97301

or to Ingrid.Swenson@OPDS.state.or.us.

OPDS's Preliminary Findings in Washington County

The Court

There are 14 judges in Washington County serving a current population of 514,269 county residents.⁴ Judge Thomas W. Kohl is the presiding judge and Richard Moellmer is the Trial Court Administrator. The court maintains a central docket with master calendaring.

The District Attorney

Robert Hermann is the District Attorney of Washington County. He has 37 deputies, two of whom are assigned to juvenile court. The office uses a lateral assignment system. Cases are handled from the initial filing to the conclusion of the case by the same deputy district attorney.

Criminal Case Processing

All criminal cases are processed initially through a courtroom in the Law Enforcement Center, which also houses the sheriff's office and the jail. Judge Rick Knapp is currently assigned to this court on a full-time basis. At arraignment defendants who are eligible for the new Early Case Resolution program (ECR), discussed below, are separated from those who are not. Persons ineligible for ECR treatment proceed to arraignment. Lawyers are not present for these arraignments. After arraignment the next hearing in felony cases is a preliminary hearing held a week later. In non-ECR cases a pre-trial conference is scheduled 2 weeks later if the defendant is in custody or 4 weeks later, if the defendant is not in custody. The county seeks to adjudicate all criminal cases

⁴ By way of contrast, Multnomah County has 38 judges and a population of 681,454. Washington County's population increased by 15% between 2000 and 2006. Source: US Census Bureau.

within 120 days.⁵ If a case is not resolved at the pretrial conference the next appearance is for case assignment on the Friday before the week of trial. All lawyers and their clients must be in the presiding judge's courtroom for case assignment to indicate whether each matter is ready for trial the following week. Cases are sometimes double set. If the first case does not proceed to trial, the back-up case is tried.

Trials are held on Tuesdays through Fridays. Monday is a pre-trial conference day. Each judge handles a certain number of pretrial conferences. There is very little time for each pretrial conference although the number of pretrial conferences is decreasing as a result of the ECR program.

ECR Program

Prior to the implementation of the ECR program two of the judges undertook to conduct an early disposition program on their own. It was used primarily for probation violations and minor misdemeanors such as Driving While Suspended, Theft II and Theft III. A significant number of cases were resolved but there was no participation by defense counsel and there was some inconsistency in outcome depending on which judge was hearing the case.

In 2005, in order to address the issue of jail overcrowding, Washington County undertook to update its Criminal Justice System Master Plan. To assist with the project it retained the services of David M. Bennett, a nationally recognized criminal justice expert. To examine one mechanism for addressing overcrowding, Mr. Bennett took a team of Washington County officials to Reno, Nevada to observe its early disposition program. Adapting what they learned to their own county, Washington County officials created what may now be a model program, which appears to comply in all important respects with the PDSC's Guidelines for Participation of Public Defense Attorneys in Early Disposition Programs.⁶

The list of misdemeanor and felony offenses eligible for ECR treatment is set forth in Exhibit B. The list includes property offenses, drug offenses and other miscellaneous non-person offenses. During the first three weeks of the program, of the 305 cases referred to the ECR court, 196 were resolved. The court also deals simultaneously with any pending probation violations and any violations arising out of the new criminal conduct, allowing the defendant full resolution of all pending matters and avoiding the need for additional court hearings. Probation staff is present in the ECR court with files for defendants with open probation cases. Probation staff also assists defendants in arranging for

⁵ Criminal cases, including felonies other than Measure 11 offenses, are resolved within 120 days of the arraignment. In 2001 there were 545 cases over a year old. As of December of 2006 there was only one misdemeanor over a year old and six felonies.

⁶ The Guidelines are attached as Exhibit A.

community service. Since the court also collects restitution and fees the trial court administrator plans to place a cashier at the justice facility to facilitate the receipt of these funds. Resolution of both the new charge and any probation violations at the initial appearance means that there will be significantly fewer Failures to Appear since defendants don't have to return to court.⁷

District Attorney Bob Hermann is very pleased with the results of the program to date. He assigned a very senior deputy to the court. The DA's office is able to provide discovery to the defense by 11:30 am for cases to be heard at 3 pm. Mr. Hermann believes that in his county the program will not result in a widening of the net.

Nine lawyers from four of the contract offices are participating in ECR. Currently contractors are receiving full case credit for these cases and a number of law enforcement and court representatives urged that PDSC not lower these rates because, although the lower level cases are now being resolved with less attorney time, the remaining cases are more difficult and will require more attention.

Drug court

Presiding Judge Thomas Kohl was instrumental in creating Washington County's drug court, which has now been operating for a year and a half. Approximately 20 clients are currently being served by the drug court but, in view of its success, it will expand to include 50 people. Initially, the court handled only defendants accused of possessing controlled substances but it soon became clear that others, including defendants with significant non-person felony histories, could benefit from the court. The program lasts from 12 to 18 months depending on the individual. Clients are in court once a week for the duration of their involvement. An MPD attorney currently staffs this court. A second attorney will be needed in the near future. MPD currently receives their normal case credit for these cases regardless of the number of appearances which may be required.

Mental Health Court

A court for probationers with mental health issues has just been inaugurated. Judge Marco Hernandez organized the Mental Health Court Policy Planning Committee which created the court. Keith Rogers of MPD is a member of the committee. According to Judge Hernandez, approximately 78% of Washington County's prisoners have mental health issues. Currently, there are only three participants in the court but the number is expected to grow to twenty and, eventually, to forty. Participants attend court proceedings once every two weeks.

⁷ Sheriff Rob Gordon indicated that this category of offenses had already fallen significantly after the county implemented a policy requiring arraignment before release. After ECR went into effect the number of Failures to Appear went from 25-30 per week to none.

The length of the program is indefinite. A single MPD attorney currently staffs the court and the office receives the underlying case credit (generally a probation violation credit). A second attorney will be needed as the number of participants increases.

System Issues in Criminal Cases

A number of concerns about the operation of the criminal court system were brought to OPDS's attention during the course of meetings with local officials and providers. These included the time that is wasted by attorneys who appear at case assignment. The cases are scheduled in alphabetical order by client so lawyers with more than one client often have to spend much of each Friday afternoon waiting for their cases to be called. Some lawyers say that pretrial conferences are a waste of time, since the deputy district attorney who is present usually has no authority to settle the case for anything other than the terms of the written offer. In Measure 11 cases some attorneys neglect to provide the state with information about the defendant that might persuade the district attorney to agree to a non Measure 11 sentence. Attorneys are busy and sometimes cannot have their cases ready as soon as the court requires. One attorney suggested that the court create a special docket time for clients who have failed to appear so that they could come to court in lieu of turning themselves in to custody and waiting days for a court hearing. OPDS believes that all of these matters could be discussed and resolved at a meeting of stakeholders. Such meetings occur regularly in other counties and might provide an appropriate forum for informal discussion of system issues in Washington County.

Juvenile System

Washington County has both a judge and a referee assigned full time to its juvenile court. The district attorney's office has two deputies handling juvenile cases. In addition to delinquency cases they also participate in dependency cases⁸ on behalf of the state until jurisdiction is established. Thereafter the Attorney General represents the Department of Human Services (DHS) and the state in dependency and termination of parental rights cases.

Judge James Fun, a former deputy district attorney, was only recently assigned to the juvenile court. His predecessor, Judge Kirsten Thompson, worked with all of the involved parties to see that attorneys were present to represent parents and children at shelter hearings in dependency cases. In the past these parties had appeared without counsel at the initial hearing.

⁸ Deputy district attorneys are not always present for shelter and other hearings. DHS workers handle much of the legal work in the case, such as preparing the petition, creating and labeling exhibits, identifying witnesses and presenting the agency's position in court.

“Team decision meetings” are now being convened by DHS at the time of the initial shelter hearing in dependency cases in order to accelerate access to services for those parents who are willing to engage in them prior to adjudication.

Status conferences are set within 30 days of the shelter hearing and contested hearings are held approximately 30 days after that. There are no pretrial conferences in dependency cases so negotiations have to be conducted outside of the court process. The county generally achieves adjudication within the required 60 day period although disposition generally does not occur until later.⁹

Once disposition has occurred, the court may not review the case until the permanency hearing, a year later. This practice may be changing. It is reported that Judge Fun is scheduling more court hearings than his predecessor.

The Citizen Review Board customarily reviews each case within 180 days of the date the child came into care.

Judge John Lewis has just started a new mediation program in termination cases.

There is a strong Court Appointed Special Advocate (CASA) program in Washington County, which is part of the joint Multnomah County/Washington County program. There are a hundred volunteers and three full-time supervisors in the program.¹⁰ CASAs are currently appointed in approximately 15 to 18% of the cases. In Washington County all CASA appointments occur after jurisdiction has been established.

System Issues in Juvenile Court

For a period of time members of the local juvenile court community were not meeting regularly. Judge Fun and Referee Michele Rini recently conducted the first of what are planned to be quarterly meetings of the bench and bar. This will be an appropriate forum for discussion of some of the issues that were brought to OPDS’s attention during interviews in preparation for the Commission’s review. They include the following.

There is a lack of adequate physical space for the parties to gather before court hearings and for attorneys to confer in confidence with their clients. The juvenile court area is very small and crowded. There are conference rooms in the Juvenile Department but these are not intended for attorney conferences and are not usually available. There is one large conference room which could

⁹ The separation of adjudication from disposition means that negotiations between the parties prior to resolution of the jurisdictional issues may not always include discussion of appropriate services and outcomes.

¹⁰ This CASA program also has a training coordinator on staff. CASAs receive 30 hours of initial training with 12 hours of additional training required per year.

accommodate a meeting between all of the parties in a case but it, too, is often in use by Juvenile Department staff. Attorneys find themselves discussing confidential matters with their clients in very public areas. There is a need for a dedicated conference space. It was reported that the county is looking for additional space.

Lawyers are very busy and prefer to have cases set for specific times, if possible, to avoid the need to be in court waiting for a case to be called. Initial appearances in termination cases, for example, occur twice a month. All of them are set for the same time requiring all of the lawyers to be present. In addition court matters that are scheduled for a specific time are scheduled for only fifteen minutes. This is almost never enough time and, as a result, the court gets farther behind as the day progresses. People report spending hours of unnecessary time in court. When a case is delayed an attorney may be required to be in another court by the time the juvenile matter is finally called, further delaying that matter for the other parties and attorneys in the case. Although there are now two full-time judicial officers in the Washington County juvenile court, they are both very busy. Despite the press of other matters, it is said that they do a good job of taking as much time as needed for each case.

It was reported that Washington County takes longer to finalize adoptions than other counties. There appears to be a lack of available adoptive homes and, as a result, adoption committees sometimes have to be rescheduled. The parties may need to ask the court to monitor this process more closely.

Representation Issues in Juvenile Dependency Cases

Attorneys on all sides in juvenile proceedings in Washington County indicate that they enjoy good working relations with each other. While they may advocate forcefully for their clients in the courtroom, they reportedly maintain a professional relationship with each other and relate well to each other outside the courtroom. Some attorneys do not treat DHS workers with the same level of respect. In addition, there does not appear to be much collaboration between CASAs and some of the attorneys, even when their positions in a case are similar.

All of the attorneys are reported to work hard but some are considered less effective than others. The more experienced attorneys in all of the firms are described as good attorneys who know when to litigate. They raise appropriate issues and hold DHS accountable. For these attorneys the main concern is that they don't have enough time to meet with their clients.

Only a few lawyers are believed to meet with child clients regularly;¹¹ most meet with them rarely, and some never. Attorneys in this latter group acknowledge that their recommendations to the court are not based on first-hand information but on information provided by the DHS caseworker or the CASA. It was reported that a number of attorneys for children decline to present a position on behalf of their child clients, sometimes advising the court that they will decide whether to take a position when all of the evidence has been presented by the other parties in the case. This does not appear to constitute “representation” as contemplated in PDSC’s contracts.¹²

A lot of attorneys also reportedly fail to meet with parent clients before court. (Of course some parent clients may not cooperate with their attorneys.) Many attorneys also fail to attend DHS team decision meetings with their clients and fail to attend Citizen Review Board hearings.

For newer attorneys in offices other than MPD, it was reported that there is a lack of adequate training. They don’t appear to have mentors or initial training. Their caseloads are also said to be high and their compensation inadequate.

Some attorneys are difficult to reach and do not return telephone calls.

Representation Issues in Delinquency Cases

In delinquency practice the quality of representation appears to vary substantially from one attorney to another. Some are reported to do very good work, to communicate well with their clients and to prepare for hearings. Other attorneys are reported to be unprepared for hearings or even absent without having arranged for another attorney to cover the hearing, to fail to see their clients before court, and to fail to respond to calls regarding their clients. Recently the release of one youth had to be delayed because the attorney had asked to be consulted about the youth’s placement before he was moved and the attorney could not be reached. Sometimes law enforcement officers want to question a youth and staff are unable to contact the youth’s attorney. Most attorneys don’t meet with the parents of their clients and this is particularly true of non-English speaking parents who feel excluded from the process. Some attorneys provide their clients with reformation plans and police reports without deleting victim contact information. In the recent past there has been no forum in which the attorneys and juvenile court counselors could discuss issues of this nature. Judge Fun recently reinstated regular bench/bar meetings at which such issues might be discussed. Juvenile department staff members are not comfortable

¹¹ MPD attorneys as a group, a small number of individual lawyers from other firms, and several non-contract attorneys are generally held out as the attorneys who always meet with their clients, return phone calls and collaborate with parties sharing similar interests.

¹² One attorney reportedly advised the court that he would not take a position one way or another in a termination case for fear of liability if the outcome for which he successfully advocated resulted in injury to the child.

talking to supervisors in the attorneys' offices for fear they might jeopardize the good will that does exist and the efforts of a few in the past to raise performance issues was not well received by the attorneys.

One commentator said that the younger attorneys may be pleading too many cases. They don't have the skills to make good decisions about which cases should be tried.

Caseload Trends

As indicated in the table below, both the criminal and the juvenile caseloads in Washington County have remained relatively stable during the current biennium.

Date	Total Caseload	Juvenile
July 2001- June 2002	16,037	2,444
July 2002 - June 2003	14,395 (<i>BRAC period</i>)	3,124
July 2003 - June 2004	17,236	3,995
July 2004 - June 2005	18,012	4,718
July 2005 - June 2006	17,927	4,952

Although the population of Washington County is increasing, according to local law enforcement agencies the crime rate appears to have leveled off.

As more juvenile cases are going to contractors, there are fewer cases for the private bar attorneys to handle.

Public Defense Providers

Most public defense services in Washington County are delivered under contract with PDSC. The principal providers are the Washington County office of Metropolitan Public Defender Services, Inc; the Oregon Defense Attorney Consortium; and four private law firms: Brindle, McCaslin & Lee; Garland, Burton & McCaffery; Karpstein & Verhulst; and Ridehalgh & Associates. Each of the contract offices is described briefly below. In addition there are non-contract attorneys who handle cases on an hourly basis.

Metropolitan Public Defender

MPD began operations in Multnomah County in 1971 and opened the Washington County office in 1973. MPD is a private, not-for-profit corporation that contracts with PDSC for 100% of its professional services. MPD has a 5-member Board of Trustees that oversees the affairs of the corporation. One

member of the board is appointed by the chair of the Washington County Commission.

The MPD-WCO is a branch office of MPD, Inc. As such, the central administration of MPD contracts with PDSC, and manages accounting and payroll, hiring and human resources, information technology, capital acquisitions and other aspects of the administration of MPD. The managers of MPD-WCO are part of the administration and are active participants in administrative decision-making. MPD-WCO functions independently and the managers have a great deal of autonomy in the day-to-day operations of the office.

MPD-WCO has 20 attorneys including the director, 6 investigators, 10 legal assistants, 4 secretaries, one data integrity specialist and one alternatives worker who also acts as a legal assistant. Many employees have worked in the office for a long time; two years ago the median length of stay was reported to 7.5 years.

A "team" at MPD-WCO generally consists of a full-time attorney, a half-time legal assistant and a one-third time investigator. Each team is assigned to one of five sections within the office: the Major Felony Section, the Misdemeanor/Minor Felony Section, the Juvenile Section, the Civil Commitment Section or the Spanish Language Section.

MPD-WCO evaluates every employee after the first six months of employment and has a goal of evaluating every employee once a year thereafter. A series of questionnaires has been developed which seek information about an employee's performance. These questionnaires are distributed to the employee's co-workers including both attorneys and staff. According to the director, feedback from judges and district attorneys is solicited on a regular basis. MPD-WCO has developed a form for obtaining client feedback but implementation of the process is reported to be in its infancy. There is a written complaint policy in place that can be used by clients and others.

MPD provides a formal full-day orientation for all newly hired employees. Immediate supervisors are responsible for the training of new employees in their sections. All new attorneys at MPD participate in a multi-day trial skills training program offered twice a year that utilizes a mock criminal case and lectures to teach trial tactics, strategy, ethics and professionalism. In recent years attorneys from other public defense offices have been invited to participate in this program if all of the openings are not needed for new MPD lawyers. Periodically, investigators, legal assistants and other members of the support staff have half-day or day-long training programs devoted to professional development and training. There are noon-hour brown bag sessions approximately every other week that focus primarily on legal issues. Occasionally there are after-hours trainings on specific topics. Limited reimbursement is available to other staff for training. MPD has an attorney trainer who plans brown bags, the trial skills

training program, and other trainings. MPD also maintains a law library at each office and electronic motion and memo banks. The attorney trainer is available to consult with other attorneys regarding legal issues in their cases.

MPD staff attorneys and other MPD employees are represented by the Association of Federal, State, County and Municipal Employees (AFSCME).

This office is described as “very good, very stable” by one judge, and “the Cadillac” by another. A third judge said that while there are issues with some attorneys,¹³ the office is a solid, major player. One commentator said that the office does a good job but that the attorneys are “buried” by the number of cases they handle.

The Director of the office, Keith Rogers, is considered an important partner in all community justice initiatives in the county. MPD is listed as a “key stakeholder,” for example, in the Criminal Justice System Master Plan referred to above. MPD is involved in all three of the county’s specialty courts.

Oregon Defense Attorney Consortium

The Oregon Defense Attorney Consortium (the consortium) was formed in 2005 for the purpose of contracting with PDSC on behalf of the member attorneys. It is organized as a private non-profit corporation. There are three members of its board of directors, all of whom are members of the consortium. The consortium plans to recruit two additional board members from outside the consortium. Rob Harris was instrumental in organizing the consortium and serves as its executive director. The consortium includes approximately 18 attorneys. Of the contractors, only MPD and the consortium handle Measure 11 cases and major felonies. The consortium also handles minor felonies and misdemeanors and participates in the ECR court. The consortium administrator receives information about any bar complaints against consortium members and actions taken by member firms in response. The administrator also inquires of the court periodically about member performance. The administrator receives complaints directly from clients and works with the attorney and client to resolve them. The consortium is seen as providing very good representation¹⁴ and creating an opportunity for some of the best and most experienced lawyers in the county to handle public defense cases. The Harris firm has added new attorneys who are now being trained and other consortium members may also be adding new lawyers in the future. Rob Harris is described as a great asset -- he is knowledgeable, provides good advice, has good skills, and gets along with everyone.

¹³ OPDS was advised that the Director does not seem able to “ease out” unsatisfactory lawyers. On the other hand, Sheriff Rob Gordon said that if there is a problem with a public defender his office just calls MPD and it is taken care of.

¹⁴ Two judges rated the consortium as the best provider in the county.

Mr. Harris is not satisfied with the rates the consortium is receiving under its current contract because they are lower than the rates received by providers in other areas of the state. As he will inform the Commission, he believes that there should be a presumption that contractors will receive equal rates and if any contractor receives more OPDS should be able to articulate the reasons for the difference.

Washington County Indigent Defenders, P.C.

This firm is also known as Garland, Burton, McCaffery. Marvin Garland is the contract administrator. His firm has contracted with OPDS since 1994. The firm has a board of directors comprised of its shareholders. There are currently eight associates. The firm handles C felonies and misdemeanors and participates in the ECR program. It also began taking juvenile cases in January of 2007.

The Garland firm has been identified in the past, prior to the addition of two new partners, as experiencing the most difficulty with performance. Under current management the firm appears to be operating more effectively. It was reported that it seems more settled and the lawyers appear to be happier.¹⁵

A number of interviewees expressed concern about the lack of training for new lawyers at this firm. It was considered a significant improvement that one of the partners was present in the courtroom to observe a new attorney in a recent jury trial. The firm has no formal training program but indicates that it is developing one. The firm reports that it performs regular evaluations of attorneys and staff. It also uses "team leaders" for the criminal and juvenile caseloads who communicate regularly with their team members by email. The lawyers also meet for lunch occasionally.

The distribution of funds within the firm was reported by observers outside the firm to be a problem. New attorneys are said to receive very poor salaries. Two interviewees recommended that PDSC review salaries in this firm (as well as in others) as part of the contracting process and require that adequate funds be distributed to the attorneys doing the work.

Karpstein & Verhultz

This firm has been contracting with PDSC since 1994. It does not have a board of directors. Steven Verhulst is the contract administrator.

The partners in this firm are well respected in the legal community. The bulk of their contract is for juvenile work. The firm has six attorneys, three of whom are new. The firm has no formal training program but has a "hands on practice",

¹⁵ One interviewee said that significant improvement is still needed. Attorneys continue to come to court without having met their clients.

assigning a supervisor who is available for consultation on a daily basis to each new attorney. Supervisors accompany new attorneys to their first trials. They are encouraged to ask questions and once or twice a month the attorneys get together to discuss cases over lunch.

Brindle, McCaslin & Lee, P.C.

The Brindle, McCaslin & Lee firm has seven associates. Under its previous name of McKeown & Brindle it has been providing public defense services in Multnomah County since 1988 and in Washington County since 1995. It does not have a board of directors. The firm is reported to have undergone a lot of changes lately. The fact that Ted Brindle, the senior partner in the firm, is now working in Washington County is considered a positive development. This firm does not have a formal training program for its new attorneys although senior attorneys review cases with newer attorneys. Lack of adequate training was reported to be a problem for this firm in the past. Recently, however, they have added some new but very experienced attorneys including a former deputy district attorney from Multnomah County.

Ridehalgh & Associates, LLC

The Ridehalgh firm has been contracting with PDSC since 2000. It has seven attorneys, including Ronald Ridehalgh, who represent clients in C felony, misdemeanor, ECR, DUII Diversion, Domestic Violence Deferred Sentencing and juvenile cases. The firm does not have a board of directors. It has an employee manual and written job descriptions. Employee performance issues are generally addressed in one-on-one discussions. A number of creative awards have been devised to recognize attorney achievements. The firm has a formal complaint procedure for clients and others. It also has a sophisticated case tracking system. Little direct comment was received about the firm from interviewees although one judge said the firm did good work and had good staff continuity. In juvenile cases some interviewees reported that Ridehalgh attorneys often fail to return calls and fail to attend treatment reviews.

Private Bar

In addition to the contractors there are attorneys who handle cases from the court appointment list on an hourly basis. The attorneys who handle juvenile cases on an hourly basis are considered important participants in the juvenile court system.

OPDS's Recommendations for Further Inquiry at PDSC's May 10, 2007 Meeting in Hillsboro

In light of the information which came to its attention during interviews with representatives of the Washington County juvenile and criminal justice systems,

OPDS recommends that PDSC focus its inquiries and discussion at the Commission's May 10th meeting in Hillsboro on the following topics:

1. Structural issues. Washington County has significant structural variety among its providers – a strong public defender office, a consortium with both experienced and new attorneys, and a number of firms and individual providers. It would appear to be a system that permits more experienced lawyers to continue to participate in public defense while maintaining their private practices but that also provides new attorneys with a variety of options for becoming involved in public defense representation. The Commission may well determine that this is at least one appropriate service delivery model. If caseloads decline there may be a need for fewer providers. One component of this system that may be especially vulnerable if caseloads decline is the hourly rate attorneys since OPDS must see that its contractors' quotas are met before authorizing appointment of hourly rate attorneys.
2. Quality improvement. Most of the issues raised by county officials in discussions with OPDS staff related to the quality of representation by, and the adequacy of training for, newer public defense attorneys, rather than the structure of these organizations.

Of course increased funding would be an important factor in the effort to improve quality. Despite the Commission's effort in the last contracting cycle to direct limited new funds to contractors with the lowest case rates, Washington County contractor compensation (except for MPD) remains below average.¹⁶

Whether or not additional funds are available, there are steps that contractors should be encouraged to take to improve representation. The consensus of opinion among those who see new lawyers in the courtroom on a regular basis is that there needs to be a basic training course for these lawyers. They need an opportunity to learn the essentials of courtroom practice before appearing in the courtroom with their first clients. Training should focus on the "how tos" of courtroom practice such as how the jury selection process works, when and how to make a motion for judgment of acquittal, which motions should be made outside of the presence of the jury, that adjudication needs to occur before the attorney addresses disposition, etc. The judges are willing to help but say they are rarely asked. Contractors who do not have in-house training like MPD should confer with the county bar association, OCDLA, the state bar and others about how to create an appropriate training plan for new attorneys. In lieu of such a training program an effective mentoring plan for each new attorney could be an effective option. One interviewee proposed that

¹⁶ True "averages" are difficult to calculate in view of the number of variables which must be considered. By "average" this report means the approximate average among similar providers.

PDSC include in its contract a requirement that all attorneys with less than 18 months' experience be required to attend a practical skills training on the essentials of courtroom practice.

It was reported that defense attorneys are missing an opportunity to be more effective in presenting their cases to juries. The prosecution makes frequent use of new technologies such as power point to better outline and present their cases. Defense attorneys say they simply don't have the equipment but others say they don't appear to be making any effort to get it. The trial court administrator's office may have some equipment it could make available. Local commentators believe it is more of a training issue than a funding issue.

In the area of juvenile representation, the issues identified in Washington County are similar to those identified in other counties – failure by some attorneys to visit with child clients and to advocate effectively for them, to meet with adult clients prior to court hearings and to attend Citizen Review Board hearings and planning meetings convened by the DHS. All of these issues are addressed in the Qualification Standards for Court Appointed Counsel, PDSC's model contract, the Oregon Rules of Professional Conduct and the Oregon State Bar's Performance Standards. Heavy caseloads and insufficient training appear to be the principal causes of unsatisfactory performance, although some lawyers manage to do excellent work despite their caseloads.

3. Although attorneys are now present for shelter hearings in juvenile cases and for the initial hearing in ECR cases, defendants who are not eligible for ECR still appear without counsel at their criminal arraignments. It is hoped that arrangements can be made in the near future for attorneys to be present at all initial hearings.
4. A number of interviewees noted the increasing need for bi-lingual and bi-cultural attorneys and office staff. The district attorney's office has ten employees who are Spanish speaking, including all of the receptionists, two victims' assistants, and two attorneys. MPD has a Spanish Language team to serve its Spanish speaking clientele. The consortium includes three member attorneys who speak Spanish. The Ridehalgh firm has successfully recruited a number of native Spanish speaking staff members, as has the Garland firm. But more Spanish speaking lawyers and staff are needed in both juvenile and criminal cases.

Because of its interest in the success of appropriately structured early disposition programs, the commission may want to monitor closely the county's ECR program and, if it proves successful, consider its use as a model in other jurisdictions.

Exhibit A

The Public Defense Services Commission's Guidelines For Participation of Public Defense Attorneys in Early Disposition Programs

In order to insure that Early Disposition Programs (EDPs) involving court-appointed attorneys compensated by the Public Defense Services Commission (PDSC) meet constitutional, statutory and ethical requirements, PDSC concludes that EDPs should comply with the following guidelines. These guidelines are intended to insure that clients of court-appointed attorneys who participate in EDPs are able to make knowing, intelligent, voluntary and attorney-assisted decisions whether to enter pleas of guilty and that court-appointed attorneys are able to provide meaningful counsel and assistance to those clients.

1. An EDP should insure that the program's operations and rules permit the establishment and maintenance of attorney/client relationships.

Commentary

Although EDPs offer defendants the opportunity for favorable dispositions of their pending criminal charges and the State of Oregon potential savings for its justice system, Oregon's Rules of Professional Conduct require defense attorneys who participate in EDPs to establish and maintain meaningful attorney/client relationships.

Oregon Rule of Professional Conduct 1.1, requires that "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.3 requires that "A lawyer shall act with reasonable diligence and promptness in representing a client and not neglect a legal matter entrusted to the lawyer."

2. An EDP should provide the opportunity for necessary pre-trial discovery, including adequate opportunity to review discovery material and investigate the facts of the case and the background and special conditions or circumstances of the defendant, such as residency status and mental conditions. Defendants participating in an EDP should be notified on the record that their attorney has not been afforded the time to conduct the type of investigation and legal research that attorneys normally conduct in preparation for trial.

Commentary

Article I, Section 11 of the Oregon Constitution provides, "In all criminal prosecutions, the accused shall have the right to be heard by himself and counsel...." This constitutional right to counsel would be meaningless without an adequate opportunity for counsel to inform himself or herself about the nature of the charges against the defendant, the factual and legal circumstance of the case and the background of the defendant.

The following Oregon Principles and Performance Standards for Counsel in Criminal Cases (the "Oregon Standards") require defense attorneys to carefully review charging instruments, police reports, relevant background information with defendants. These Oregon Standards also require counsel to conduct necessary independent investigation or consultation with experts in appropriate circumstances before advising their clients concerning participation.

STANDARD 1.1 – Prerequisites for Representation

Counsel shall only accept an appointment or retainer if counsel is able to provide quality representation and diligent advocacy for the client.

STANDARD 1.2 – General Duties and Responsibilities of Counsel to Clients

Upon being retained or appointed by the court, counsel should contact the client as soon as practicable AND maintain regular contact thereafter. Counsel should endeavor to establish a relationship of trust and open communication with the client and should diligently advocate the client's position within the bounds of the law and the Rules of Professional Responsibility.

STANDARD 1.3 – Role of Counsel

Counsel should seek the lawful objectives of the client and should not substitute counsel's judgment for that of the client in those case decisions that are the responsibility of the client.

STANDARD 1.4 – Initial Client Interview

Counsel should conduct a client interview as soon as practicable after being retained or appointed by the court, in order to obtain information necessary to provide quality representation at the early states of the case and to provide the client with information concerning counsel's representation and the case proceedings.

STANDARD 2.5 – Initial Court Appearances

Counsel should preserve all of the client's constitutional and statutory rights at initial court appearances.

STANDARD 2.6 – Independent Investigation

Counsel should promptly conduct an independent review and investigation of the case, including obtaining information, research and discovery necessary to prepare the case for trial or hearing.

3. An EDP should provide for adequate physical space to ensure necessary privacy and adequate time to conduct confidential consultations between clients and their attorneys.

4. An EDP should provide adequate time for defendants to make knowing, intelligent, voluntary and attorney-assisted decisions whether to enter pleas of guilty or whether to agree to civil compromises or diversion. Clients should be allowed a reasonable continuance to make their decisions in the event there is incomplete information or other compelling reasons to postpone entry of a plea, civil compromise or diversion agreement. Clients should be allowed to withdraw their pleas, petitions or agreements in an EDP within a reasonable period of time in extraordinary circumstances.

Commentary

The following Oregon Standards require that defense counsel with clients in Early Disposition Programs have adequate time and privacy to meet with their clients and carefully review the clients' rights, obligations and options. These standards, as well as applicable rules of law, require that defendants be given adequate time to consider their options, to knowingly and intelligently waive their rights and to withdraw guilty pleas or agreements to enter programs in appropriate circumstances.

STANDARD 2.7 – Pretrial Motions; Hearings Regarding Ability to Aid and Assist Counsel should research, prepare, file and argue appropriate pretrial motions whenever there is reason to believe the client is entitled to relief. Counsel should be prepared to provide quality representation and advocacy for the client at any hearings regarding the client's ability to aid and assist...

STANDARD 2.8 – Pretrial Negotiations and Admission Agreements
Counsel should:

1. with the consent of the client explore diversion and other informal and formal admission or disposition agreements with regard to the allegations;
2. fully explain to the client the rights that would be waived by a decision to enter into any admission or disposition agreement;
3. keep the client fully informed of the progress of the negotiations;
4. convey to the client any offers made by the prosecution and the advantages and disadvantages of accepting the offers;
5. continue to preserve the client's rights and prepare the defense notwithstanding ongoing negotiations; and
6. not enter into any admission or disposition agreement on behalf of the client without the client's authorization.

ORS 135.049(C) provides that every EDP must provide (i) written criteria for eligibility, (ii) victim notification and appearance, and (iii) a process to ensure representation and discovery.

5. An EDP should insure that attorney caseloads are sufficiently limited to provide for full and adequate legal representation of each client.

Commentary

Oregon Rule of Professional Conduct 1.1, requires that "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

6. An EDP should provide for alternative representation for a client eligible for an EDP where such representation would constitute a conflict of interest for the client's original attorney.

Commentary

The following Oregon Rules of Professional Conduct forbid attorneys from representing clients when that representation involves a conflict of interest.

RULE 1.16 DECLINING OR TERMINATION REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if:

(1) the representation will result in violation of the rules of professional conduct or other law

RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client;
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer; or
- (3) the lawyer is related to another lawyer, as parent, child, sibling, spouse or domestic partner, in a matter adverse to a person whom the lawyer knows is represented by the other lawyer in the same matter.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not obligate the lawyer to contend for something on behalf of one client that the lawyer has a duty to oppose on behalf of another client; and
- (4) each affected client gives informed consent, confirmed in writing.

RULE 2.1 ADVISOR

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political.

7. An EDP should not penalize clients or sanction their attorneys for acting in conformity with any of the foregoing standards.

NOTE: These guidelines will be accompanied by descriptions of at least two EDPs currently operating in the state that conform with these guidelines – one from a large, more populous judicial district and one from a small, less populous judicial district.

100

Exhibit B

CRIMES ELIGIBLE FOR PROPOSED EARLY CASE RESOLUTION (ECR) PROGRAM

(Sorted Alphabetically)

Statute	Charge
166076	Abuse of a Memorial
496695	Aid in F/G Violation
	All Fish & Game
	ALL TRAFFIC
167340	Animal Abandonment
163208(1)	Assault on Police Ofc.
8115401b	Attempt to Elude - Foot
164215	Burglary 2
477515	Burn in Restricted Area
811135	Careless Driving
166240	Carry Concealed Weapon
7010551	Contract w/o Registration
6471251	Countrft Mark/Manuf/Sell-Mis
164345	Crim Mischief 3
164354	Crim Mischief 2
164365	Crim Mischief 1
1641404a	Crim Poss Rent Prop <\$500
1641404b	Crim Poss Rent Prop >\$500
164245	Crim Trespass 2
164255a	Crim Trespass 1
164255b	Crim Trespass 1 - reentry
163245	Custodial Interference 2
164813	Cut/Transp Spec Forest Prod
475991	Del Imitation Control Subst
1647751	Deposit Trash Near Water
1647752	Deposit Trash In Water
166025	Disorderly Conduct
3234802	Distrib Cigarettes w/o License
806010	Driving Uninsured
8111823	DWS Felony
8111824	DWS Misd
8111824R	DWR Misd
811182FR	DWR Felony
468951	Environmental Endangerment
807570	Fail Carry/Present ODL
806012	Fail Carry Proof Insurance
803505	Fail Carry Registration Card
803540	Fail Display License Plate
811265	Fail Obey Traffic Control Dev.
807530	False Application DL
8060501	False Cert Finan Resp
165692	False Claim Health Care Pymt
807620	False Info to Police
162385	False Info to Police on Cite
806055	False Liab Ins Info to Police
807520	False Swear to Receive Lic
475981	Falsify Drug Test Records
806050	Falsify Finan. Responsibility
496162	Fish & Game Violation
496162a	Fish & Game Misd
803230	Forged Title or Registration

165007	Forgery 2
165013	Forgery 1
1650554a	Fraud Use Credit Card <\$750
1650554b	Fraud Use Credit Card >\$750
167222	Freq Place Cntrld Sub Used
4714101	Furn Liquor Intox Person
4714102	Furn Liquor Minor - Misd
4714103	Furn Liquor Minor - Viol
166429	Furnish Firearm/Further Fel
811700	Hit & Run - Misd.
803550	Illegal Alter/Display Plates
165570	Improper Use of 911
162375	Initiate False Report
811150	Interf w/ Emergency Veh
166116	Interfere Public Transportation
165572	Interfere w/ Making Report
807590	Lend ODL to Another
607045	Livestock at Large
164162	Mail Theft
3140752	Make False Tax Return
4714301	Minor Poss/Purch Liquor
4714303	Minor Enter Liq Premises
166095	Miscond Emerg Phone Call
165805	Misrep Age by Minor
807430	Misuse ID Card
1650653a	Negotiate Bad Check Misd
1650653b	Negotiate Bad Check Fel
165107	No Metal Purchase Records
8070101	No Op License
701990	No Valid Builder Registr
166450	Oblit ID Marks Firearm
165540	Obtain Contents Communic
475994	Obtain CS Unlawfully
164805	Offensive Littering
443725	Op Unlicensed Care Facility
624320	Opr Commissary/Vend No Lic
	PCS Cocaine
	PCS Ecstasy
	PCS Heroin
	PCS Meth
	PCS MJ
	PCS MJ <oz
4759992b	PCS MJ near School
	PCS Sched 1
	PCS Sched 2
	PCS Sched 3
	PCS Sched 4
	PCS Sched 5
163709	Point Laser Light at Officer
1647851	Place Pollution Sub in Water
1647852	Place Poll Sub Highway/Prop
164235	Poss Burglary Tools
165017	Poss Forged Instr 2
164022	Poss Forged Instr 1
165032	Poss Forgery Device

165070	Poss Fraud Commun Device
166385	Poss Hoax Destr Device
819300	Possess Stolen Vehicle
167007	Prostitution
1641621e	Receive Stolen Mail
811140	Reckless Driving
163195	Reckless Endangering
471478	Remove Keg ID
162315	Resist Arrest
471360	Serve Alcohol w/o Permit
4961621a	Take F/G Prohib Method
167212	Tamper w/ Drug Records
166090	Telephonic Harassment
164043	Theft 3
164045	Theft 2
164055	Theft 1
1641255a	Theft of Services <\$50
1641255b	Theft of Services \$50-\$749
1641255c	Theft of Services \$750-\$9999
476715	Throw Lighted Material
647150	Trademark Counterfeit 1
164272	UEMV
167385	Unauth Use Livestock
164383	Unlaw Apply Graffiti
478960	Unlaw Burn Commerc. Waste
1662201b	Unlaw Discharge Weapon
466100	Unlaw Disposal Haz Waste
323482	Unlaw Distrib Cigarettes
164868	Unlaw Label Sound Recrdng
339020	Unlaw Maintain Child School
411630	Unlaw Obtain Public Assist
165813	Unlaw Poss Fictitious ID
164386	Unlaw Poss Graffiti Implmt
166250	Unlaw Poss Weapon
166425	Unlaw Purchase Firearm
480120	Unlaw Sale/Use Fireworks
164865	Unlaw Sound Recording
1643772	Unlaw Use Computer
411840	Unlaw Use Food Stamps
477740	Unlaw Use of Fire
1678085a	Unlawful Inhalent Use
471475	Unlic Serve Liquor
807600	Use Another's ODL
807580	Use Invalid License
164135	UUV
809500	VBR
468943	Water Pollution 2

Attachment 3

**OPDS's Final Report on Service Delivery in Judicial District No. 7
& PDSC's Service Delivery Plan for the District
(Hood River, Wasco, Gilliam, Sherman & Wheeler Counties)
(June 8, 2006)**

Introduction

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

Foremost among those strategies is PDSC's service delivery planning process, which is designed to evaluate and improve the operation of local public defense delivery systems. During 2004, 2005 and 2006, the Commission completed investigations of the local public defense systems in Benton, Lane, Lincoln, Linn, Multnomah, Marion, Klamath and Yamhill Counties. It also developed Service Delivery Plans in each of those counties to improve the operation of their public defense systems and the quality of the legal services provided by those systems.

This report presents the results of OPDS's preliminary investigation of conditions in Hood River and Wasco Counties, in particular, and in Gilliam, Sherman and Wheeler Counties to a lesser extent. It also contains the comments during PDSC's April 13, 2006 public meeting in Judicial District No. 7 from judges, prosecutors, public defense contractors and other justice professionals in the district, and reflects the deliberations of PDSC leading up to its adoption of a service delivery plan for the district. In conclusion, the report sets forth PDSC's Service Delivery Plan for Judicial District No. 7.

PDSC's Service Delivery Planning Process

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

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

Third, after considering OPDS's preliminary draft report and public comments during the Commission's meetings in a county or district, PDSC develops a "service delivery plan," which is usually set forth at the conclusion of the final version of OPDS's report. That plan

may confirm the quality and cost-efficiency of the local public defense delivery system and services in the area or propose changes to improve the delivery of the region's public defense services. In either event, the Commission's service delivery plans (a) take into account the local conditions, practices and resources unique to the area, (b) outline the structure and objectives of the area's delivery system and the roles and responsibilities of local public defense contractors and (c) when appropriate, propose revisions in the terms and conditions of the region's public defense contracts in the area.

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

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

Background and Context to the Service Delivery Planning Process

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

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

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

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

OPDS has also formed a Quality Assurance Task Force of contractors to develop an evaluation or assessment process for all public defense contractors. Beginning with the largest contractors in the state, this process is aimed at improving the internal operations and management practices of those offices and the quality of the legal services they provide. In 2004, site teams of volunteer public defense managers and lawyers have visited the largest contractors in Deschutes, Clackamas and Washington Counties and prepared reports assessing the quality of their operations and services and recommending changes and improvements. In 2005, the site teams visited contractors in Columbia, Jackson, Klamath, Multnomah and Umatilla Counties and, in 2006, teams have visited the juvenile contractors in Multnomah County and the principal contractor in Linn County. During the remainder of this year, the Quality Assurance Task Force plans to send site visit teams to Lane, Washington, Lincoln and Columbia Counties. In accordance with its Strategic Plan for 2003-05, PDSC has also developed a systematic process to address complaints over the behavior and performance of public defense contractors and individual attorneys.

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

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

“Structure” versus “performance” in the delivery of public defense services. Distinguishing between structure and performance in the delivery of public defense services is important in determining the appropriate roles for PDSC and OPDS in the Commission’s service

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

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

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

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

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

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

delivering public defense services.

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

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

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

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

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

employment relationship between the attorneys and the office.² Attorneys in the not-for-profit public defender offices are full-time specialists in public defense law, who are restricted to practicing in this specialty to the exclusion of any other type of law practice. Although these offices are not government agencies staffed by public employees, they are organized as non-profit corporations overseen by boards of directors with representatives of the community and managed by administrators who serve at the pleasure of their boards.

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

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

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

2. Consortia. A "consortium" refers to a group of attorneys or law firms formed for the purposes of submitting a proposal to OPDS in response to PDSC's RFP and collectively handling a public defense caseload specified by PDSC. The size of consortia in the state varies from a few lawyers or law firms to 50 or more members. The organizational structure of consortia also varies. Some are relatively unstructured groups of professional peers who seek the advantages of back-up and coverage of cases associated with a group practice, without the disadvantages of

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

³ *Id.*

interdependencies and conflicts of interest associated with membership in a law firm. Others, usually larger consortia, are more structured organizations with (a) objective entrance requirements for members, (b) a formal administrator who manages the business operations of the consortium and oversees the performance of its lawyers and legal programs, (c) internal training and quality assurance programs, and (d) plans for “succession” in the event that some of the consortium’s lawyers retire or change law practices, such as probationary membership and apprenticeship programs for new attorneys.

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

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

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

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

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

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

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

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

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

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

qualification process for court appointments to verify attorneys' eligibility for such appointments, including requirements for relevant training and experience.

OPDS's Preliminary Investigation in Judicial District No. 7

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

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

On April 13, 2006, PDSC held a public meeting in the Hood River County Courthouse. The purpose of that meeting was to (a) consider the results of OPDS's investigation in Judicial District No. 7 as reported in a preliminary draft of this report,⁴ (b) receive testimony and comments from judges, the Commission's local contractors, prosecutors and other justice officials and interested citizens regarding the quality of the public defense system and services in the Judicial District and (c) identify and analyze the issues that should be addressed in the Commission's Service Delivery Plan for Judicial District No. 7.

The preliminary draft of this report was intended as a framework to guide the Commission's discussions about the condition of the public defense system and services in the Judicial District, and the range of policy options available to the Commission — from concluding that no changes are needed in the district to significantly restructuring the district's delivery system. The preliminary draft of this report also provided guidance to PDSC's invited guests at its April 13th meeting in Hood River, as well as the Commission's contractors, public officials, justice professionals and other citizens who were interested in this planning process, about the kind of information and comments that would assist the Commission in improving public defense in Judicial District No. 7.

In the final analysis, the level of engagement and the quality of the input from all of the stakeholders in the judicial district's justice system is probably the single most important

⁴ Relevant portions of the preliminary draft of this report, which differ significantly from this version of the report, are set forth in Appendix A.

factor contributing to the quality of the final version of this report and PDSC's Service Delivery Plan for counties in the district. Accordingly, OPDS invited written comments from any interested public official or private citizen prior to the Commission's April 13th meeting in the district for inclusion in the final version of this report.⁵

A Demographic Snapshot of the Counties in Judicial District No. 7⁶

Hood River County

With a population of 20,500 residents, Hood River County is located at the center of the Columbia River Gorge National Scenic Area, extending from Mt. Hood north to the Columbia River. Agriculture, lumber and recreation are the County's primary sources of revenue and industry. With fertile valley soils of exceptional quality, Hood River County leads the world in Anjou pear production. More than 14,000 acres of commercial pear, apple, cherry and peach cover the county, with acreage of wine grape vineyards growing at a rapid pace.

Hood River County also has two ports and two boat basins which service commercial traffic, as well as recreational boating. Due to its wealth of natural and recreational resources, the county attracts many tourists during the summer months, which swells its permanent population of 20,500 significantly.

The recorded history of Hood River County began with the arrival of Nathaniel Coe and his family in 1854, who were the first white settlers to file a land claim in the area where the City of Hood River is now located. By 1880, there were seventeen families living in the valley. Hood River was originally part of Wasco County until 1908, when a separate county was established. George Prather published the first newspaper in the county in 1889 and the Columbia River Highway was completed in 1922.

The 1980's and 1990's saw tremendous growth in Hood River County, largely due to Columbia Gorge winds and the sport of windsurfing, in particular during tourist seasons. Many windsurfers consider Hood River to be the "Windsurfing Capitol of the World." And the September 2005 issue of Skiing magazine named the City of Hood River one of the "Top Ten Ski Towns in America."

The influx of new residents may explain the higher education level of Hood River County compared to other less populous, rural counties in the state. Just over 15 percent of its adult population holds a Bachelor's Degree and 7.8 percent with a graduate degree (compared to statewide averages of 16.4 percent and 8.7 percent respectively).⁷ The

⁵ Other than written responses to a questionnaire from one of the Commission's contractors in the district, OPDS did not receive any written comments in response to this invitation.

⁶ The following information was taken from the official websites of the counties in Judicial District No. 7 and from data compiled by Southern Oregon University's Southern Oregon Regional Services Institute, which is contained in the Institute's Oregon: A Statistical Overview (May 2002) and Oregon: A Demographic Profile (May 2003).

⁷ The respective numbers in Yamhill County, for example, are 13.4 and 7.2 percent. In Klamath County, they are 10.6 and 5.4 percent.

county has an average proportion of its adult population employed in management and professional positions at 32.5 percent (compared to the state's average of 33.1 percent). Only 70.4 percent of its residents over the age of 25 graduated from high school or its equivalent, however, compared to the statewide average of 78.6 percent.

In 2000, Hood River County had the ninth highest unemployment rate among Oregon's 36 counties at 7.8 percent, compared to the state's average rate of 4.9 percent. Its per capita annual income was \$17,877 compared to a statewide average of \$20,940, although 20 Oregon counties had lower per capita incomes. The county also had the 13th highest rate of residents living in poverty at 14.2 percent, compared to an 11.6 percent average in Oregon and 12.4 percent in the United States. The teen pregnancy rate in the county is below average at 14.5 per 1,000 residents, compared with the statewide average is 16.7, and its high school dropout rate is Oregon 14th lowest during the past decade.

The diversity of Hood River County's population is the third highest in the state. Its non-white and Hispanic residents make up 29.3 percent of the county's population, compared to 16.5 percent for Oregon as a whole.

With juveniles (aged 18 years old or younger) making up 28 percent of its total population, the county's "at risk" population (which tends to commit more criminal and juvenile offenses) is the fourth highest in the state. Nevertheless, Hood River County ranked 29th in "index crimes" in 2000 among Oregon's 36 counties with a rate of 27.6 index crimes per 1,000 residents (compared to a statewide rate of 49.2) and 24th in juvenile arrests at 52 per 1,000 residents compared to Oregon's average rate of 53.⁸

In 2005, the public defense caseload in Hood River County totaled 1,219 out of 170,987 cases in the state. That amounted to 0.71 percent of Oregon's public defense caseload in 2005.

Wasco County

Thousands of years before anyone conceived of Wasco County, Native Americans carved petroglyphs on rocks overlooking the Columbia River in this area. Later, Native American tribes, including the Wasco, Paiute, and Warm Springs, gathered for centuries near Celilo Falls to trade and fish. Wasco County's Native American heritage is most apparent today with the Confederated Tribes of the Warm Springs Reservation in the southern county

Wasco County was created by proclamation of the Oregon Territorial Legislature and approval by Congress on Jan. 11, 1854. It was the largest county in U.S. history. The county comprised 130,000 square miles and was named for the Wasco tribe of the Chinook occupying some of the area, though most of the area was apparently controlled by the Shoshone. The county stretched from the Cascades to the Rocky Mountains

⁸ For the purposes of this statistic, "index crimes" are those crimes reported by the Oregon State Police as part of its Oregon Uniform Crime Reports, and include murder, rape and other sex offenses, robbery, aggravated assault, burglary, theft, including auto theft, and arson. Oregon: A Statistical Overview at p. 122.

including parts of what are now Idaho, Montana, and Wyoming. The northern border was Washington Territory and the southern border was California. The county seat was The Dalles, which was the only white settlement east of the Cascades with approximately 35 permanent residents, which gained fame as the end of the Oregon Trail.

Now the trading hub of north-central Oregon, The Dalles remains the county seat, but the county now covers 2,387 square miles. While still a comparatively large county geographically, its population is small and virtually the same as Hood River County at 22,500.

Wasco County's economy is based primarily on agriculture (orchards, wheat farming, livestock ranching), lumber, manufacturing, electric power, transportation, and tourism. Aluminum production was previously a major support of the local economy, but electrical price fluctuations and a slump in global aluminum prices has forced the closing of a number of local aluminum foundries.

Wasco County also claims windsurfing as one of its foremost recreational attractions, with a popular windsurfing launch site at Celilo Park, nine miles east of The Dalles.

In Wasco County, 10.5 percent of its adult population holds a Bachelor's Degree and 5.2 percent holds a graduate degree (compared to statewide averages of 16.4 percent and 8.7 percent respectively). Twenty-seven percent of the county's residents are employed in management and professional positions, compared to the state's average of 33.1 percent. Seventy-six percent of its residents over the age of 25 graduated from high school or its equivalent, which is just below the statewide average of 78.6 percent.

Wasco County ranked 16th in unemployment among Oregon's 36 counties in 2000 with a rate of 6.5 percent compared to an average rate of 4.9 percent. Per capita annual income in the county was \$17,195, about \$700 below Hood River County. Wasco County had a lower rate of residents living in poverty than Hood River County, but its teen pregnancy rate is the seventh highest in the state at 18 per 1,000 residents and its high school dropout rate is the eighth highest at 7.5 percent of the county's high school graduates.

The diversity of Wasco County's population is about average, with a non-white and Hispanic population of 16.1 percent compared to a 16.5 percent average for the state.

Juveniles (aged 18 years old or younger) make up 25.4 percent of Wasco County's population in comparison to a 24.7 percent average for the state. Nevertheless, Wasco County ranked 12th in "index crimes" in 2000 among Oregon's 36 counties with a rate of 39.5 index crimes per 1,000 residents (compared to a statewide rate of 49.2) and second in juvenile arrests at 89.9 per 1,000 residents.

In 2005, the public defense caseload in Wasco County was 1,649. That amounted to 0.98 percent of the state's public defense caseload in 2005.

Gilliam, Sherman and Wheeler Counties

Gilliam County was established in 1885 from a portion of Wasco County and was named after Col. Cornelius Gilliam, a veteran of the Cayuse Indian War. The first county seat was at Alkali, now Arlington. At the general election of 1890, voters chose to move the county seat to Condon, known to early settlers as "Summit Springs."

Gilliam County is in the heart of the Columbia Plateau wheat area. The economy is based mainly on agriculture, with an average farm size of about 4,200 acres. Wheat, barley and beef cattle are the principal crops. The largest individual employers in the county are two subsidiaries of Waste Management Inc., Chemical Waste Management of the Northwest and Oregon Waste Systems, Inc., two regional state-of-the-art waste disposal landfills. The estimated population in 2004 was 1,817. This was a decrease of 5.12% from the 2000 census.

Sherman County lies between the John Day River on the east, the Deschutes River on the west and the Columbia River on the north. Much of the boundary on the south is defined by the canyons of Buck Hollow, a tributary of the Deschutes.

The county's first white settler was William Graham, who settled at the mouth of the Deschutes River in 1858. Innkeepers and operators of ferries, toll bridges and stage stations followed, and then stockmen with their herds of horses, cattle and sheep. Homesteaders arrived in the 1880s by steamboat, stagecoach and wagon, settling on nearly every quarter section, plowing grass and fencing fields.

As the area's population grew, so did sentiment for independence from Wasco County. In 1889, legislation created a new county to be called Fulton after a pioneer family. The county's name finally became Sherman after Civil War General William Tecumseh Sherman.

The county seat of Sherman County is Moro. The county's economy is still based on wheat, barley and cattle and, increasingly, tourism. Its current population is approximately 1,800, which also represents a decrease from the 2000 census population of 1,934.

Wheeler County was established in 1899 from parts of Grant, Gilliam, and Crook Counties and was named after Henry Wheeler, who operated the first stage line through the county. The county seat is Fossil. The town's name was derived from the first postmaster's discovery of fossil remains on his land in 1876, which still serves as the basis for what the county claims is an international reputation.

In addition to fossils as a tourist attraction, portions of two national forests lie within Wheeler County's boundaries. Forest lands cover nearly one third of the county. The county reports its principal industries as agriculture, livestock, and lumber.

Wheeler County's 2000 population was 1,547, representing a 10.82 percent increase from 1990, but a substantial decrease from a peak population of 3,313 in 1950.

With a combined population of approximately 5,000, Gilliam, Sherman and Wheeler Counties enjoy relatively low crime rates. Gilliam and Wheeler Counties were tied for the second lowest index crime rates in Oregon in 2000 (13.6 per 1,000 after Wallowa County's

6.2). Sherman County had the 12th lowest rate of 30.5 per 1,000 (compared to a state average of 49.2). Wheeler, Sherman and Gilliam Counties also had some of the lowest juvenile arrest rates in Oregon with rankings of first, fifth and seventh, respectively. As a result of such low crime and arrest rates, the three counties' public defense caseload in 2005 was 206, or 0.15 percent of the state's total caseload for that year.⁹

OPDS's Preliminary Findings in Hood River and Wasco Counties

On March 20 to March 23, 2006, John Potter and Peter Ozanne visited Hood River and Wasco Counties on behalf of the Commission and OPDS to gather preliminary information for PDSC's April 13th meeting in the Judicial District. They interviewed all four Circuit Court Judges and the Trial Court Administrator in the District, both counties' District Attorneys and Sheriffs, representatives of both counties' community corrections and juvenile departments and local offices of the Department of Human Services, the police chief of The Dalles, two CASAs and all three public defense contractors in the District.¹⁰

As a result of the foregoing interviews, OPDS found a general consensus among justice officials and professionals about the quality of the public defense delivery systems in Hood River and Wasco County. With the exception of the reservations described below, and while noting obvious differences between the two counties, they expressed a high level of satisfaction with the quality of public defense services. Although their assessments of the competence and performance of PDSC's individual contractors and public defense attorneys varied, they were generally complimentary of PDSC's contractors, as well as most of the private attorneys on the counties' court-appointment lists. The main concerns expressed during OPDS's interviews related to the limited supply of attorneys in Hood River and Wasco County and the problems in the quality of justice that would result if lawyers who currently take court-appointments leave the area or stop taking appointments. Several observers expressed their belief that a few attorneys on the counties' court-appointment lists either lack the experience or ability to handle public defense cases or do not have adequate staff or access to training and collegial support to operate an effective law practice.

PDSC contracts with three organizations to deliver public defense services in Judicial District No. 7. With four shareholders, three associates and over 20 years of experience as a public defense provider, Morris, Olson, Smith & Starns, P.C. (Morris Olson) is the largest contractor in the District, providing services in all five of its counties.¹¹ The firm's responses to a questionnaire developed by OPDS's contractor site visit teams, which provides additional information about the firm's governance and quality assurance practices, is attached in Appendix B.

⁹ In 2005, the total public defense caseload for the five counties in Judicial District No 7 was 3,128 cases, which represented 1.83 percent of the state's caseload for last year.

¹⁰ OPDS is currently conducting additional telephone interviews with representatives of the courts and local adult and juvenile justice agencies in Hood River and Wasco Counties, as well as in Gilliam, Sherman and Wheeler Counties. The results of these interviews will be included in the final draft of this report, which will be submitted to PDSC prior to its review and approval of a Service Delivery Plan for Judicial District No. 7.

¹¹ Morris Olson's current contract with PDSC for the delivery of services through December 2007 is for 2,437 cases per year at an annual amount of \$879,468.

Aaron and Associates has been, until recently, the solo practice of Brian Aaron, who has practiced in the District for approximately 15 years.¹² Mr. Aaron provides services in Hood River County under contract with PDSC,¹³ and handles court-appointments in other counties in the District.

The Wasco/Sherman Indigent Defense Corporation (WSIDC), as the name implies, provides defense services in Hood River and Sherman Counties. WSIDC currently has two associates in the law firm of VanValkenburgh & Associates. One associate, who also serves as the consortium administrator has approximately five years of experience and the other associate has less than two years of experience.¹⁴

Morris Olson is consistently regarded as a well-established law firm of first-rate, knowledgeable public defense professionals who are zealous advocates, but generally easy to deal with as well. As the primary contractor in the Judicial District, Morris Olson appears to fill the role as the “go to” organization for cooperation in addressing systemic issues in a county, with its senior attorneys assuming active roles in policymaking groups and local projects to improve the administration of justice.

There is a perception in both Hood River and Wasco Counties, however, that the turnover rate of Morris Olson’s lawyers over the years has been high. The apparent result is the arrival of new lawyers in the District who lack the necessary training and experience to handle cases effectively for some period of time. Opinions vary about the level of training and supervision that new lawyers receive at Morris Olson, though virtually all observers complemented the firm’s lawyers for their professional skills and ethics once they gained some experience.

Jack Morris has frequently reported the difficulties his firm faces in retaining younger lawyers once they have been trained, including skyrocketing housing prices in the area (now in Wasco County as well as Hood River County) and greater professional opportunities for young lawyers in the Willamette Valley.¹⁵ Mr. Morris indicated during OPDS’s March visit that, more recently, lawyer turnover at his firm has decreased and the firm’s membership has stabilized.¹⁶ The firm’s responses to the site visit teams’ questionnaire in Appendix B describe its effort to train and supervise its lawyers in some

¹² Mr. Aaron hired a new associate a day or two before OPDS visited his office in March.

¹³ Aaron and Associates’ current contract through December 2007 is for 228 cases per year at an annual rate of \$74,784.

¹⁴ WSIDC currently has a contract for 204 cases per year at \$62,628. Neither Aaron and Associates nor WSIDC responded to OPDS’s request to complete relevant portions of the questionnaire contained in Appendix B.

¹⁵ As the questionnaire in Appendix A indicates, OPDS’s contractor site visit teams have increasingly taken an interest in the issue of attorney retention and its relationship to the distribution of contract funds and other revenues by PDSC’s contractors as salaries for their attorneys. This information has historically not been accessible to OPDS or its predecessor agency on the ground that its contractors are independent. In response to this questionnaire, Morris Olson indicates that the salary scale is “approximately \$50 to \$100 less per month compared to that of Metropolitan Public Defender.” Appendix A, Morris Olson’s “Response to Questionnaire for Public Defense Firms,” p. 8.

¹⁶ At the Commission’s April 13th meeting in Hood River, Mr. Morris presented data which suggested that his firm’s turnover rate is relatively normal for a law firm of seven lawyers. See Appendix C.

detail.

The only potential problem regarding Morris Olson's performance that came to OPDS's attention during its March visit was a personal disagreement or conflict between the senior lawyer in the firm and a juvenile court counselor in Hood River County, which has apparently manifested itself in the courtroom. Mr. Morris first brought the matter to OPDS's attention, indicating that the disagreement stemmed from differences in the philosophy and treatment of juveniles, particularly with regard to their commitment to juvenile facilities or incarceration in prison. During an interview with OPDS, the director of the county's juvenile department noted the disagreement and expressed her willingness to resolve the matter in any reasonable manner, fearing that the attitude of Morris Olson's clients toward her department or the counselor in question would affect the course of their rehabilitation. OPDS concludes that Mr. Morris's perspective as an advocate for his juvenile clients is a valid one that should not be questioned by OPDS or the Commission. On the other hand, the concerns of the county's juvenile department director, if true, would be understandable. To the extent that this matter does in fact pose problems in the administration of juvenile justice in Hood River County, OPDS is confident that the Presiding Judge or the Juvenile Court Judge will resolve the matter.

The work of Aaron and Associates generally received positive reviews, though relations between Mr. Aaron and the Hood River County District Attorney appear somewhat strained. During his meeting with OPDS, Mr. Aaron's primary concern was the amount of compensation he receives under his contract with PDSC and whether he can afford to continue his public defense practice, despite his commitment to the work. In the absence of additional information about his firm's internal operations in response to the questionnaire in Appendix B, it remains to be seen how much training and supervision Mr. Aaron's new associate will receive.

Most of the justice officials and professionals interviewed by OPDS in March offered favorable comments about the services provided by WSIDC. While admittedly not the most aggressive advocates, the majority of observers felt they had good relations with their clients and served the interests of those clients. A number of those observers questioned the level of lawyer training and supervision available at WSIDC and noted that the least experienced attorney frequently lacked the technical knowledge to advance his clients interests in juvenile court.¹⁷ A few questioned the interest or commitment of WSIDC's attorneys to public defense work. To his credit, in the face of the announced intention by the Juvenile Court Judge in Wasco County to appoint another attorney on the court-appointment list to represent children in juvenile dependency cases, WSIDC's administrator expressed his view that this attorney did an excellent job in representing children and encouraged OPDS to enter into a contract with her at WSIDC's expense.

The District Attorneys in Hood River and Wasco Counties expressed general satisfaction with their counties' public defense systems and their offices' working relationships with the

¹⁷ Based upon comments from the administrator of WSIDC at PDSC's April 13th meeting in Hood River, OPDS understands that, while Mr. VanValkenburgh no longer has an active public defense practice, he does make himself available to provide mentoring and advice to the two associates in his firm that currently constituted WSIDC.

counties' defense attorneys.¹⁸ While they emphasized that their office's settlement offers do not vary depending on the identity of the attorney for a defendant or juvenile client, they did report variations among public defense attorneys with respect to their willingness to accept settlement offers or proceed to trial, and in their level of experience and competence. Variations in the experience and competence of defense attorneys appear to be most pronounced between contract attorneys and attorneys on court-appointment lists. Both prosecutors also reported that, among PDSC contractors, Morris Olson generally had lawyers with the greatest skills and abilities as advocates in their counties.

Hood River County's District Attorney emphasized that he has good working relationships with the senior lawyers and management at Morris Olson and a higher level of trust and confidence in them than other public defense attorneys and organizations. He did say, however, that he has encountered some resistance from them to changes in policies and administrative practices that he considered improvements in the local justice system, such as video arraignments and early disposition programs. He also expressed concern over conflicts between the senior lawyer at Morris Olson and a juvenile court counselor and his or anyone else's apparent inability to resolve the matter.

Wasco County's District Attorney expressed particular concern about the lack of "back up" in the public defense bar. He also emphasized the need for training and mentoring programs for the county's defense attorneys and wondered whether anyone in the state offered such programs.

The law enforcement officials, probation and parole officers and juvenile court counselors with whom OPDS spoke in March noted the professionalism of the public defense attorneys in Hood River and Wasco County, particularly the attorneys at Morris Olson. Several interviewees volunteered that the approach to advocacy of most defense attorneys in the District rarely became "personal" by attacking a professional witness's character, and that their agencies' procedures and practices improved as a result of the fair but vigorous advocacy of public defense attorneys.

Preliminary Findings in Gilliam, Sherman and Wheeler Counties

OPDS is aware of the Commission's commitment to providing quality, cost-efficient public defense services in every county of the state, no matter what the county's population or public defense caseload is. OPDS shares that commitment.

However, due to limitations on the time and staff available to OPDS to conduct investigations, the fact that the judges who sit in Hood River and Wasco County also preside over cases in Gilliam, Sherman and Wheeler Counties and because PDSC's contractors in Hood River and Wasco Counties also handle court-appointed cases in those counties, OPDS has relied on the information it collected during its interviews in Hood River and Wasco Counties on March 20 to March 23 for preliminary findings regarding the

¹⁸ Both District Attorneys handle a full caseload and have two deputies.

quality of public defense services in Gilliam, Sherman and Wheeler Counties.

OPDS finds, in general, that levels of satisfaction with the quality of public defense services and the performance of lawyers in these counties are comparable to the levels of satisfaction that OPDS found in Hood River and Wasco Counties. Furthermore, concerns about the inadequate supply of competent public defense attorneys in these counties may be even greater.

To help verify these findings, OPDS has invited the District Attorneys in Gilliam, Sherman and Wheeler Counties to attend the Commission's April 13th meeting in Judicial District No. 7 or, alternatively, to submit their comments about the quality of public defense services and lawyers in their counties before that meeting. As of the date of this report, Gilliam County's District Attorney has confirmed that he will attend the meeting.

PDSC's Public Meeting in Judicial District No. 7

As noted earlier, PDSC held a public meeting in the Hood River County Courthouse on April 13, 2006 from 11:00 a.m. to 4:00 p.m. The purpose of that meeting was to (a) consider the results of OPDS's preliminary investigation in Judicial District No. 7 as reported in a preliminary draft of this report, (b) receive comments from judges, the Commission's local contractors, prosecutors and other justice officials and interested citizens regarding the quality of the public defense system and services in the district and (c) identify and analyze the issues that should be addressed in the Commission's Service Delivery Plan for Judicial District No. 7.

The Commission received comments on April 13th from the following guests, in order of appearance: Presiding Circuit Court Judge, Hood River County District Attorney John Sewell, Jack Morris, a senior partner in Morris Olson, Wheeler County District Attorney Tom Cutsforth, Circuit Court Judge John V. Kelly, Kevin Hashizume, the administrator of WSIDC and Brian Aaron of Aaron & Associates. An edited transcript of their comments and discussions with the Commission's members and staff is included in Appendix C.

PDSC's Service Delivery Plan for Judicial District No. 7

PDSC agrees with OPDS's conclusion in the preliminary draft of this report that the public defense delivery system and the Commission's contractors in Judicial District No. 7, in general, are operating effectively and cost-efficiently and that its primary contractor, Morris, Olson, Smith & Starns, P.C., in particular, is a well-established, well-run law firm made up of knowledgeable, first-rate public defense attorneys.¹⁹ The Commission shares local concerns in the district, which were expressed to OPDS during its preliminary investigations, that the limited supply of qualified public defense attorneys poses problems

¹⁹ This section in the preliminary draft of this report, entitled "Preliminary Recommendations for a Service Delivery Plan for Judicial District No. 7," is set forth in Appendix A.

for the quality of justice and a threat to public safety if the lawyers who currently take court-appointments leave the district, retire or stop taking appointments for economic reasons.²⁰ The Commission also concludes, as OPDS suggested, that there may be a shortage of available training and supervision for new lawyers entering public defense practice in the district.

Because of the generally high quality of public defense services and providers in the district and relatively few immediate problems facing its public defense delivery system, this Service Delivery Plan for Judicial District No. 7 offers only a few suggestions for improving the delivery of public defense services. The plan does, however, address several issues of organizational structure that were raised by OPDS in its preliminary draft of this report, not because they have any immediate application to service delivery in the district, but because they may be relevant there in the future or, currently, in other parts of the state.

1. *OPDS, in close collaboration with Morris Olson and other contractors in Judicial District No. 7 should, whenever necessary and feasible, pursue PDSC's strategies designed to increase the number of qualified public defense attorneys in the district.*

The Commission recognizes that the single most important factor in successfully recruiting and retaining qualified public defense attorneys in any area of the state is adequate funding of the public defense function by the Oregon Legislature. That remains one of PDSC's highest priorities. Nevertheless, the Commission has identified a number of strategies designed to encourage qualified public defense attorneys and new attorneys interested in public defense practice to consider moving to underserved areas of the state like Judicial District No. 7.²¹ The Commission itself is pursuing some of these strategies, like the establishment of student loan forgiveness programs, through its official role as an advocate for an effective state public defense system before policymaking bodies like the state legislature and the United States Congress.

Even in the absence of additional resources, PDSC firmly believes that a coordinated strategy by OPDS and its contractors to actively recruit graduating law school students for legal practice in underserved areas of the state will produce results. In particular, new lawyers will be drawn to regions of Oregon like Judicial District No. 7 by (a) a statewide directory of job openings administered by OPDS and (b) recruitment teams made up of lawyers from less populous areas of state, who can impress upon anxious law students facing a highly competitive job market that places like Hood River and Wasco County offer professional opportunities and a quality of life that many law school graduates will be unable to find along the I-5 corridor. PDSC urges OPDS and contractors like Morris Olson to coordinate such efforts with OPDS's new Diversity Task Force, which will likely be designing and implementing similar strategies to encourage attorneys and legal staff of color to consider practicing in areas of the state with professional opportunities and welcoming communities.

²⁰ Indeed, one of PDSC's two contractors in Hood River County, Brian Aaron, informed the Commission that he plans to discontinue his public defense practice because he can no longer support his law practice or his family with the revenue he receives from a contract with PDSC. See Appendix C.

²¹ See the list of six strategies set forth in Appendix A.

During the course of OPDS's preliminary investigation and PDSC's public meeting in Judicial District No. 7, it became obvious that this part of the state offers a quality of life and accessibility to other parts of the state – most notably, the Portland Metropolitan Area – than many Oregonians may not appreciate. This leads the Commission to wonder if those in the local legal community who have participated in this planning process may be underestimating the area's attractiveness and opportunities for new lawyers. While the good fortune of local home owners' rapidly growing equity presents an obstacle to homeownership for newcomers and entry-level job seekers, those circumstances are by no means unique to Judicial District No. 7. And, as Jack Morris noted, salaries in his firm are commensurate with the salaries of Portland's public defenders offices, where the housing market may be equally inflated. More importantly, while PDSC is not eager to promote commuting, distances from The Dalles or Hood River to East Portland and other more affordable housing markets are no greater than the common commuting distances along I-5. In short, the opportunities for a fulfilling law practice and quality of life in the district, and the chances of attracting to new lawyers to the area, appear equal to or greater than most areas of the state.

Of course, any "pipe line" of new lawyers will quickly disappear if a local legal community greets new arrivals with indifference, or fails to offer them meaningful opportunities for training and mentoring. Hence, the Commission offers the following recommendation.

2. *When, in the estimation of the Circuit Court, PDSC's contractors and local district attorneys, there is a need for additional training and mentoring for private attorneys who take court appointments in Judicial District No. 7, Morris Olson should propose a formal training and mentoring program to the Commission, to be performed and compensated pursuant to contract.*

PDSC concludes that current conditions in Judicial District No. 7 do not call for more formal training and mentoring programs for new public defense attorneys. The Circuit Court judges with whom the Commission and OPDS have spoken indicate that, while all of the lawyers currently on the district's court-appointment lists are qualified, some are excellent but others have less than ideal work habits and office practices. While local perceptions vary over the number of new or untrained lawyers that Morris Olson has employed in the past, no one in the district questions the skill and experience of their current lawyers, who are generally regarded as excellent. Finally, while some in the district question the current depth of experience at WSIDC, the consortium's administrator reports that the lawyers at Morris Olson and throughout Wasco County are willing and able to offer their advice and assistance.

In the event new lawyers happen to arrive in the district or the foregoing recruiting strategies prove successful, and these new lawyers fill the district's greatest need by taking court-appointments that Morris Olson cannot handle due to conflicts, PDSC believes that a more systematic training and mentoring program will be necessary to ensure the continuing quality and cost-efficiency of public defense services in the district. Thus, the Commission proposes that, when local justice policymakers identify

the need for more training and mentoring of new lawyers, Morris Olson, which admittedly performs most of the functions of a public defenders office in the district, should, in accordance with that role, design and propose to PDSC a formal training program for new public defense lawyers practicing outside of its offices. The Commission recognizes that such a program would need to be recognized and agreed to under the terms and conditions of its contract with Morris Olson.

3. *The organizational structure of PDSC's primary contractor in Judicial District No. 7 as a private, for-profit law firm (a) has not interfered with the performance of its role as PDSC's primary contractor in the district, (b) may have preserved and promoted its performance of that role in a manner well suited to local circumstances and (c) may offer an organizational model for primary contractors in similar circumstances.*

In its preliminary draft of this report, OPDS posed the question of whether the organizational structure of a private, for-profit law firm was best suited for carrying out the obligations of a primary public defense contractor and the mission of PDSC. For the purposes of providing guidance for similar-situated contractor and regions of the state and the development of plans for the future of Oregon's public defense system, OPDS suggested that a private law firm may not be as willing to accept the degree of transparency in its operations and accountability to a public agency like PDSC as a not-for-profit corporation headed by a board of directors with outside members and staffed by full-time, salaried public defense attorneys under the direction of a professional public defense manager.

During the Commission's April 13th meeting in Hood River, Jack Morris forcefully defended the structure of the Morris Olson law firm, highlighted the many ways in which the firm has served the role of a public defenders office in Judicial District No. 7 and offered a number of persuasive reasons why the organizational structure of Morris Olson was essential to establishing and maintaining that role in the district – most notably, the ability to supplement the income of the firm's members with privately retained cases and to establish rapport with clients who trust private defenders more than public defenders. Because OPDS's preliminary draft report communicated consistently favorable reports of the superior performance of Morris Olson and its lawyers, and the relevant observations in OPDS's draft were aimed at the development of future plans for Oregon's public defense system and for other areas of the state, PDSC interpreted Mr. Morris's remarks primarily as a claim that private, for-profit law firms offer a superior organizational model for the delivery of public defense services outside of Oregon's urban areas in the state, rather than a defense of his firm's particular structure and performance in Judicial District No. 7.

Notwithstanding his persuasive arguments in support of this claim, Mr. Morris's presentation to PDSC on April 13th, along with other information that OPDS and PDSC have been able to gather about the Morris Olson firm, leads the Commission to reach two separate but related conclusions. First, the performance of Morris Olson or any organization, whatever its structure, depends primarily on the quality of the people it employs. Morris Olson, indeed, Oregon's entire public defense system, have benefited from the firm's ability to attract a core group of first-rate attorneys, including senior

lawyers who have been imbued with standards of management and a commitment to excellence through prior professional experiences at places like Metropolitan Public Defender, Inc. In the absence of an employment relationship with public defense attorneys, PDSC and OPDS must recognize that their role in promoting incremental improvements in the quality of public defense services by changing the structure of local delivery systems or by establishing quality assurance programs are no substitute for successful efforts to employ highly qualified lawyers.

Second, the advantages that Morris Olson's organizational structure offers in Judicial District No. 7, including the ability through retained work to supplement the income of lawyers who may not otherwise be able to remain with the firm and the ability through revenue from that work to continue providing services in outlying areas like Gilliam, Sherman and Wheeler Counties or during state budget shortfalls like "BRAC," demonstrate once again the truth of the maxim that "one size does not fit all" in terms of local delivery systems for public defense services in Oregon. When it assumed responsibility for administering the state's public defense system and initiated this planning process in 2003, PDSC recognized that no one organizational structure for delivering public defense services is superior to all other structures in every county of the state, and that each county has a unique set of circumstances, including its own legal culture and community, unwritten practices and procedures and local resources, that requires an organizational structure tailored to the needs and history of the county. The organizational structure and outstanding performance of Morris Olson in Judicial District No. 7 reaffirms the wisdom of this approach to administering and structuring Oregon's public defense system.

Finally, PDSC is left with the conclusion that *depending on local circumstances* it may well be that a non-profit corporate structure may ensure professional management, transparency in its operations and accountability to the Commission and the community is the most suitable organizational structure in some counties. On the other hand, the flexibility and resilience offered by a private, for profit law firm like Morris Olson, particularly when its lawyers are excellent, may be the most suitable organizational structure in other counties.²² Moreover, when there is an adequate supply of available lawyers, a consortium may be the most suitable organization in some counties due to its capacity to handle conflict of interest cases cost-efficiently. In short, the answer to which organizational structure is the best one for a particular county or judicial district is "it depends."

4. *PDSC urges public defense contractors like Morris Olson to collaborate with OPDS and OCDLA in offering public forums or open houses for public officials in their counties or judicial districts for the purpose of providing information about the realities and challenges of public defense practice.*

²² The fact that a law firm shared other positive attributes of Morris Olson, like the implementation of office policies and procedures developed at established public defense offices like MPD in Portland and a recognition that the role as PDSC's primary contractor in a county or judicial district calls for open and responsive working relationships with OPDS and the Commission, would add to the suitability of that organization in another county or district.

PDSC could make this recommendation to almost any public defense contractor in Oregon; however, the recommendation is made to Morris Olson for three reasons. First, the firm offers a model in the state of what can be done to provide excellent legal services with inadequate resources, and what will be lost if the level of state funding continues to fall behind the rate of inflation and cost of living in Oregon. Second, the particular skills and experiences of Morris Olson's attorneys increase the chances that communications with local elected officials will have positive effects. At least two of the firm's senior attorneys have management experience in other public defender offices, one has recently been recognized by the Citizens Review Board for excellence and contributions to children and families in the district, and another has experience as legal counsel to a key legislative committee. Finally, the firm forthrightly admitted to the Commission that it has not devoted its efforts and talents to informing local public officials about the accomplishments and mission of Morris Olson and the other public defense firms and attorneys in Judicial District No. 7.

At the Commission's May 11, 2006 meeting in Portland, Morris Olson expressed the view that these public forums should be held first in more populous counties and judicial districts in the state because more public officials and public defense attorneys reside there and, therefore, the participation in and impact of forums held in those areas would be greater. That may be true. PDSC will defer to the collective judgment of OCDLA's staff and members and OPDS staff and advisory groups with regard to the appropriate location, structure and schedule for these events; however, the Commission also accepts Morris Olson's offer to lend its talents and support to the first public forums, wherever they are held.

PDSC can offer some suggestions about the form a public forum or open house for local public officials might take. The lawyers in the Commission's contractors, the staff of OPDS and the staff and members OCDLA, will obviously have many other ideas.

The Commission suggests that a report like this one accompany letters of invitation to state and local officials in the counties or judicial districts where the forums will be held. In addition to state legislators and city and county officials, judges and other justice officials should be invited to these events in order to offer their perspectives on the essential role and precarious condition of the local public defense system. The staff of OPDS and appropriate representatives of OCDLA should attend and, depending on the date and location of these events, members of PDSC should be invited too.

Given the likelihood that these public forums will succeed in conveying the importance of Oregon's public defense system and the threat that inadequate state funding poses to the system's continued existence and, as a consequence, to the public safety of all Oregonians, PDSC intends to urge public defense contractors throughout the state to sponsor these forums. Because the 2007 legislative session is just six months away, PDSC hopes that several forums can be organized and presented during the fall and winter of 2006.

This proposal is based on the Commission's conviction that Oregon's public defense community cannot expect OPDS's small staff, PDSC's volunteer members and the few

lobbyists retained by OCDLA to secure increased state funding for public defense without more widespread participation in legislative and political processes by individual public defense attorneys and organizations across the state. PDSC believes that communication in local communities between public defense attorneys and their state and local elected officials is among the most effective strategies to develop greater understanding and support for public defense in Oregon.

Appendix A

Preliminary Recommendations for a Service Delivery Plan
for Judicial District No. 7

OPDS concludes that the public defense delivery system and PDSC's contractors in Judicial District No. 7 are operating effectively and cost-efficiently in light of the available resources. As in many areas of the state, problems in the level of attorney training and supervision appear to exist in the District. Depending on the information PDSC gathers at its April 13th meeting in Hood River County, those problems may justify specific recommendations or directions by PDSC in the final version of this report and the Commission's Service Delivery Plan for Judicial District No. 7. At this point, however, OPDS recommends that the Commission consider the following strategies for the District's public defense system in the future.

1. *This service delivery planning process provides PDSC with the opportunity to reconsider the wisdom and feasibility of strategies to increase the supply of public defense attorneys in less populous regions of the state like Judicial District No. 7, including the strategies proposed in its Strategic Plan for 2003-05.*

During its 2003 Retreat, PDSC identified the following policies and practices to encourage public defense attorneys to practice in areas of the state experiencing a shortage of public defense services, which were included in the Commission's Strategic Plan for 2003-05:

- 1) Identify and actively recruit defense attorneys in the offices of current contractors, who have approximately three to five years of experience and are interested in establishing law practices in underserved areas of the state;
- 2) As a primary incentive, offer these attorneys four-year contracts with guaranteed caseloads, supplemented by appellate and PCR cases if necessary;
- 3) Advocate for the forgiveness of student loans and housing allowances as additional incentives;
- 4) Recruit interested law students and, in cooperation with larger contractors' offices, provide apprenticeship training upon graduation, in exchange for a commitment to practice in underserved areas;
- 5) Offer technical and administrative support for new offices in these areas; and

6) Assign FTE from OPDS to fill gaps in services and to provide technical support in underserved areas of the state.

2. *This service delivery planning process also provides PDSC with an opportunity to consider the wisdom and feasibility of planning for the future of public defense delivery systems in jurisdictions like Judicial District No. 7, where the primary contractor is a privately held, for profit law firm that may not possess the organizational characteristics necessary to implement and perpetuate the Commission's mission and best practices.*

OPDS is not suggesting the need for any immediate changes in the organization or structure of the public defense delivery system or the primary public defense contractor in Judicial District No. 7. As the foregoing report indicates, Morris Olson is a group of first-rate public defense lawyers committed to effective advocacy and public defense that has provided quality, cost-effective legal services throughout the District for 20 years. Any improvements that might result from short-term changes in this organization, in OPDS's view, would be far outweighed by the disruption and potential loss of morale of this key service provider.

Furthermore, OPDS is aware that at least some members of the Commission are troubled by any potential intrusion into what they view as the management and administrative prerogatives of independent professional contractors. Thus, OPDS does not anticipate the possibility of significant changes in the structure of the public defense delivery system or the Commission's primary contractor in Judicial District No. 7 for perhaps a decade or more.

Nevertheless, OPDS suggests that a planning process like this one provides an opportunity to discuss the future directions of a local public defense system, as well as similarly situated systems across the state. OPDS believes such a discussion is appropriate for at least four reasons.

First, OPDS is skeptical that any private, for-profit law firm can serve as a primary vehicle for implementing and perpetuating the kinds of "best practices" in public defense management that PDSC has begun to identify over the past three years and has increasingly sought to implement. Those best practices include (a) the establishment of boards of director to bring greater management and financial expertise to contractors' operations, (b) county-wide or regional training and mentoring programs and active participation in policy making by primary contractors, (c) periodic evaluations of attorneys and staff, (d) periodic evaluations of management that are made available to the Commission and (e) fair, rational and transparent compensation systems. While it is certainly conceivable that a private law firm might adopt and promote these practices, the resistance that OPDS has observed from such organizations is understandable and perhaps reasonable, in light of the traditional organization, purposes and culture of forprofit law firms.

Second, for those on the Commission who have reservations about intruding into the prerogatives of independent contractors, PDSC may have greater justification and authority to influence the organization and direction of entities like Morris Olson, where 95 to 99 percent of their revenue is derived from a public defense contract with the Commission.

Third, without changing any of the attorneys who deliver public defense services in a county or the compensation they are paid (other than to hopefully raise it) reorganizing a primary contractor into a not-for-profit corporation, which either operates a full-time law office or a consortium, may increase the likelihood that the Commission's best practices in public defense management will be implemented and promoted. Obviously, a board of directors is necessary for a not-for-profit corporation. The culture and expectations fostered by a not-for-profit organization may be more conducive to the provision of system-wide training and mentoring programs and participation in policy making groups. In addition, a not-for-profit may be less likely than a private law firm to (i) refuse membership in its organization for the kinds of personal reasons that may understandably influence a for-profit entity, (ii) reject outside influence over its management and internal operations by a board of directors or advisory group, (iii) perpetuate inequitable compensation systems and (iv) disband when its principals leave or retire.

Finally, such a discussion by the Commission will have important policy implications for the state public defense system, from providing guidance to similarly situated contractors and local delivery systems that are interested in the future, to testing the scope and feasibility of some of the best practices that the Commission has begun to promote in the absence of additional organizational or structural changes in the state's delivery systems.¹

¹ For example, can the Commission expect to improve management practices or increase accountability significantly by recommending to private law firms that they form "advisory groups" in lieu of boards of directors or subject their firm's management to periodic formal evaluations?

Appendix B

QUESTIONNAIRE FOR PUBLIC DEFENDER OFFICES AND PUBLIC DEFENSE FIRMS

Please respond as completely as possible to the following questions. Questions in some categories may overlap with questions in other categories. Some questions may not be relevant to your office. Please feel free to refer to previous answers when appropriate. Please provide any written materials that are responsive to the questions set forth below. If the requested information is contained in a document being provided with the responses, no additional response is necessary. Finally, please provide the Office of Public Defense Services with any comments or recommendations you might wish to make regarding this questionnaire or any other part of the Public Defense Services Commission's planning process.

Appeal:

How and when are clients advised of their appellate rights in criminal and juvenile cases?

Availability

1. Under what circumstances are your office's attorneys made available to members of the public seeking information about criminal and juvenile matters?
2. When is an attorney in your office first available to an indigent person suspected of a law violation?
3. Is an attorney present for the initial court appearance in criminal and juvenile cases? If not, why not?
4. Does your office have a policy requiring contact with in-custody and out-of-custody clients within a specified period of time? What is the policy? Does your office monitor compliance with this policy? How? Is the policy generally followed?

Board of Directors

1. Does your office have a board of directors?
2. Who serves on your board of directors?
3. How are board members selected and how long do they serve?
4. How often does the board meet?
5. What are the functions of the board?
6. Does the board have written policies and procedures?

Case Management

1. What is your case file protocol?

2. What is your case assignment process?
3. How do you determine whether cases are being distributed fairly among attorneys?
4. What policy or procedure do you have for case relief when needed?
5. What is your procedure for identifying and handling conflicts?
6. Do you maintain records of conflicts for each attorney?

Community Education

1. How is your office involved with the local community (local government, local criminal and juvenile justice systems, and local legal community)?
2. Does your office provide trainers to the local community? If so how and on what topics?
3. If not described in response to items 1 and 2, how does your office participate in efforts to improve the local public safety system?

Competence

1. What standards do you use for the hiring, monitoring, and management of the professional competence of your staff?
2. How do you review the casework of your staff? How is that review shared with the staff?
3. Do you have a complaint process for use by staff, clients, others? How is it used?
4. Do you have a procedure in place to obtain regular feed-back from public defense clients regarding the representation they received from your office? Please describe.
7. Have any post-conviction relief petitions been granted against attorneys in your office? What were the circumstances?
8. Have any attorneys in your office been disciplined by the Oregon State Bar for violation of the Rules of Professional Conduct or the former Disciplinary Rules? What were the circumstances?

Cultural Competence

What steps have you taken to provide culturally competent representation to clients of diverse backgrounds?

Personnel

1. Do you have written policies and procedures for handling personnel matters? If not, do you have a system you use? Please describe.
2. Do you have written job descriptions? If not, please outline the functions of each category of employee.

3. Do you have written policies regarding supervision of your staff? If not, describe your system of supervision.
4. What is your staff evaluation process?
5. How do you address issues of underperformance?
6. How do you acknowledge and reward excellence?
7. Do your salary scales compare to other local attorney offices?
8. Do you have a plan in place to permit new attorneys to join your office?
9. How do you monitor the general quality of the working environment in your office? Are there regular staff meetings? Is there a process for obtaining feed-back from staff regarding the working environment?

Training

1. How do you orient new staff to your office?
2. How do you insure that attorneys are familiar with and abide by the Oregon Rules of Professional Conduct?
3. What ongoing professional development training is offered to staff by your office?
4. What assistance or support do you provide to staff in order to encourage participation in professional development training outside the office?

Zeal

What steps have you taken to inspire and support your staff in providing zealous representation to public defense clients?

Conclusions:

1. In what areas do you believe your office excels?
2. Are there any areas in which improvement is needed? What are they? How do you intend to address them?

Morris, Olson, Smith & Starns, P.C.
Response to Questionnaire for Public Defense Firms
March 2006

APPEAL

1. How and when are clients advised of their appellate rights in criminal and juvenile cases?

Clients are advised of their appellate rights immediately upon the case being finalized. Additionally appellate rights are often discussed with clients well in advance of their case being finished, particularly when there may be a legitimate appellate issue in the case such as the denial of a motion to suppress.

AVAILABILITY

1. Under what circumstances are your office's attorneys made available to members of the public seeking information about criminal and juvenile matters?

We occasionally get calls from the public (sometimes when they are looking for an attorney and sometimes when they just want information) and we often play the role of a general information source. We take these calls and try to answer questions about the justice system generally to the best of our ability without giving specific legal advice since no attorney client relationship exists at that point. There are also times when we take calls from the press concerning matters involving the justice system and in particular indigent defense.

There are occasionally other opportunities to provide information to the public as well. For example there are occasions when one of the judges will entertain a class from a school or a group of individuals visiting the courthouse. On those occasions we have often been asked to talk about the role of defense counsel.

2. When is an attorney in your office first available to an indigent person suspected of a law violation?

From time to time we remind other players in the system, notably the courts and corrections, that we are available to take calls from people prior to being charged particularly when they are being interrogated and wish to have the benefit of counsel. Not surprisingly, the law enforcement folks don't pass that information out very freely and therefore we only rarely get those types of calls. Other than that we make ourselves available as soon as we are contacted. Many former clients call us immediately after being arrested or cited. In cases where it appears likely that the person will be receiving appointed counsel we handle the case generally as if we had already been appointed.

3. Is an attorney present for the initial court appearance in criminal and juvenile cases? If not, why not?

We are available and present at first appearances for virtually every case. We always have an attorney present for the regular in-custody docket. This applies to initial appearances in Hood River and Wasco County and to the three eastern counties, since those are usually done by video with a judge either in Hood River or Wasco County. First appearances on juvenile cases are not always regularly scheduled, however, when we are made aware that a case is coming up we attend those personally as well.

4. Does your office have a policy regarding requiring contact of in-custody and out of custody clients within a specified period of time? What is the policy? Does your office monitor compliance with this policy? How? Is the policy generally followed?

Our policy with respect to in-custody clients is consistent with what we believe is, and should be, statewide policy. We try very hard to see all of our in-custody clients within 24 hours of appointment and in those cases where that proves to be impossible we nonetheless make at least telephone contact and then follow it up with personal contact. Attorneys are made aware that this is the office policy and that it is expected to be followed. Compliance with the policy does prove to be problematic at times because the jail is a 42 mile round trip from the Hood River office and our schedules make getting there difficult. However, even with that problem we are in compliance with the policy probably 95% of the time at least. Out of custody clients are told to call immediately to schedule an office appointment.

BOARD OF DIRECTORS

1. Does your office have a board of directors?

We are a private law firm and as such do not have an actual board of directors. Having said that, the firm consists of four named shareholders and three associates. Most decisions are made after discussion amongst the shareholders and on occasion the associates as well. Matters involving policy decisions are made only after shareholders come to some consensus, and specific matters such as hiring etc. are also made on a group basis.

CASE MANAGEMENT

1. What is your case file protocol?

Files are preassembled and include a face sheet for contact and charge information as well as separate sheets for background information (including family relations, immigration status and length of time in the United States), employment information, educational background, drug and alcohol issues and prior criminal history. We also obtain a copy of the booking sheet with the client's photo from the Northern Oregon Regional Correction Facility web site for the file. In many instances potential conflicts are caught at this point. With respect to in-custody clients, at

the time of the first appearance the attorney (or in some cases one of the legal assistants) fills out at a minimum, the information needed to contact the client and information regarding the charge. We usually attempt to gather any information that may be relevant to a release decision by speaking with the person in-custody during the actual appearance and we present that information as soon as possible. Although the size of the courtrooms and equipment being used make simultaneous contact with the client nearly impossible, we have insisted on having an opportunity to speak with our clients during appearances by phone and have done so since the implementation of video system. Although not a perfect situation, this has actually worked out quite well.

Unlike many jurisdictions around the state it is common for us to make a release pitch at that initial appearance and we are often successful in having clients released at that time. The charging instrument is received and placed in the file. In Hood River county approximately 80 or 90% of the time we receive discovery consisting of police reports, etc. at that time as well.

After the initial court appearance, whether it is in or out of custody, the file is then returned to the office where staff updates it with any other information that is available, checks for conflicts and opens the file. The files on in-custody clients are expected to be returned to the attorney the same day and files on out of custody clients are expected to be returned to the attorney within 24 hours.

2. What is your case assignment process?

The case assignment process differs between the two counties somewhat, however, it is still geared toward the goal of having the attorney who will actually be assigned the case present at the initial appearance. In Hood River because other appearances are mixed in with initial appearances for new clients, we typically have two of the three attorneys present. The 11:00 in-custody calendar is a routine part of our day. Typically the misdemeanor cases and minor felony cases are given to the most junior attorney with other cases going to the other two. While there is no set assignment schedule the system works quite well and constant monitoring of individual case loads results in an equitable distribution.

In Wasco County the four attorneys each have an individual pick up week. The attorney whose week it is, takes responsibility for being at initial appearances or if he/she is tied up, for instance in trial, for making arrangements for one of the other attorneys to cover for the 1:00 docket. Often times more than one attorney is actually present and again we endeavor to have the attorney who is actually going to be assigned the case present at that time. It is a relatively rare occasion when only one attorney is present. In some cases, however, the case may be passed to a different attorney in the office. For instance, when one of our junior attorneys is picking up cases and a serious felony comes in that case is given to one of the more senior attorneys and the reverse is true as well.

3. How do you determine whether cases are being distributed fairly among attorneys?

4. What policy or procedure do you have for case relief when needed?

In both counties the senior attorney is responsible for monitoring the caseloads to make sure that there is an equitable distribution. If for some reason the usual assignment process results in someone's case load being out of proportion arrangements are made to alleviate that situation. For instance, in Wasco County the individual attorney may skip an assignment week or perhaps have it delayed. In Hood River County, simply being aware of each other's case loads and making allowances for the same achieves an equitable distribution. In both counties the case list is monitored as well.

5. What is your procedure for identifying and handling conflicts?

In the Hood River office we ordinarily get discovery at the initial appearance upon the attorney's return from court the staff goes through the police reports and checks all names against our database. This results in most conflicts being discovered the same day we pick the case up and we immediately notify the court if we have a conflict that prevents us from representing the individual. Often times the person is assigned new counsel the same day. Because of the brief period of time that we have these cases we forgo taking credit.

In The Dalles office although discovery is not available immediately, victim's and co-defendant's names are ran for conflicts even before we appear in court. When discovery becomes available it is immediately checked for conflicts in the same fashion. Again, when a conflict is discovered that prevents us from representing the individual, we notify the court immediately and the defendant is usually assigned new counsel quickly.

6. Do you maintain records of conflicts for each attorney?

The meaning of this question is unclear, however, we will assume that it is asking whether some record of the number of conflicts that each attorney has is kept. The answer is generally no, however, we don't believe there is a need to keep a record of the number of conflicts for each attorney since the conflict decision is usually done on a group basis. As stated before, the staff initially brings the conflict to the attorney's attention and in each county the case attorney is required to run the potential conflict past the senior attorney for his input as to whether it is an actual conflict or not. (Requests for extraordinary expenses are also reviewed by the senior attorney). Only in the most clear cases is that step skipped, for instance when we represent a co-defendant. Even those cases are fairly rare since we usually are aware at court whether we have a co-defendant or not and we simply advise the court not to assign us the new case from the beginning.

COMMUNITY EDUCATION

1. How is your office involved with the local community? (Local government, local criminal and juvenile justice systems, and local legal community)?

2. Does your office provide trainers to the local community? If so, how and on what topics?

Our office is almost always represented by someone with respect to any justice system meetings that may take place. We always attend CRB hearings and we have a presence on the LIPSIC committee in Hood River. We also almost always have a presence at any meetings that are designed to deal with specific components of the system. For instance, we attend meetings about domestic violence and local treatment options, meetings regarding improvements in the juvenile justice system and any meetings the court may have to deal with procedural issues.

While we have not specifically provided trainers to the local community we have made it known in both counties that we are available to serve as a resource to the other attorneys in town in terms of sharing our expertise and we are often asked for advice as well as materials such as forms and plea petitions. We also act as a resource for other attorneys when they have clients that are eligible for the Drug Court programs that we have in each county. We have made it known that we are available and willing to help other attorneys who may not be familiar with that process and procedure. Additionally, the courts generally do a good job in including us in ongoing planning and decision making for the courts and we are very appreciative of that fact. For instance, in Hood River county when the video appearance room was being planned we were advised of the same and asked for our input.

Finally, because of our continuing involvement with OCDLA and association with PDSC, as well as other bodies, the firm often plays the role of an informal liaison between those decision making bodies and the local court community.

COMPETENCE

1. What standards do you use for the hiring, monitoring, and management of the professional competence of your staff?

2. How do you review the casework of your staff? How is that review shared with the staff?

Of the seven attorneys in the office, five have been with the firm for five years or more. With respect to the hiring and monitoring of newer attorneys we start by attempting to hire new attorneys that have demonstrated interest in criminal defense. We have found over the years that while an opening in the firm may attract a number of applicants, many of those applicants are applying simply because they need a job and have been unsuccessful in finding one. While these applicants may profess an interest in criminal defense we have found that interest may be exaggerated or in some cases totally absent. Therefore we look for professional and work histories that actually demonstrate an interest in what we do. Our most recent hire, Conor Sullivan, for example, worked in the Lane County Public Defender's office as both a certified law student and a clerk. While over the last few years we have found that it is more and more difficult to find applicants with a demonstrated interest in criminal law, we feel that nevertheless it is essential to attempt to locate those individuals and to give them a strong preference in our hiring process.

New attorneys are monitored primarily by the senior attorney in each office. We attempt to

educate the attorneys with respect to office systems and procedures so that they immediately begin performing their task in the way we want them to. Court appearances are observed and we make it a point to try to have one of the other attorneys present and available as a resource to the new attorney whenever possible. After the new attorney has been with us for a short time we typically will talk to the judges to get their feedback and occasionally will talk to court staff as well so that we can get their perspective on how the new attorney is doing. At about the 90 day mark we have in the past sat down with the new attorney and gone through his/her case load, file by file, to see if he/she is keeping files in an appropriate manner, whether appropriate investigation and funding requests are being made, and whether the attorney is catching the issues that are present.

We share whatever information that is gathered with the new attorney and while we do have a formal evaluation process in place we have found that sharing that information informally and in a constructive manner is usually superior.

- 3. Do you have a complaint process for use by staff, clients, others? How is it used?**
- 4. Do you have a procedure in place to obtain regular feed-back from public defense clients regarding the representation they received from your office? Please describe.**
- 5. Have any post-conviction relief petitions been granted against attorneys in your office? What were the circumstances?**
- 6. Have any attorneys in your office been disciplined by the Oregon State Bar for violation of the Rules of Professional Conduct or former Disciplinary Rules? What were the circumstances?**

Office staff and attorneys are directed to speak with the lead attorney in each office if they are having some kind of issue. If the problem can't be resolved at that level then it is referred to the senior shareholder to address.

We do not have a procedure in place for obtaining feed-back from clients, however, we of course do get feed-back indirectly and directly by the unsolicited comments of clients regarding the service we have provided to them and perhaps more frequently comments from clients about what they have heard about our firm from others. Usually these comments are positive and we believe our reputation in the local lay community is in fact a good one.

To the best of our knowledge there have been no successful post-conviction relief petitions granted against any of the attorneys in our office, nor has there been any discipline of attorneys by the Oregon State Bar.

CULTURAL COMPETENCE

- 1. What steps have you taken to provide culturally competent representation to clients of diverse backgrounds?**

Although we deal with Native American clients, by far the largest minority group we deal with is the Hispanic community. We estimate that in Wasco county approximately 5 to 10% of our clients are Hispanic and in Hood River county, at times, close to 1/3 of our clients are Hispanic. In each office we have a bilingual staff person who is not only fluent in Spanish, but who is integrated into the local Hispanic community and is known to that community.

In addition to the formal training sometimes provided by organizations such as OCDLA, we look to these two individuals not only for their expertise in interpreting but for answers to our questions that may come up regarding Hispanic culture and the community. We believe that with respect to the Hispanic community, at least, we are extremely culturally sensitive and perhaps possess a better understanding of the culture and community than many of the other players in the justice system. The decision to be sensitive to the needs and differences of our minority clients is a conscious one.

It deserves mentioning here that because of the number of non-English speaking clients we have, the firm has close to the equivalent of a one FTE position that is spent providing interpreting services. We have never received additional compensation for providing the service even though we have literally saved the state tens of thousands of dollars. We have in fact provided interpreting services for so long that at this point it is simply taken for granted that we will do so and it is rare that we receive any acknowledgment that we perform above and beyond what can fairly be expected of us.

PERSONNEL

1. Do you have written policies and procedures for handling personnel matters? If not, do you have a system you use? Please describe.

We have a policy manual which is quite comprehensive and which every employee gets a copy of when they join the firm (attorneys additionally are given copies of code of professional responsibility, information regarding conflicts and information regarding immigration issues). The office policy manual contains among other things our statement of purpose, our non-discrimination policy, sections on general office procedures, vacations and leave of absence, discipline, evaluations and criteria for successful performance. (A copy of our office policy manual is available upon request).

2. Do you have written job descriptions? If not, please outline the functions of each category of employee.

3. Do you have written policies regarding supervision of your staff? If not, describe your system of supervision.

4. What is your staff evaluation process?

We do not have written job descriptions in the strict sense, however, the chapter on evaluations in the policy manual contains criteria for employees generally and for the different job descriptions specifically and lays out the responsibilities of the different job descriptions.

We do have an evaluation and supervision policy which consist of regular or at least annual evaluations of the individual. However, like many small offices, evaluations are not done as consistently as they should be and employees who are not problematic may go for some period of time without a formal evaluation although their work is constantly being evaluated informally. Additionally, part of our pay structure consists of annual pay raises when fiscally possible and this step standing alone is an indication to the employee that their performance is at least satisfactory.

5. How do you address issues of under performance?

6. How do you acknowledge and reward excellence?

Staff or attorneys who are not performing adequately are approached initially by the lead attorney in the office, and if problems continue, the senior shareholder after consultation with the other shareholders. Depending on the nature of the problem the method of dealing with the issue may range from an informal meeting to a formal evaluation. Placing the individual on probation with the expectation that performance will improve is an option. Encouraging the individual to seek employment elsewhere with the hope that an orderly transition out of the office can be made is another.

7. Do your salary scales compare to other local attorney offices?

We do not have any similar offices with which to compare ourselves locally. The other firms in the area are civil firms typically consisting 3 to 5 attorneys and the other attorneys who practice criminal law are typically sole practitioners or perhaps associated with a firm that does primarily civil work.

In order to have a salary scale that is appropriate we have in the past obtained copies of the salary scale for the Metropolitan Public Defenders office in Portland. The salary scale for our attorneys averages approximately \$50 to \$100 less per month compared to that of the Metropolitan Public Defender. Attorneys are also encouraged to supplement their salaries with the little bit of retained work that is available and this can at times be quite helpful. It is not uncommon for an attorney to be able to do a few retained cases with a relatively negligible time commitment, but yet be able to supplement his/her salary by perhaps 10 or 15%. This is due, of course, to the fact that retained cases are done at the market rate rather than the deeply discounted rate that work is done for the state under the contract.

It should be mentioned that it is office policy that clients are all treated alike whether they are appointed or retained, and that we take pride in this fact. There have, in fact, been occasions in

the past when appointed clients have indicated that they wanted to retain us because of their beliefs that we would perform better if being paid by the client rather than the state. In those cases the clients were told in no uncertain terms that we work the same for any client regardless of who is footing the bill, and that in cases where people obviously qualify for court appointed counsel we are not interested in doing work on a retained basis. In those relatively few cases where we have not been able to change a client's belief that he/she will get better service on a retained basis, we have given the client the choice of either staying with us on an appointed basis or going elsewhere to retain someone. We will not take a case on a retained basis because the client thinks he or she will get better service by paying us.

8. Do you have a plan in place to permit new attorneys to join your office?

With seven attorney positions and hopefully eight in the near future, we typically have one position that becomes available every two or three years. With the level and the depth of experience we have now those positions are entry level positions and we have in the past had some associates that received a good start here and then gone elsewhere in the state to become an asset to indigent defense.

9. How do you monitor the general quality of the working environment in your office? Are there regular staff meetings? Is there a process for obtaining feed-back from staff regarding the working environment?

Our firm has a joint office meeting of attorneys every Wednesday morning in order to keep the two offices integrated and to provide an opportunity for the exchange of ideas and concerns. We work with staff on a team concept model in which the staff are considered an important part of the office rather than just clerical workers as is the case in some firms. Both John Olson and Jack Morris received their initial legal experience at the Metropolitan Public Defender in Portland where the idea of an integrated team consisting of attorneys, trial assistants and investigators was, and is, alive and well. Staff are encouraged and expected to be very flexible in their job duties and to be able to make the transition back and forth between clerical duties and what would typically be considered trial assistant duties, such as contact with clients, searching for alternatives and providing in-court assistance to the attorneys.

We have staff meetings occasionally and although not as often as everyone would like, we also have social gatherings for office members and their families. In the summer time in particular we have office barbeques which bring the entire office together.

TRAINING

1. How do you orient new staff to your office?

2. How do you insure that attorneys are familiar with and abide by the Oregon Rules of Professional Conduct?

Typically attorneys walk into a caseload that is relatively small and are advised of the procedures

that we use in the office for everything from putting a file together to conducting a client interview to appearing in court. Attorneys and staff are encouraged to ask questions constantly and it is the occasional attorney or staff person who doesn't ask questions that sets off a red flag for the rest of us and consequently gets more attention.

Attorneys are provided with a copy of the Oregon Rules of Professional Conduct as part of the package of materials they get when they join the office. Attorneys are educated about the importance of abiding by the rules and in conducting themselves in an ethical manner generally. Attorneys are, in fact, advised that because the nature of our work we must hold ourselves to a higher standard of ethical responsibility than our colleagues on the prosecution side because of the fact that we are subject to more intense scrutiny and suspicion.

3. What ongoing professional development training is offered to staff by your office?

4. What assistance or support do you provide to staff in order to encourage participation in professional development training outside the office?

This is an area that I believe our firm excels in. We recognize that because we are not in a major metropolitan area educational opportunities for attorneys can be limited. Because of this and because our firm has always been closely associated with the Oregon Criminal Defense Lawyers Association (the senior shareholder is a former president) we encourage and expect attorneys to go to OCDLA training conferences on a regular basis. Typically in the past we have encouraged attorneys to attend the Spring conference, the annual conference in June, the late summer conference and the winter conference at the Benson. One of these is usually a juvenile conference.

The firm typically reimburses attorneys for their tuition and occasionally provides some allowance for housing as well in order to ensure that all attorneys can afford to go, particularly the newer attorneys. There is an expectation that attorneys when they go to conferences will, of course, attend classes, however, attorneys are also encouraged to introduce themselves to the other attorneys and socialize so that we stay integrated with the criminal defense bar of Oregon as a whole. We probably attend more conferences on a per capita basis than any other firm in the state.

In the past we have also encouraged the non-attorney staff to attend the annual management conference when that program includes a significant amount of education aimed specifically toward firm staff.

ZEAL

1. What steps have you taken to inspire and support your staff in providing zealous representation to public defense clients?

Perhaps our most significant success is in the area of creating a culture in the office of zealous

representation. (We fly the Jolly Rodger whenever we win a trial or motion). While this is intangible it is nonetheless very real. Our attorneys are appropriately aggressive and understand that part of our role is to ensure the integrity and fairness of the system as a whole and that our responsibility, attention and concern is not, and should not be, limited solely to the individual clients.

CONCLUSIONS

1. In what area do you believe your office excels?

As stated our office excels in creating the same or superior atmosphere or culture of zealous advocacy, often found in larger organizations. We encourage and reward aggressive advocacy and attempt to constantly recognize the necessity of it by encouraging each other in the office. We also stay tied into the larger defense bar primarily through channels made available by the Oregon Criminal Defense Lawyers Association. Each attorney is a member of OCDLA and as such has available to him or her all of the resources of the organization including the information shared on the internet site and list serve. (The Pond).

We have had the good fortune of having a firm that for 15 years now has operated aggressively and effectively and yet has had almost a complete absence of problems requiring the attention of any indigent defense administration in Salem. We do our work well, although as is the case with everyone else doing indigent defense, we are chronically underfunded.

Indigent defense has traditionally been subsidized by idealism and principle. Individuals who grew up in the 60's or 70's understood the need for professional criminal defense and understood that there is a need for checks and balances against the power of the government. As the individuals of that era become fewer, and student loan debt of new attorneys becomes higher making job choices based on idealism impossible, lack of adequate funding from the state becomes even more critical. There must be new and creative ways found to make individual firms or entities more attractive to new attorneys and better able to fulfill our duties. We believe that by combining the atmosphere, training and zealousness of a classic public defender's office with the increased flexibility and potential for a small level of additional income of a private firm, that we have achieved this goal in a unique fashion.

2. Are there any areas in which improvement is needed? What are they? How do you intend to address them?

There is always room for improvement no matter how well an office performs. Ours is no different. We would like to see an increase in the level of social service type assistance that we are able to provide to clients and we specifically would like to see an increase in our ability to handle juvenile, particularly dependency cases effectively. (We already provide some representation that could be considered atypical, for instance attending school suspension and expulsion hearings.)

We would like to have one trial assistant in each office whose primary responsibility is working dependency cases and acting as a liaison with DHS, CASA and the respective CRB boards. We will continue to work towards that goal and hopefully be able to provide the increased level of attention those cases deserve.

There are of course a limitless number of other ways that we can continue to improve and we will continue to look for them. We do, however, firmly believe that we provide a high level of indigent defense, and that we are not only an asset to the indigent defense system, but that we can and should, serve as a model to other indigent defense providers who are similarly situated.

Respectfully submitted,

Jack Morris

Morris, Olson, Smith & Starns, P.C.
Response to Questionnaire for Public Defense Firms
March 2006

APPEAL

1. How and when are clients advised of their appellate rights in criminal and juvenile cases?

Clients are advised of their appellate rights immediately upon the case being finalized. Additionally appellate rights are often discussed with clients well in advance of their case being finished, particularly when there may be a legitimate appellate issue in the case such as the denial of a motion to suppress.

AVAILABILITY

1. Under what circumstances are your office's attorneys made available to members of the public seeking information about criminal and juvenile matters?

We occasionally get calls from the public (sometimes when they are looking for an attorney and sometimes when they just want information) and we often play the role of a general information source. We take these calls and try to answer questions about the justice system generally to the best of our ability without giving specific legal advice since no attorney client relationship exists at that point. There are also times when we take calls from the press concerning matters involving the justice system and in particular indigent defense.

There are occasionally other opportunities to provide information to the public as well. For example there are occasions when one of the judges will entertain a class from a school or a group of individuals visiting the courthouse. On those occasions we have often been asked to talk about the role of defense counsel.

2. When is an attorney in your office first available to an indigent person suspected of a law violation?

From time to time we remind other players in the system, notably the courts and corrections, that we are available to take calls from people prior to being charged particularly when they are being interrogated and wish to have the benefit of counsel. Not surprisingly, the law enforcement folks don't pass that information out very freely and therefore we only rarely get those types of calls. Other than that we make ourselves available as soon as we are contacted. Many former clients call us immediately after being arrested or cited. In cases where it appears likely that the person will be receiving appointed counsel we handle the case generally as if we had already been appointed.

3. Is an attorney present for the initial court appearance in criminal and juvenile cases? If not, why not?

We are available and present at first appearances for virtually every case. We always have an attorney present for the regular in-custody docket. This applies to initial appearances in Hood River and Wasco County and to the three eastern counties, since those are usually done by video with a judge either in Hood River or Wasco County. First appearances on juvenile cases are not always regularly scheduled, however, when we are made aware that a case is coming up we attend those personally as well.

4. Does your office have a policy regarding requiring contact of in-custody and out of custody clients within a specified period of time? What is the policy? Does your office monitor compliance with this policy? How? Is the policy generally followed?

Our policy with respect to in-custody clients is consistent with what we believe is, and should be, statewide policy. We try very hard to see all of our in-custody clients within 24 hours of appointment and in those cases where that proves to be impossible we nonetheless make at least telephone contact and then follow it up with personal contact. Attorneys are made aware that this is the office policy and that it is expected to be followed. Compliance with the policy does prove to be problematic at times because the jail is a 42 mile round trip from the Hood River office and our schedules make getting there difficult. However, even with that problem we are in compliance with the policy probably 95% of the time at least. Out of custody clients are told to call immediately to schedule an office appointment.

BOARD OF DIRECTORS

1. Does your office have a board of directors?

We are a private law firm and as such do not have an actual board of directors. Having said that, the firm consists of four named shareholders and three associates. Most decisions are made after discussion amongst the shareholders and on occasion the associates as well. Matters involving policy decisions are made only after shareholders come to some consensus, and specific matters such as hiring etc. are also made on a group basis.

CASE MANAGEMENT

1. What is your case file protocol?

Files are preassembled and include a face sheet for contact and charge information as well as separate sheets for background information (including family relations, immigration status and length of time in the United States), employment information, educational background, drug and alcohol issues and prior criminal history. We also obtain a copy of the booking sheet with the client's photo from the Northern Oregon Regional Correction Facility web site for the file. In many instances potential conflicts are caught at this point. With respect to in-custody clients, at

the time of the first appearance the attorney (or in some cases one of the legal assistants) fills out at a minimum, the information needed to contact the client and information regarding the charge. We usually attempt to gather any information that may be relevant to a release decision by speaking with the person in-custody during the actual appearance and we present that information as soon as possible. Although the size of the courtrooms and equipment being used make simultaneous contact with the client nearly impossible, we have insisted on having an opportunity to speak with our clients during appearances by phone and have done so since the implementation of video system. Although not a perfect situation, this has actually worked out quite well.

Unlike many jurisdictions around the state it is common for us to make a release pitch at that initial appearance and we are often successful in having clients released at that time. The charging instrument is received and placed in the file. In Hood River county approximately 80 or 90% of the time we receive discovery consisting of police reports, etc. at that time as well.

After the initial court appearance, whether it is in or out of custody, the file is then returned to the office where staff updates it with any other information that is available, checks for conflicts and opens the file. The files on in-custody clients are expected to be returned to the attorney the same day and files on out of custody clients are expected to be returned to the attorney within 24 hours.

2. What is your case assignment process?

The case assignment process differs between the two counties somewhat, however, it is still geared toward the goal of having the attorney who will actually be assigned the case present at the initial appearance. In Hood River because other appearances are mixed in with initial appearances for new clients, we typically have two of the three attorneys present. The 11:00 in-custody calender is a routine part of our day. Typically the misdemeanor cases and minor felony cases are given to the most junior attorney with other cases going to the other two. While there is no set assignment schedule the system works quite well and constant monitoring of individual case loads results in an equitable distribution.

In Wasco County the four attorneys each have an individual pick up week. The attorney whose week it is, takes responsibility for being at initial appearances or if he/she is tied up, for instance in trial, for making arrangements for one of the other attorneys to cover for the 1:00 docket. Often times more than one attorney is actually present and again we endeavor to have the attorney who is actually going to be assigned the case present at that time. It is a relatively rare occasion when only one attorney is present. In some cases, however, the case may be passed to a different attorney in the office. For instance, when one of our junior attorneys is picking up cases and a serious felony comes in that case is given to one of the more senior attorneys and the reverse is true as well.

3. How do you determine whether cases are being distributed fairly among attorneys?

4. What policy or procedure do you have for case relief when needed?

In both counties the senior attorney is responsible for monitoring the caseloads to make sure that there is an equitable distribution. If for some reason the usual assignment process results in someone's case load being out of proportion arrangements are made to alleviate that situation. For instance, in Wasco County the individual attorney may skip an assignment week or perhaps have it delayed. In Hood River County, simply being aware of each other's case loads and making allowances for the same achieves an equitable distribution. In both counties the case list is monitored as well.

5. What is your procedure for identifying and handling conflicts?

In the Hood River office we ordinarily get discovery at the initial appearance upon the attorney's return from court the staff goes through the police reports and checks all names against our database. This results in most conflicts being discovered the same day we pick the case up and we immediately notify the court if we have a conflict that prevents us from representing the individual. Often times the person is assigned new counsel the same day. Because of the brief period of time that we have these cases we forgo taking credit.

In The Dalles office although discovery is not available immediately, victim's and co-defendant's names are ran for conflicts even before we appear in court. When discovery becomes available it is immediately checked for conflicts in the same fashion. Again, when a conflict is discovered that prevents us from representing the individual, we notify the court immediately and the defendant is usually assigned new counsel quickly.

6. Do you maintain records of conflicts for each attorney?

The meaning of this question is unclear, however, we will assume that it is asking whether some record of the number of conflicts that each attorney has is kept. The answer is generally no, however, we don't believe there is a need to keep a record of the number of conflicts for each attorney since the conflict decision is usually done on a group basis. As stated before, the staff initially brings the conflict to the attorney's attention and in each county the case attorney is required to run the potential conflict past the senior attorney for his input as to whether it is an actual conflict or not. (Requests for extraordinary expenses are also reviewed by the senior attorney). Only in the most clear cases is that step skipped, for instance when we represent a co-defendant. Even those cases are fairly rare since we usually are aware at court whether we have a co-defendant or not and we simply advise the court not to assign us the new case from the beginning.

COMMUNITY EDUCATION

1. How is your office involved with the local community? (Local government, local criminal and juvenile justice systems, and local legal community)?

2. Does your office provide trainers to the local community? If so, how and on what topics?

Our office is almost always represented by someone with respect to any justice system meetings that may take place. We always attend CRB hearings and we have a presence on the LIPSIC committee in Hood River. We also almost always have a presence at any meetings that are designed to deal with specific components of the system. For instance, we attend meetings about domestic violence and local treatment options, meetings regarding improvements in the juvenile justice system and any meetings the court may have to deal with procedural issues.

While we have not specifically provided trainers to the local community we have made it known in both counties that we are available to serve as a resource to the other attorneys in town in terms of sharing our expertise and we are often asked for advice as well as materials such as forms and plea petitions. We also act as a resource for other attorneys when they have clients that are eligible for the Drug Court programs that we have in each county. We have made it known that we are available and willing to help other attorneys who may not be familiar with that process and procedure. Additionally, the courts generally do a good job in including us in ongoing planning and decision making for the courts and we are very appreciative of that fact. For instance, in Hood River county when the video appearance room was being planned we were advised of the same and asked for our input.

Finally, because of our continuing involvement with OCDLA and association with PDSC, as well as other bodies, the firm often plays the role of an informal liaison between those decision making bodies and the local court community.

COMPETENCE

1. What standards do you use for the hiring, monitoring, and management of the professional competence of your staff?

2. How do you review the casework of your staff? How is that review shared with the staff?

Of the seven attorneys in the office, five have been with the firm for five years or more. With respect to the hiring and monitoring of newer attorneys we start by attempting to hire new attorneys that have demonstrated interest in criminal defense. We have found over the years that while an opening in the firm may attract a number of applicants, many of those applicants are applying simply because they need a job and have been unsuccessful in finding one. While these applicants may profess an interest in criminal defense we have found that interest may be exaggerated or in some cases totally absent. Therefore we look for professional and work histories that actually demonstrate an interest in what we do. Our most recent hire, Conor Sullivan, for example, worked in the Lane County Public Defender's office as both a certified law student and a clerk. While over the last few years we have found that it is more and more difficult to find applicants with a demonstrated interest in criminal law, we feel that nevertheless it is essential to attempt to locate those individuals and to give them a strong preference in our hiring process.

New attorneys are monitored primarily by the senior attorney in each office. We attempt to

educate the attorneys with respect to office systems and procedures so that they immediately begin performing their task in the way we want them to. Court appearances are observed and we make it a point to try to have one of the other attorneys present and available as a resource to the new attorney whenever possible. After the new attorney has been with us for a short time we typically will talk to the judges to get their feedback and occasionally will talk to court staff as well so that we can get their perspective on how the new attorney is doing. At about the 90 day mark we have in the past sat down with the new attorney and gone through his/her case load, file by file, to see if he/she is keeping files in an appropriate manner, whether appropriate investigation and funding requests are being made, and whether the attorney is catching the issues that are present.

We share whatever information that is gathered with the new attorney and while we do have a formal evaluation process in place we have found that sharing that information informally and in a constructive manner is usually superior.

- 3. Do you have a complaint process for use by staff, clients, others? How is it used?**
- 4. Do you have a procedure in place to obtain regular feed-back from public defense clients regarding the representation they received from your office? Please describe.**
- 5. Have any post-conviction relief petitions been granted against attorneys in your office? What were the circumstances?**
- 6. Have any attorneys in your office been disciplined by the Oregon State Bar for violation of the Rules of Professional Conduct or former Disciplinary Rules? What were the circumstances?**

Office staff and attorneys are directed to speak with the lead attorney in each office if they are having some kind of issue. If the problem can't be resolved at that level then it is referred to the senior shareholder to address.

We do not have a procedure in place for obtaining feed-back from clients, however, we of course do get feed-back indirectly and directly by the unsolicited comments of clients regarding the service we have provided to them and perhaps more frequently comments from clients about what they have heard about our firm from others. Usually these comments are positive and we believe our reputation in the local lay community is in fact a good one.

To the best of our knowledge there have been no successful post-conviction relief petitions granted against any of the attorneys in our office, nor has there been any discipline of attorneys by the Oregon State Bar.

CULTURAL COMPETENCE

- 1. What steps have you taken to provide culturally competent representation to clients of diverse backgrounds?**

Although we deal with Native American clients, by far the largest minority group we deal with is the Hispanic community. We estimate that in Wasco county approximately 5 to 10% of our clients are Hispanic and in Hood River county, at times, close to 1/3 of our clients are Hispanic. In each office we have a bilingual staff person who is not only fluent in Spanish, but who is integrated into the local Hispanic community and is known to that community.

In addition to the formal training sometimes provided by organizations such as OCDLA, we look to these two individuals not only for their expertise in interpreting but for answers to our questions that may come up regarding Hispanic culture and the community. We believe that with respect to the Hispanic community, at least, we are extremely culturally sensitive and perhaps possess a better understanding of the culture and community than many of the other players in the justice system. The decision to be sensitive to the needs and differences of our minority clients is a conscious one.

It deserves mentioning here that because of the number of non-English speaking clients we have, the firm has close to the equivalent of a one FTE position that is spent providing interpreting services. We have never received additional compensation for providing the service even though we have literally saved the state tens of thousands of dollars. We have in fact provided interpreting services for so long that at this point it is simply taken for granted that we will do so and it is rare that we receive any acknowledgment that we perform above and beyond what can fairly be expected of us.

PERSONNEL

1. Do you have written policies and procedures for handling personnel matters? If not, do you have a system you use? Please describe.

We have a policy manual which is quite comprehensive and which every employee gets a copy of when they join the firm (attorneys additionally are given copies of code of professional responsibility, information regarding conflicts and information regarding immigration issues). The office policy manual contains among other things our statement of purpose, our non-discrimination policy, sections on general office procedures, vacations and leave of absence, discipline, evaluations and criteria for successful performance. (A copy of our office policy manual is available upon request).

2. Do you have written job descriptions? If not, please outline the functions of each category of employee.

3. Do you have written policies regarding supervision of your staff? If not, describe your system of supervision.

4. What is your staff evaluation process?

We do not have written job descriptions in the strict sense, however, the chapter on evaluations in the policy manual contains criteria for employees generally and for the different job descriptions specifically and lays out the responsibilities of the different job descriptions.

We do have an evaluation and supervision policy which consist of regular or at least annual evaluations of the individual. However, like many small offices, evaluations are not done as consistently as they should be and employees who are not problematic may go for some period of time without a formal evaluation although their work is constantly being evaluated informally. Additionally, part of our pay structure consists of annual pay raises when fiscally possible and this step standing alone is an indication to the employee that their performance is at least satisfactory.

5. How do you address issues of under performance?

6. How do you acknowledge and reward excellence?

Staff or attorneys who are not performing adequately are approached initially by the lead attorney in the office, and if problems continue, the senior shareholder after consultation with the other shareholders. Depending on the nature of the problem the method of dealing with the issue may range from an informal meeting to a formal evaluation. Placing the individual on probation with the expectation that performance will improve is an option. Encouraging the individual to seek employment elsewhere with the hope that an orderly transition out of the office can be made is another.

7. Do your salary scales compare to other local attorney offices?

We do not have any similar offices with which to compare ourselves locally. The other firms in the area are civil firms typically consisting 3 to 5 attorneys and the other attorneys who practice criminal law are typically sole practitioners or perhaps associated with a firm that does primarily civil work.

In order to have a salary scale that is appropriate we have in the past obtained copies of the salary scale for the Metropolitan Public Defenders office in Portland. The salary scale for our attorneys averages approximately \$50 to \$100 less per month compared to that of the Metropolitan Public Defender. Attorneys are also encouraged to supplement their salaries with the little bit of retained work that is available and this can at times be quite helpful. It is not uncommon for an attorney to be able to do a few retained cases with a relatively negligible time commitment, but yet be able to supplement his/her salary by perhaps 10 or 15%. This is due, of course, to the fact that retained cases are done at the market rate rather than the deeply discounted rate that work is done for the state under the contract.

It should be mentioned that it is office policy that clients are all treated alike whether they are appointed or retained, and that we take pride in this fact. There have, in fact, been occasions in

the past when appointed clients have indicated that they wanted to retain us because of their beliefs that we would perform better if being paid by the client rather than the state. In those cases the clients were told in no uncertain terms that we work the same for any client regardless of who is footing the bill, and that in cases where people obviously qualify for court appointed counsel we are not interested in doing work on a retained basis. In those relatively few cases where we have not been able to change a client's belief that he/she will get better service on a retained basis, we have given the client the choice of either staying with us on an appointed basis or going elsewhere to retain someone. We will not take a case on a retained basis because the client thinks he or she will get better service by paying us.

8. Do you have a plan in place to permit new attorneys to join your office?

With seven attorney positions and hopefully eight in the near future, we typically have one position that becomes available every two or three years. With the level and the depth of experience we have now those positions are entry level positions and we have in the past had some associates that received a good start here and then gone elsewhere in the state to become an asset to indigent defense.

9. How do you monitor the general quality of the working environment in your office? Are there regular staff meetings? Is there a process for obtaining feed-back from staff regarding the working environment?

Our firm has a joint office meeting of attorneys every Wednesday morning in order to keep the two offices integrated and to provide an opportunity for the exchange of ideas and concerns. We work with staff on a team concept model in which the staff are considered an important part of the office rather than just clerical workers as is the case in some firms. Both John Olson and Jack Morris received their initial legal experience at the Metropolitan Public Defender in Portland where the idea of an integrated team consisting of attorneys, trial assistants and investigators was, and is, alive and well. Staff are encouraged and expected to be very flexible in their job duties and to be able to make the transition back and forth between clerical duties and what would typically be considered trial assistant duties, such as contact with clients, searching for alternatives and providing in-court assistance to the attorneys.

We have staff meetings occasionally and although not as often as everyone would like, we also have social gatherings for office members and their families. In the summer time in particular we have office barbeques which bring the entire office together.

TRAINING

1. How do you orient new staff to your office?

2. How do you insure that attorneys are familiar with and abide by the Oregon Rules of Professional Conduct?

Typically attorneys walk into a caseload that is relatively small and are advised of the procedures

that we use in the office for everything from putting a file together to conducting a client interview to appearing in court. Attorneys and staff are encouraged to ask questions constantly and it is the occasional attorney or staff person who doesn't ask questions that sets off a red flag for the rest of us and consequently gets more attention.

Attorneys are provided with a copy of the Oregon Rules of Professional Conduct as part of the package of materials they get when they join the office. Attorneys are educated about the importance of abiding by the rules and in conducting themselves in an ethical manner generally. Attorneys are, in fact, advised that because the nature of our work we must hold ourselves to a higher standard of ethical responsibility than our colleagues on the prosecution side because of the fact that we are subject to more intense scrutiny and suspicion.

3. What ongoing professional development training is offered to staff by your office?

4. What assistance or support do you provide to staff in order to encourage participation in professional development training outside the office?

This is an area that I believe our firm excels in. We recognize that because we are not in a major metropolitan area educational opportunities for attorneys can be limited. Because of this and because our firm has always been closely associated with the Oregon Criminal Defense Lawyers Association (the senior shareholder is a former president) we encourage and expect attorneys to go to OCDLA training conferences on a regular basis. Typically in the past we have encouraged attorneys to attend the Spring conference, the annual conference in June, the late summer conference and the winter conference at the Benson. One of these is usually a juvenile conference.

The firm typically reimburses attorneys for their tuition and occasionally provides some allowance for housing as well in order to ensure that all attorneys can afford to go, particularly the newer attorneys. There is an expectation that attorneys when they go to conferences will, of course, attend classes, however, attorneys are also encouraged to introduce themselves to the other attorneys and socialize so that we stay integrated with the criminal defense bar of Oregon as a whole. We probably attend more conferences on a per capita basis than any other firm in the state.

In the past we have also encouraged the non-attorney staff to attend the annual management conference when that program includes a significant amount of education aimed specifically toward firm staff.

ZEAL

1. What steps have you taken to inspire and support your staff in providing zealous representation to public defense clients?

Perhaps our most significant success is in the area of creating a culture in the office of zealous

representation. (We fly the Jolly Rodger whenever we win a trial or motion). While this is intangible it is nonetheless very real. Our attorneys are appropriately aggressive and understand that part of our role is to ensure the integrity and fairness of the system as a whole and that our responsibility, attention and concern is not, and should not be, limited solely to the individual clients.

CONCLUSIONS

1. In what area do you believe your office excels?

As stated our office excels in creating the same or superior atmosphere or culture of zealous advocacy, often found in larger organizations. We encourage and reward aggressive advocacy and attempt to constantly recognize the necessity of it by encouraging each other in the office. We also stay tied into the larger defense bar primarily through channels made available by the Oregon Criminal Defense Lawyers Association. Each attorney is a member of OCDLA and as such has available to him or her all of the resources of the organization including the information shared on the internet site and list serve. (The Pond).

We have had the good fortune of having a firm that for 15 years now has operated aggressively and effectively and yet has had almost a complete absence of problems requiring the attention of any indigent defense administration in Salem. We do our work well, although as is the case with everyone else doing indigent defense, we are chronically underfunded.

Indigent defense has traditionally been subsidized by idealism and principle. Individuals who grew up in the 60's or 70's understood the need for professional criminal defense and understood that there is a need for checks and balances against the power of the government. As the individuals of that era become fewer, and student loan debt of new attorneys becomes higher making job choices based on idealism impossible, lack of adequate funding from the state becomes even more critical. There must be new and creative ways found to make individual firms or entities more attractive to new attorneys and better able to fulfill our duties. We believe that by combining the atmosphere, training and zealousness of a classic public defender's office with the increased flexibility and potential for a small level of additional income of a private firm, that we have achieved this goal in a unique fashion.

2. Are there any areas in which improvement is needed? What are they? How do you intend to address them?

There is always room for improvement no matter how well an office performs. Ours is no different. We would like to see an increase in the level of social service type assistance that we are able to provide to clients and we specifically would like to see an increase in our ability to handle juvenile, particularly dependency cases effectively. (We already provide some representation that could be considered atypical, for instance attending school suspension and expulsion hearings.)

We would like to have one trial assistant in each office whose primary responsibility is working dependency cases and acting as a liaison with DHS, CASA and the respective CRB boards. We will continue to work towards that goal and hopefully be able to provide the increased level of attention those cases deserve.

There are of course a limitless number of other ways that we can continue to improve and we will continue to look for them. We do, however, firmly believe that we provide a high level of indigent defense, and that we are not only an asset to the indigent defense system, but that we can and should, serve as a model to other indigent defense providers who are similarly situated.

Respectfully submitted,

Jack Morris

Appendix C

PUBLIC DEFENSE SERVICES COMMISSION

EXCERPTS FROM THE UNOFFICIAL MEETING TRANSCRIPT

April 13, 2006 Meeting
Hood River County Courthouse
Courtroom 301
309 State Street
Hood River, Oregon

MEMBERS PRESENT: Barnes Ellis
Shaun McCrea
Jim Brown
John Potter
Chip Lazenby
Paul J. De Muniz

STAFF PRESENT: Peter Ozanne
Kathryn Aylward
Ingrid Swenson
Laura Anson

Agenda Item No. 3 Introduction of the Preliminary Report on Service Delivery in Judicial District No. 7

217 P. Ozanne I see we have Presiding Judge Hull in the audience. I would like to ask him in a moment to come up and speak with you. Throughout the day, I see a number of people who we hope will speak. I see that we have representatives for our contractors here and I know the Hood River County District Attorney will be here to speak in the next hour. Let me just offer some broad-brush strokes with regard to the result of our preliminary investigation. Then Judge Hull, as presiding judge, can speak first and answer the questions you may have. The preliminary draft report is really an attempt to frame some of the issues we noted during our initial assessment by talking to a number of key players in the counties in the judicial district. When I say "the counties," I am talking about all five counties in the judicial district. Although, as I indicated in the report, given our time and resources, we didn't get to spend as much time as I would have liked in a perfect world to cover Gilliam, Sherman and Wheeler counties. We spent our time in this county, Hood River, and in Wasco County. When I say "we," Commissioner John Potter was kind enough to join me for our preliminary investigation and spent two of the three days in the district talking with folks. As I indicated in the report, we talked to all four judges, to the district attorneys in Wasco and Hood River County, to both sheriffs and the police chief of The Dalles, and representatives of the Department of Human Services and community corrections in both Wasco and Hood River County. To the extent these offices, like the courts, have relationships or operations in Wheeler, Sherman and Gilliam Counties; we asked questions and received information regarding those counties as well. We also spoke with the Trial

Court Administrator, Chuck Wall, who has been kind enough to provide his hospitality and these accommodations. I also talked by telephone to the three district attorneys in Sherman, Gilliam and Wheeler Counties. I understand that, this afternoon, Tom Cutsworth from Wheeler County will be attending our meeting. In a period of three days, we were able to develop a pretty good picture of defense services in Judicial District No. 7. And, as I hope the preliminary report makes clear, things are going well here. I think people are generally very satisfied with the public defense services in the district. Once again, we encountered good working relationships among the people in the district's justice systems. The advocacy is zealous when necessary, but relationships are not jeopardized in general by personal issues or conflicts. I thought it was particularly interesting that probation officers and police said that our contract lawyers are tough advocates – “they cross-examine us intensely, but they are professional and they are not tempted to get into personalities when it isn't necessary and they maintain professional relationships.” As I indicated in the report, these people said that the lawyers make them more effective in terms of their own agencies' practices and procedures. I think that, in general, the lawyers in this district are doing the work that we ask them to do. The primary problem, as noted in the report, is a shortage of qualified public defense lawyers. After the courts get past the “starting lineup” – our contractors and the more experienced private attorneys – “the bench” is very thin. Jack Morris, who will speak to you today, has spoken about this issue in the district many times before. We have discussed it many times with regard to what we have called underserved areas of the state – areas where there isn't a sizable population of lawyers and there are problems of recruiting lawyers and getting them to stay in the area. So, once they get past our contractors and a number of good people on the list, the judges in this district worry about who they can appoint and what they are going to do when qualified lawyers retire or move on. So the supply of lawyers is a big issue here. The report does address one other issue. As you know, we have a great opportunity to come to a county and learn through our investigations of their justice systems. And I think most counties appreciate the fact that someone from the outside looks at their operations and reports on the effectiveness of those operations, keeping in mind that we also try to mind our own business. One issue that a lot of people reported, and though it wasn't a matter the Commission was going to act on I wanted people in the district who had read the report to know that we were aware of the issue, was an ongoing disagreement between a senior lawyer at the Morris Olson firm and a juvenile court counselor in Hood River County. Though I mentioned it in the report, I'm confident that the judges in the district will resolve this issues if it disrupts the administration of justice or proceedings in the courtroom. Since the report was written, I understand that there may be a unique practice in the county that may call for gathering more information and that may suggest that we want to be careful about discouraging vigorous but fair advocacy by our defense contractors. In this instance, there is apparently a practice in Hood River County involving a team approach to sex offender treatment of juveniles where the therapist and the juvenile court counselor work together with an individual juvenile in order coordinate their efforts to rehabilitate and treat the juvenile. Although this is considered a best practice in the corrections profession, I understand in Hood River County that the juvenile court counselor sits in during therapy sessions where self-incriminating statements may be made that are conducive to treatment, but which may result in corrections sanctions. I understand the best practice envisions separate therapeutic sessions with the therapist and the juvenile where secrets and confidences can be freely revealed and separate case management sessions with the court counselor and the therapist to share appropriate information and track a juvenile progress. So there may be a true philosophical or professional disagreement in this county

about this matter which no doubt will be resolved through leadership from the bench. Finally, another issue that I raised in the report for discussion today is an issue of planning for the future of Oregon's public defense system. In counties such as this, and there are probably not that many, where a private law firm is our primary contractor, is this the structure that you wish to perpetuate in the future. As the draft report hopefully makes clear, the law firm in this district – the Morris Olson firm – is doing an excellent job. I am impressed with their implementation and administration of best practices. For example, Jack Morris sent me the firm's office manual, which I am going to share with our Legal Services Division because it is a very good office manual. We also know that the firm has conducted a survey of court personnel to see how its lawyers are doing. You know from the appendix to our draft report that Jack and his partners conduct lawyer evaluations on a periodic and systematic basis. Therefore, I am not suggesting that there is any problem with the primary private law firm in this county that currently needs addressing. But in terms of planning for the future throughout the state, I am raising the issue for discussion. I suggested in our report that a private law firm may be less receptive to the influence and the suggestions of the Commission with regard to best practices than a non-profit corporation that operates as a consortium or a full-time public defender. Not surprisingly, Jack Morris disagrees with these observations and I said "Great, we'll have a discussion here at the Commission meeting." After three years, it is my impression that sometimes our conversations about best practices, boards of directors, connections with the community, periodic management and attorney performance reviews and lawyer accountability amount to a dialogue between the Commission and non-profit public defenders and consortia, with private law firms and attorneys looking on as disinterested or uninvolved observers. If I were in that position, I would certainly be thinking, "I have a law firm and I'm running it the way I want to without outside meddling." With that I suggest, Mr. Chair, that we invite Judge Hull to come up as our first guest, followed by Hood River County District Attorney John Sewell.

421 Chair Ellis

Judge Hull, thank you very much for coming. Let me just mention from the Commission's point of view, we started about a year ago on a program of trying to go to areas in the state and meet with the people who are involved in the system. We are here to learn. We are here to get a good understanding of what is happening in this area and we don't start with a presumption that there is only one way to provide quality defense service. We have actually got a range of ways throughout the state that we are using. I think the other lesson that we have learned is this is a very diverse state. The law enforcement issues vary a lot because you have got different levels of population, you have different types of population and you have got a different economic base in different parts of the state. We just think it is healthy for us to get around and learn. It is also healthy for the different counties to get a chance to interact with us and give us some of their thoughts and observations. It is in that spirit that we are here and we look forward to hearing from you.

446 Judge Hull

It is too bad you weren't up here yesterday because it was beautiful. The clouds are coming in today. I don't have a lot to talk about because I talked with Mr. Ozanne and Mr. Potter when they were here three weeks ago. What I told them was where to go fishing and apparently they didn't follow up. Let me just talk to you a little bit from the perspective of a judge. If I'm not incorrect, Mr. Brown, you were a district attorney many years ago?

454 J. Brown

Many years ago.

- 455 Judge Hull In Corvallis, correct? The same time I was district attorney here.
- 456 J. Brown I am remembering that as you speak.
- 457 Judge Hull We used to share information about operating our district attorney offices many years back in the early 70's. Just to give you some history so you understand my comments, I come from a background of being a prosecutor back in 1970 until 1974.
- 462 Chair Ellis With Judge Jeldricks?
- 462 Judge Hull I followed Judge Jeldricks in the district attorney job, when he went into private practice and then went on the bench in 1973. Then I was in private practice from 1975 through 1990, and I did a substantial amount of criminal defense work in those days when they would put horse collars on us to get us in to do criminal work. I did my share of criminal work both at the misdemeanor level and the felony level.
- 470 Chair Ellis So you come from a hermaphroditic background?
- 481 Judge Hull Yes, and I became a judge in 1990. So I have a full gambit of the operational experience. And from what I have seen and my experience, I am very satisfied with what is going on here in terms of the quality of the legal services provided, the timeliness of them and the professionalism of them in dealing with others in a professional capacity. But at the same time, when there is an issue to litigate it is done in way that is not offensive, but also represents the client to the fullest. The only problem we have, and I think Peter mentioned it, is occasionally we get into situations where – and this is not a fault of our providers, it is just the numbers – a case has multiple defendants and we start running out of attorneys because we have co-defendants or there are children involved. We have attorneys for children and the parents and lot of the attorneys just don't do criminal defense work anymore. At my old law firm, there is not a lawyer that does criminal defense work anymore. Judge Jeldricks, when he was the presiding judge, had a rule that "If you are going to practice law in this jurisdiction and do any courtroom work, you are also going to provide criminal defense services when I call you." I don't subscribe to that philosophy because I think if you call up a lawyer and he doesn't want to do the case, he is not going to put his heart and soul into it. If the lawyer doesn't want the case and won't take it, I am not going to require him to provide defense services.
- 511 Chair Ellis If I can ask, I would think in a smaller county with the law firm as the predominant provider, you are going to have conflict situations where it is going to be very hard to provide counsel in these situations. How do you deal with that?
- 518 Judge Hull We just start figuring out who is representing whom, and then we know Morris Olson is representing one of the parties and Mr. Aaron is involved because his firm is the backup provider. Then there are other lawyers who do criminal defense work or juvenile work on a regular basis in addition to doing private practice. We call them. Then sometimes we go to The Dalles and bring attorneys in from there to cover those situations where we need multiple lawyers involved. It doesn't happen a lot, but it happens enough to where we need to address those coverage situations. That is just the problem of a small community. A lot of lawyers start developing a good civil practice and they don't want to be in the courtroom anymore.

536 Chair Ellis Is there a seasonal component to the caseload here?

538 Judge Hull That is an excellent question, and I haven't thought about that and haven't really analyzed it. Even though we are a tourism area, I have not found that it increases during the summer. Mr. Morris can address this better. I don't find that to be a big issue based on tourism. Probably just because of numbers, we probably have more cases in the summer because of more traffic going through the area. So, to some extent, yes, but I don't find it a big swing in terms seasonality. I am open for other questions. I am satisfied with how the public defense system is operating. I think it is much better than it used to be when I was a prosecutor. And things are different today. The volume is much greater than when I was a prosecutor. Drugs didn't exist much in the 70's. Now, eighty percent of the cases are drug-related. When I was doing defense work, we didn't have this system. The judge just went out and tried to get various private attorneys to provide services. But again, the numbers have increased in the drug cases and everything else related thereto. It has just exponentially increased from about the late 80's. I can't speak to Mr. Ozanne's comment about having a board of directors because that is an internal matter as to how you folks operate and I have never been involved in that situation. I know when I was practicing law and providing legal services, I would not have liked to have a board. Can I just digress a bit about the issue that was raised in The Oregonian. I felt a little bit uncomfortable this morning when I had the Chief in my courtroom and I had that very situation. It is really tough when we are doing an hour or an hour and a half of arraignments and we are doing them one right after the other. Somebody is charged with a very serious crime, you look at their questionnaire and they have some assets.

[Tape 1; Side B]

081 Judge Hull If you don't understand the framework in which this all works, somebody would say, not sitting in my chair, "Sure, they can afford a lawyer." But my comment is, "How are they going to afford a lawyer when they are self-employed and now they are sitting in jail subject to a \$50,000 bail?" How are they going to sell assets to pay for a lawyer when they are sitting in jail on \$50,000 bail? I appoint a lawyer for them because I have a 60-day speedy trial issue. I have to get the case moving. I have got to get a defense lawyer on board, if they are not able to hire a lawyer right away. I have got to get discovery moving, if there are going to be motions, because I have a 60-day issue. They are going to be released unless they waive the 60-day issue on the speedy trial. So those are ramifications that weren't even discussed in the newspaper article that trial judges face as a reality. As a practical matter, the case has to start marching pretty quickly. We can't be waiting two or three weeks to get a lawyer on board. I have a trial docket that I need to fit this case into, especially if they don't waive their 60 days. That, I don't believe, was really addressed in the article by The Oregonian. I read that article and thought, "Boy, I wish they would come to my court sometime and just see some of the practical issues that we deal with to try and keep the cases moving." It is not as easy as recouping all this money and making better choices. I think trial judges have a difficult time in that regard just because they have a very short time frame to deal with cases. That is my comment on that.

103 Chair Ellis Questions for Judge Hull?

103 C. Lazenby I am just wondering, in general, outside the criminal defense delivery system, is the county facing infrastructural stresses in terms of a lot more cases of drugs. Are there treatment programs in place or are they flooding your docket? Is it

more backed up than, say, 10 years ago, in terms of the number of judges that you have here to process cases?

- 109 Judge Hull I think we are doing a fairly decent job in terms of dealing with what I call the social aspects of the cases. It is hard to generate services that fit all the types of cases because we don't have hard numbers to support to have services for all of those cases. Sometimes it is difficult to deal with this situation. We are running a drug court both in Wasco County and Hood River County now. We held that court this morning and we are getting more people involved. Everybody – the district attorney's office and the defense lawyers – are involved. We are up and running in that regard. I don't see us being flooded with cases.
- 124 Chair Ellis Let me go back to the conflict area for a moment. We have learned in some areas that the system for identifying conflicts is not perfect. You get part way into a case and it turns out there is a conflict with another witness or co-defendant, and then you have to change lawyers.
- 130 Judge Hull Then you have to find a back up.
- 131 Chair Ellis From our point of view, that is a real problem because we have to pay one and then pay another. How much of that are you doing?
- 132 Judge Hull Not much. That happens occasionally, but I think very rarely. I must say that, in terms of the two major providers, Mr. Morris's office and Mr. Aaron's office, they do a very good job of keeping some sort of a diary or logging of information. So they know right up front. I'll make an appointment and they will get back to me either that day or the next morning and say, "We have a conflict." They look at the computer and see if there has been any prior representation and let me know immediately. Sometimes it is that day. We have the beauty of not having 14 attorneys in Mr. Morris' firm where the left hand does not know what the right hand is doing. We have two or three lawyers from their firm that work in Hood River and two or three that work in Wasco County. They keep pretty good tabs and have a good tracking system of who they have represented. They let me know and Mr. Aaron does the same thing. Even the lawyers who are not part of that group let me know right away. I can call up Mr. Gellar and say "I have a case. Are you able to handle that?" He'll do a quick computer check and say he has a prior conflict and can't do it. We don't run into a problem very often. We sometimes run into the problem where we discover that this person is a witness and the witness comes into the case later on. Then we have that problem. But that is very rare.
- 158 Chair Ellis This is a hard question for you to answer, I'm sure. But I'll float it out there. One worry we have, obviously is: are cases being tried when they shouldn't be tried? Are pleas being made that really shouldn't be made, or is there about the right mix between those?
- 164 Judge Hull I guess I can rely on my opinion based on 36 years. I think the cases that are being tried need to be tried and the cases that are getting resolved, short of a trial, should be getting resolved. Some cases have to be tried and I learned that early on. I don't find we are spending a lot of time in the courtroom that we shouldn't spend in the courtroom. I think cases are getting plea bargained when they should be. I have been satisfied with that. If I am not satisfied with that, normally I will make some comment, and I have done that very rarely because I question how much I want to get into the process. But on the whole, I think the cases that should be tried are being tried and the cases getting resolved should be getting resolved. I have been satisfied with that. I think Mr. Morris and Mr.

Aaron and those that work in the system know what cases need to be tried and what cases don't need to be tried. They deal with the system enough that we are not spending time in the courtroom that we don't need to and spending money in that regard. When it is being spent it is being spent pretty well. I have been satisfied with that.

- 187 Chair Ellis One of the comments in the preliminary draft report is there has been a lot of turnover among younger lawyers and another passage indicates it is harder than perhaps I would have thought to attract new lawyers to the community who are interested in providing defense services. Do you have an observation about those issues?
- 193 Judge Hull I haven't really thought about that.
- 195 Chair Ellis This is otherwise known as the graying of the defense bar.
- 196 Judge Hull Practically speaking, I have a son at the University of Oregon, and he is a mountain climber and a skier. I'll just tell you a family story and my comment to him, and then it will explain some of the answers to that. He said "Dad, someday I hope to come back and practice law in Hood River." I said, "Jeremy, I'm not sure how you are going to do that because I don't think you can afford to live here." Housing today in this town is expensive. You cannot buy a dog house for \$275,000 to \$400,000. To live here in Hood River, the cost of living has just gone bananas because of the pressure and what is going on in the community.
- 206 Chair Ellis When you say that, you are talking about the recreational sports?
- 207 Judge Hull Housing here – and maybe that is true throughout the state and I'm sure it is – housing here has gotten difficult to buy. You can't buy a two or three bedroom house for much less than \$300,000 to \$400,000. I don't know how a young lawyer could come in and afford to make a down payment and a house payment. In the summertime, I can rent a bedroom out of my house for \$600 a month. I did that 12 years ago, and it has gotten worse today. I don't know how people can afford to rent a place to live on what young lawyers make; plus make their debt service from law school. and if they are married and have children. Economically, it is a very difficult situation. Then again, I think a lot of lawyers say, and I remember my days, "I'll get my experience in the courtroom and then I am going to go out and make some money in the private practice." Working in the district attorney's office and working in defense services is not where you make a substantial income down the road. The pay is much greater in private practice than in working for a public agency. It is hard to keep people unless you are real dedicated. I think that explains why there is some turnover to whatever extent there is. I don't know if I have answered your question or not.
- 232 Chair Ellis Do you have any suggestions about how we can perform our job better or how either Peter or Kathryn can interact better?
- 235 Judge Hull I don't. Your function is to oversee this entire process statewide, is that correct? I think you have a very difficult job because, as you indicated when I first came in and as you were going around the state, things are different. Things are different here than when you talk to Wasco County. We do things differently than 20 miles up the road. They do things differently than we do. I think it is a function of how we have done things in the past. Maybe it is time to change all that but, over the years, small communities east of the Sandy River and south of Portland, and in eastern and central Oregon, have had there own framework of

how they have done things, and it is not easy to change. Maybe some of them are resistant to change. But we have just developed the habit of doing things that way. I have been here for 36 years and we are still doing things somewhat the same way. Wasco County does things their own way. I think you have a difficult job to try and provide services or oversight when you have all these different competing things. It is really interesting when I go to the judge's conference, and I just came back from one. It is fun to talk to other judges because, when you listen to how they run their courts and know how we run ours, we get some ideas, but everything is different. It was also interesting when I went to the National Judges School in Reno, Nevada 16 years ago. I was shocked that not everybody ran their justice system the way Oregon does. There are 50 states and they all run them differently. We are so accustomed to thinking this is the way it is done, when in fact this isn't the way it is always done at all. It is unique to Oregon, and it is unique to Hood River and unique to The Dalles. So you have a difficult job, and I can't tell you how to do a better job. I'm glad you are doing it and not me.

- 266 Chair Ellis You know our door is open. So if you come up with any suggestions, please let us know.
- 267 P. Ozanne Judge, are there any unique issues in other parts of the district? As I mentioned, and if you had a chance to look at the draft report, we haven't given as much attention to Sherman, Gilliam and Wheeler Counties as we would have liked in a perfect world. Are there issues in those three counties, even though they have a much smaller caseload?
- 275 Judge Hull Not really. I will say that we get prompt coverage in those counties and I have been satisfied. The only problem that I have in those counties is when I try a case there is that I ask the jury if anyone has heard anything about the facts of this case and everybody on the prospective jury panel has already heard about the case and discussed the case. It is difficult to get 12 people who haven't already heard everything about the case. I have more problems with jurors in those counties than I do with getting defense coverage. We have a consortium in The Dalles and I think the Morris Olson firm covers Gilliam and Wheeler also?
- 284 J. Morris All three counties.
- 284 Judge Hull So we see them on the road, and now we are using the video a lot for arraignments. And that saves a lot of travel time. We get good coverage and I have been satisfied with it. I had a trial two weeks ago and I am not going to mention names. But in Gilliam County, in Condon, John Olson was defending in that case and Scott Jackson from the Attorney General was prosecuting that case. It was probably the best case I have seen tried in 25 years, including my own involvement as a defense attorney. I always thought I was a pretty good attorney. But I walked back to my office the next day and talked to Marsha, my JA, and I said, "You know, I had to go to Condon to observe some of the best legal work I have seen in 25 years." I firmly believe that. And I have tried as a judge cases in Multnomah County, Washington County, Linn County and Lane County. That case was tried better than any case I have seen in a long, long time. I think you are getting the bang for the buck with this sort of work. That is my view.
- 305 Chair Ellis Any other questions for Judge Hull?
- 306 Judge Hull Thank you very much. I appreciate the time.

316 John Sewell

I may need just a moment to collect myself. I was hoping in my heart of hearts that some of the best work that Judge Hull had ever seen had actually been when I was in the courtroom. I'll get over that. I know that most of you haven't met me. Just real quickly by way of background, I am John Sewell. I am the district attorney for this county. I have been a prosecutor for 26 years. The last 14 years I have been the elected district attorney here; for 12 years, as a deputy. For the last 20 years I have been appearing in this courtroom, such as it is. I worked for four years on the coast before I came here. I worked for a year in Coos County and three years in Lincoln County. I am not going to reiterate the comments that I made to Mr. Ozanne and Mr. Potter. They are in the report. I would state simply that I am of the opinion that the community is well served by the public defense services that are being provided. I should comment on a couple of things. I think there is still a seasonal aspect to the workload here in that it does go up in the summer months a little bit. I don't think that is any different though than a lot of communities in the state. When the weather is nicer, the criminals are more active. Another aspect is, in the winter when there is snow on the ground, it slows down a little bit. I think another point not to be overlooked, and I think you would probably hear this around the state. If communities are on the I-5 corridor or on the I-84 corridor, they get a lot of work off of that freeway. It is not just a matter of whether there are 20,000 people or 40,000 in the summer. I have spent a lot of time prosecuting cases, as do my deputies, that arise on Interstate 84 and that involve defendants that aren't residents of this community. Following up on one point that was made about the cost-of-living, I have two deputy district attorneys that work for me; they both live in the greater Portland area and commute here. This is a god awful expensive place to live because of what has gone on with the surfing industry and what it has done for the property values in the community. Addressing the issue of the juvenile department and their participation in the sex offender treatment programs that go on here, I would observe that it has always been the practice here that anything that is said in treatment stays in treatment. And by that I mean there are no charges ever filed based on any, for lack of a better word, confessions or admissions that are made during those treatment programs. In other words, if a young person acknowledges that there are two or three other victims that they have had that we didn't know about, that is the end of it. We find out about them outside of that venue, of course, and they are in play. I would note that the juvenile counselor or counselors that participate in those sessions aren't doing it simply as an observer, but actually play a role in the process and participate in that process. I would also point out that they do not sit in on individual counseling sessions. They sit in in the group sessions that sometimes occur and, any suggestion that practice be discontinued, I would suspect would be met with stern resistance by my office, the juvenile department, and the treatment provider. It is a very workable situation. It does not work to the detriment of any of the young people that are participating in those programs. And again, we do not file charges based on any admissions that are made in these counseling sessions. This is a matter of fact and just for your information. There was a question to Judge Hull about cases being pled out as opposed to cases being tried. Over the years here, I have seen a shift in the number of cases that go to trial. I think that is attributable to a number of things.

386 Chair Ellis

Shift in what direction?

386 J. Sewell

More cases plead out now than go to trial. I think that is for a number of reasons. One is that some cases just don't ever end up in the system. First time DUIs go to diversion. We are one of the first jurisdictions in the state to have a domestic violence diversion program, so first time domestic violence cases go to

diversion. First time drug possession cases, as a matter of policy in my office, regardless of what the rest of their criminal history might be, if they don't have a prior drug arrest, they are eligible for a conditional discharge on their first PCS. So some cases are being funneled off initially because of those alternative programs that exist. I think sentencing guidelines, Measure 11, have had an effect somewhat on the number of cases that go to trial. In the language of the street, when there is real money on the table, defendants think twice about rolling the dice. Then, finally the fact that we have a jail here, a real honest-to-god working jail, that presents the possibility of people actually being incarcerated if they are convicted, and being incarcerated for a longer period time if they turn down the deal. The fact that people aren't released unless they are really, honestly a good release risk without the posting of cash bail has greatly diminished the number of failures to appear that we have in this community; the number of cases that just never get resolved and it also, I think, compels the defendants to make decisions. I think it is just human nature that we have some of the people that by nature are somewhat irresponsible in their day-to-day lives. You have a person that is charged with a crime. They are not paying for their lawyer because they have a court-appointed attorney, so they don't have a lot to think about immediately; they don't have a lot to worry about; they don't have to make a decision. Sometimes they don't keep the appointment with their lawyer once they are out. Those cases are hard to resolve. When they are sitting in jail because they can't make bail and they are not from here and their lawyer is sitting across the table from them, they get the offer on the table and they have to make up their mind. They want a trial; that is fine. We will have the trial. If they want to take the offer, they'll take the offer. But that results in not just more cases being resolved quickly; but a lot more cases being resolved with pleas because it is in front of them and a decision is mandated. I think I have addressed all of the things that caught my ear when I was sitting in the back of the room. I know you are waiting on your lunch, so I will just simply ask at this point if there are any questions.

431 Chair Ellis

Tell us a little bit about the size of your office.

431 J. Sewell

There is me. I am a working district attorney, in that besides administering the office, which happens more or less, I handle the bulk of the felony caseload in the office. The cases I don't handle involve child abuse or child neglect. I have one deputy district attorney that is funded by the county. That is the same number of deputy district attorneys that the county has paid for since the day that Judge Hull was the district attorney back in the 1970's. I think I had the first deputy district attorney that was funded full-time by the county. That deputy district attorney does all of the misdemeanor caseload, except for cases that involve child abuse or child neglect or domestic violence. I have another deputy district attorney that is not paid for by this county. It is funded through our CAMI program. Are you familiar with that program? Every defendant convicted in this county – not every, but almost all defendants – is ordered to pay some sort of unitary assessment to the court. Part of the money that is collected goes into this program; that is, the Child Abuse Multidisciplinary Intervention Program. Those monies then are used in this county in approved programs to address the issues of child abuse and child neglect. The bulk of those funds received in this county go to fund the other prosecutor that I have in my office. The funds do not support a full-time position, but they support a position where I have a deputy district attorney that works four days a week or 80 percent. Her responsibility is solely addressing cases that involve child abuse, child neglect and domestic violence in a home where children are present. She will do misdemeanors or felonies that fall into that area. Any felonies she

- doesn't do, I do. Any misdemeanors that she doesn't do, the other deputy district attorney does. That is how it works.
- 473 Chair Ellis That first district attorney, the one that is funded by the county, is 100 percent of his or her time misdemeanors?
- 477 J. Sewell That is because, at this point in time, that deputy district attorney is new to the office. As they develop more experience, then I would expect, for a variety of reasons including job satisfaction, that they will be given an opportunity to do more felony work.
- 483 Chair Ellis How did you recruit?
- 483 J. Sewell My typical method of recruiting a new deputy district attorney is to advertise the position in The Oregonian, which is required by the county. But more significantly, we advertise it in the District Attorney Association's monthly newsletter. For an entry level position, I will typically get somewhere between 50 and a 100 resumes or applications. Of those, there might be 20 percent --
- 491 Chair Ellis People that are in district attorney offices elsewhere?
- 492 J. Sewell Some of them will be in other district attorney offices that are interested in a move. Some of them are recent graduates from law school that just know through the grapevine that the District Attorney's Association publishes job openings.
- 499 Chair Ellis That is a pretty large number of responses.
- 501 J. Sewell Sure. It is not uncommon to get 50. That is pretty typical. It was a different time economically, but the first time I ever had to hire a deputy right after I became the elected district attorney, I think I got 110.
- 506 Chair Ellis You would describe it as a buyer's market?
- 508 J. Sewell It still is for district attorneys. That is changing. Every time I have an opening, and I don't have openings every day, I get a few less: from 110 down to 60 down to 50 down to 40. It is dropping. I think there is less interest because of the economic factors in being a prosecutor. I think philosophically there is still more interest in being a prosecutor than there is in being a defense attorney. That is just my take on it.
- 519 Chair Ellis When you were going through that process, did you develop any information on comparable incomes for entry-level district attorneys and defenders?
- 522 J. Sewell Every year the District Attorney's Association does a salary study. From that I know what every district attorney office in the state is paying. I have just the rudimentary knowledge of what is going on out in the private sector. I think state secrets should be guarded as well as private attorneys guard their income figures.
- 531 Chair Ellis So, to put it out on the table, what do you pay an entry-level district attorney?
- 534 J. Sewell I am embarrassed to admit that, right off the top of my head, I don't know. What are you getting?
- 537 C. Rasumussen For a four-day work week I am getting \$45,000.

- 539 J. Sewell She is paid as well as I am. It is just that she only works four days a week, so she gets \$45,000. That is just about what we pay an entry-level deputy to be here five days a week. You know what I make? I make \$67,000 and some change. For kids just out of law school with stars in their eyes, we can compete very well with a private law firm. Then you get some people like me that just stay on because they don't know any better. In terms of where they are, a couple of years into this game and we can't compete.
- 559 Chair Ellis Can't compete with the private firms doing defense work or the private firms doing –
- 561 J. Sewell General work; the civil work. The first deputy district attorney I ever hired left after four years to go to Clackamas County to do the exact same job that he was doing here for a 50 percent pay raise at the district attorney's office there. That is another way we can't compete, and by "we" I mean the smaller counties. We cannot compete with the district attorney offices in the I-5 corridor in terms of what they will pay for an experienced prosecutor. I could leave tomorrow and get a job working for one of my buddies and make substantially more money.
- 575 Chair Ellis Within this area of Hood River and The Dalles, which way do you think the parity pipe runs? Are the entry-level district attorneys doing better or not as well as the entry-level defenders?
- 581 J. Sewell They are very, very close. The district attorney and I make the same salary and I think the deputy district attorneys are very close. We might just pay a little bit more.
- 585 Chair Ellis You are comparing prosecutor to prosecutor, and I am trying to get a handle –
- 586 J. Sewell Defense attorneys? In the private sector?
- 587 Chair Ellis You don't know?
- 587 J. Sewell Might as well be where they have nuclear weapons stashed in terms of what I know about what they make. I have suspicions, but I really don't know. I'm sorry I can't address that. I tell you where one of my windows of knowledge comes from. For years we have had a program where new associates from private firms in Portland come out and do some misdemeanors –
- 603 Chair Ellis Get some courtroom experience?
- 603 J. Sewell Yes, with a real judge and a real jury. I know what they make from talking to them, these entry-level associates.
- 608 Chair Ellis They make more than you make?
- 609 J. Sewell Oh yeah, by 40 percent. Even though we are working with a bit smaller firm now, and principally because a couple of associates moved on, they still make substantially more than anything I can pay; and for that matter, more than I make. The gal that comes up here right now to try a drunk drive once in awhile, makes more than Judge Hull.
- [Tape 2; Side A]
- 001 Chair Ellis . . . He announced that some of the Trail Blazers were making more than the President of the United States. But I pointed out to him that the President didn't

have a very good outside shot. I do want to say that one of the things that happened in the last few years has been much better, and in many ways, very healthy communication between the Commission and district attorneys, and between the defense community and the prosecution community, in our common interest of getting adequate legislative support for the criminal justice system as a whole. I want to commend you, as an individual, and your group within the district attorney community. I think that this has been a very healthy thing. It used to be almost a cannibalistic process, and now it is the opposite. I really think since the crisis of 03, both sides have recognized that we are part of a broader system and, if either function is under-funded, neither function can work very well.

- 019 J. Sewell I apologize for digressing into a discussion about what I make or what my deputies make. I know that is not your purpose here, and it is not that I think anybody in this system makes too much. I think there are some of us that don't make enough. I did want to make one observation, and this is not any reflection on how law is practiced here, the people involved or how well services are delivered. But I worked in counties that have had both kinds of systems and, in terms of the big picture, or where indigent defense might be going in the future, from having worked with both systems and seen both up close, it is my opinion that a delivery system that involves public defender offices is more efficient and more effective than the contract system or the consortium system, in terms of how the services get delivered.
- 031 Chair Ellis Are you comparing service provision from an office that is distinguished from appointed individuals? Is that the point you are making?
- 032 J. Sewell If I want to annoy Jack Morris, I refer to him as the Public Defender's Office because, the fact is, that is what they do here. They are the primary contractor and that is really what they do. I worked in Coos County where they had a public defender's office. Working there, I think I had a very intimate knowledge of how it was organized and how it was operated; and I saw the results in terms of how their clients were defended. I worked in Lincoln County for three years before the days of this Commission, of course, and before the state had actually taken over indigent defense. It was the judge sitting up on the bench going down the list, trying to figure out who was available to take the next case for \$40 an hour, which was a very ineffective way to do it. That is where we have problems here in this community. Once we have been through the primary contractor and the secondary contractor, it is who is next on the list. I just think that, in terms of who is first up to do the work, I think it works more effectively and efficiently when it is in a public defender's office in a community, rather than a contract firm or consortium.
- 050 Chair Ellis Treating Morris Olson as a public defender?
- 050 J. Sewell I tend to believe that, much to their irritation. But they are; that is what they do.
- 052 Chair Ellis You are a specialist and your two deputies also specialists. Do you feel that the degree of specialization that you're seeing in your counterparts is comparable to your own or less? How would you describe it?
- 056 J. Sewell I would say it is comparable. Not to belabor this, but how they operate is basically as a public defender's office. It is because of that that I see that level of expertise, if you will. It is difficult, and this is no comment on the individuals, but it is difficult to see that level by others. I guess a better way to put it is, it is difficult for individual practitioners to maintain that same level of

expertise while they are also trying to practice law in a number of other areas, particularly when you are talking about the firms in town that still have somebody that participates in indigent defense. It is usually the youngest, newest member of the firm. You are not going to see the same level of expertise as in a the firm where that is pretty much all they do.

- 070 Chair Ellis Any questions for John?
- 071 S. McCrea I just have a comment, because you covered pretty much the questions that I had. John, I wanted to compliment you. I am sort of the designated criminal defender position on the Commission and I want to compliment you on the programs that you have with the domestic violence diversion and the conditional discharge on drug offenses. What I am inferring in terms of the effort at rehabilitation of offenders is that, if there are other disclosures, those don't get charged, which would encourage people to be able to disclose and hopefully move on. Those are wonderful programs, and I hope that you can persuade some of your colleagues around the state to take a look at them.
- 078 J. Sewell One thing that is encouraging is the statewide efforts now to promote drug courts, for instance. I think that would be a help. I would echo what Judge Hull said with respect to what meth has done to our caseload.
- 084 S. McCrea We appreciate all your comments.
- 084 J. Sewell Well, hopefully they were helpful. Thanks a lot.
- 095 Chair Ellis Let's break for a half an hour and will resume again at 1:00.
- [Break at 12:30 p.m.]
- 101 Chair Ellis [The meeting was called back to order at 1:10 p.m.] Jack, if you would step forward and share your perspectives with us.
- 104 J. Morris I have been looking forward to this meeting, particularly since about 11:00 this morning when it looked like the meter was going toward favorably, rather than the other way.
- 107 Chair Ellis Was that in doubt?
- 108 J. Morris Well you never know, Barnes. With some of the folks on this Commission, anything could happen. Thanks for coming and visiting with us in Hood River. We appreciate it. Those of us who are in eastern Oregon living and working here sometimes feel a little neglected. So it is nice to have you here. I think all of you know me. I want to tell you a little bit about the firm. We have two offices, and there are seven attorneys and seven staff. I want to deal with a couple of things that have been mentioned with respect to the staff makeup. But let me introduce some folks first. John Olson, the 25-year wonder with that trial several weeks ago, is my senior partner. John is 40 and he has been with us about seven years. Prior to that, he was a public defender and head of the office in Twin Falls, Idaho. Lonnie Smith is just a hair over 50 and has been with us five years. He was a civil lawyer in Florida. He was also, in a prior life, a CPS worker for child protective services. That has led him into being our secret weapon when it comes to juvenile law. He is our resident expert. Just two years ago, he received the blue ribbon award for person of the year from the CRB. And rumor is, and I'm not sure if I believe this part or not, that is the first time it has ever been awarded to a criminal defense lawyer. We are pretty pleased with

that so we can have a little sound bite we can point to to say, “Hey, juveniles, that is our specialty.”

126 P. Ozanne Jack, we frequently get complaints from CRBs about lawyers not showing up, so that is especially noteworthy.

128 J. Morris I don't think we ever miss them. Brian Starnes is the other shareholder. He is here in the front row. He is 34-years-old and he has been with us eight years. He was from Nebraska and we felt sorry for him because of that and I gave him a job. We have three associates. Heather Clark, who has been with us five years and she is 30. Jennifer Robins is 31 and has been with us a year. I should mention Heather Clark is our drug court specialist out in Wasco County. Jennifer was a court clerk in Multnomah County. And we have our most recent addition, Conor Sullivan, who is 27 and an alumnus of Lane County Public Defender, having been a certified law student and clerk there. I think I forgot to mention, John, in addition to myself, were both alumni of Metro in Portland. He was a certified law student there. I have been here 15 years. It has been a fun ride. Prior to being here, I was a trial lawyer at Metro under Jim Hennings, which was a unique opportunity that I am still appreciative of. I was a felony group leader and I dabbled in Senate Judiciary Committee in the '85 and '89 sessions. That is where probably, originally, I know most of you from. It may seem a little odd that I mention ages and length of time with the firm, but I am doing that for a reason. The reason is there was a mention in the preliminary report that a comment was made that seemed like we had a lot of turnover. The fact is I don't believe we do. We went back and checked and we have had, since 1993, about one vacancy per year with seven attorneys, and two of those were due to the BRAC problem. I think that is just about right. That is subject to disagreement, but any of you who have ever run an office similar to ours know that there has to be a certain amount of turnover. We can't have seven people all with 10 years of experience simply because we can't afford it. The other thing that is good about that, and I think it addresses one of the Commission's concerns, is it has given us the opportunity to get some new attorneys in and get them trained. Probably the stranger thing I mentioned is ages. I have done that on purpose as well because there is constant concern voiced to the Commission and elsewhere about the graying of the defense bar. Our average age is 38 and we have a wide range of ages. So we are only a little tiny bit gray. We can still serve this Commission and indigent defense for a good 20 to 25 years, I think.

162 J. Potter I didn't catch your age, Jack?

162 J. Morris Well, 50 is fast approaching, but not quite as fast as your Vice-Chair.

165 S. McCrea Two months is not that big of difference.

166 J. Morris When I received the preliminary report on Monday I was, as you might expect, very pleased. It was extremely complimentary, and I appreciate the work that Peter did. As some of you know, I have been at several of the Commission hearings. I think I have read all of the reports that have been done so far. With probably some room for disagreement, I think the things that were said about our firm are probably about the most complimentary passages that have been found in those reports, and I appreciate that very much. Peter is obviously a fine judge of legal talent and I think the Commission should keep him on for at least awhile. The one area of disagreement that we do have – and I'm not really clear if we are still even disagreeing on this – but you saw from the e-mails that were included the objection that I made to Peter's language about the Commission being skeptical about whether a private firm can play this role. I know, when

we spoke last toward the end of the conversation, you said something to the effect of “Jack, I think you have convinced me of your position.”

- 181 P. Ozanne Yes. In fact the report didn’t say “the Commission;” it said “OPDS.” And most people know that, when I say “OPDS” in the context of these preliminary draft reports, it is really mostly me.
- 184 C. Lazenby Then why are we here?
- 185 P. Ozanne That is just in the preliminary report, Chip.
- 185 J. Morris So I am hoping that I changed your mind; and I am hoping that I have changed your mind to the degree that you will feel it is appropriate to perhaps delete that language.
- 187 Chair Ellis Can you share with us the dialogue you are referring to?
- 188 J. Morris I believe you have copies of a couple of e-mails in your materials.
- 190 P. Ozanne We sent Jack’s survey of court staff with that.
- 191 Chair Ellis I am not starting with any agenda, but it is a subject that I find interesting because you have had experience in an MPD office, and because you have the private firm model you are using here. How would you describe the differences between an MPD model and the private firm?
- 196 J. Morris Barnes, I am really glad you asked that question; and the reason for that is because, as John Sewell acknowledged a little while ago, we are in fact basically a de facto public defender’s office. Having had the good fortune of working for Jim Hennings at Metro, I think there are very few differences between our office and a public defender. The differences that we do have are all positive ones. That is the theme of what I want to tell you and my response to the questionnaire. What we have done is combine what I think is the best things of a public defender’s office with some of the advantages of a private firm. I really think that is where we are at, and that is the primary message that I wanted to give to you folks today. To the extent that I need to address that, I don’t know how big of an issue that is. Does that answer your question?
- 208 Chair Ellis That is the conclusion, give me the buildup.
- 209 J. Morris What we do have, partially out of just good fortune and partially out of our structure, is a core group of experienced, talented lawyers. As I said, we have five people who have been here longer than five years. The other three shareholders are all extremely talented. We work on the team concept model, as we did at Metro with respect to our support staff. None of our support staff is simply a clerical worker. When they are hired, they are told they are going to play a lot of different roles such as trial assistant, social services hunter and all of those types of things. That is what we have. What we have done is combine the best features of a public defender. We have the zealotry of not just a public defender’s office, but a good public defenders’ office. We have the commitment to indigent defense that might typically be found in a PD’s office and, as I think I have pointed out in the questionnaire, we participate in the system as one might expect.
- 225 Chair Ellis What percentage of your firm’s revenues are public defense versus private?

- 226 J. Morris The little bit of retained work that we do over the last couple of years resulted in an average of about another 15 percent of income for our attorneys. Our salary scales --
- 229 Chair Ellis Let me see if I understand that. Does that mean 85 percent of your revenues are indigent defense services and 15 percent are private?
- 232 J. Morris About 11 percent of our revenues is private and that results in about a 15 percent increase for the attorneys.
- 235 Chair Ellis Private revenues, is that all retained criminal work?
- 235 J. Morris Yes it is.
- 236 Chair Ellis So you guys are 100 percent criminal defense but, of the 100 percent criminal defense, 89 percent is public defense --
- 238 J. Morris Criminal and other areas that are connected, like juvenile and that kind of thing. So it results in about a 15 percent increase on average. It is also results in us being able to have things that we probably wouldn't have otherwise. It gives us some flexibility. If we are over budget and we have a little bit of extra money from retained work, that helps a lot. It helped us get through the BRAC experience and, as I said, it helps us have some extra things that we probably wouldn't have otherwise. An example is, when we have an attorney or staff that celebrates their fifth year anniversary with us, we buy them a plane ticket to someplace within reason as a reward. It has allowed us to do some other things, and this one might resonate a little bit better with you. One of the things we were able to do two years ago when we started drug court is we contributed \$1,000 from the firm toward drug court start-up costs. If we were strictly state revenue, we wouldn't be able to do those kinds of things.
- 253 Chair Ellis I should know this, but what is your contract configuration? Is that on a bulk basis or a unit basis?
- 256 J. Morris It is on a unit basis with differing case values and caseload projections for a two-year period. Is that what you are asking me?
- 258 Chair Ellis Yes.
- 259 J. Morris A typical contract, as I understand it. It is fairly uniform around the state. I have told you what we have and what we have done and how we see ourselves. Again, I think at least in some part, I have Jim Hennings to thank for this. We see ourselves as having responsibility to indigent defense that extends outside our firm. We play the role that Jim does in his shop in Multnomah County or that Greg does in Lane County. We see ourselves as being responsible for participating in policy decisions that are made. We do that on a regular basis. I myself am involved in a number of different things like the LPSCC Committee and the drug court. We had a juvenile work group not too long ago. We see ourselves, probably to our detriment, being responsive to the needs of indigent defense and the Commission, probably even more than we should be at times. I'll return to that in a minute. As I said, the little bit of revenue that we get allows us to do other things. The other thing it does is it helps us avoid the stigma of being a public defender. When I say that, I suspect that you all know what I am talking about. There is a stigma that is completely undeserved by clients who don't know any better; who when they hear the term "public defender" count it against you. I was present at the Lane County meeting and I

thought Doug Harclerod, the Lane County District Attorney, put it real well. He was asked a question along the lines of who gets the most complaints, the PD's office or the court-appointed list. His response was, "Well it seems to be the PD's office," which he found somewhat amazing because he found them to be by far the most skilled and talented group of lawyers in Lane County. My point is it allows us to kind of sidestep some of that stigma that makes it easier to deal with our clients. Again, the stigma is completely and totally undeserved in every area of this state that I am familiar with. A moment ago, I told you that we probably put indigent defense's needs above our own to a degree that we shouldn't. I guess the best example of that is a few years ago the state, I think it was Ann Christian, asked us to cover the eastern counties, what we call the "eastern front." That is Gilliam, Sherman and Wheeler. We stepped up to the plate and we have been doing that ever since. And believe me, it does not pencil out cost-wise. We do it because somebody needs to do it, and it might as well be us. For those of you who are geographically challenged, from The Dalles, and the attorneys in The Dalles are the ones primarily responsible for those counties, the county seat, Morrow, is 80 miles round trip; Condon is 140 round trip and Fossil is 180 miles round trip. We get a little bit of a travel allowance, but we still come out on the short end. Again, the reason we have always done that is because you guys need somebody to do it, and it is us. So we shoulder that burden with some hesitation I suppose, but I think in return we have been treated well and it works both ways. So we are happy to do that. That brings up another issue. Until the BRAC crisis, I was naïve enough to think that all the contractors had wonderful relationships with indigent defense like we do. I found out during that crisis that this is not the case. I mention that only as an example of the cooperation we have, for instance covering the eastern counties; but also because you can't say it too often: we have had the best luck of the draw with indigent defense analysts that we could ever hope for. We had Larry Craig to begin with, we had Lorrie Railey and now we have Laura Weeks. Our relationship with the state has probably been the least troublesome and the most mutually beneficial of any contractor in the state. Maybe that it is an exaggeration, but I don't think so. That is the way I feel about it. Our willingness to help out has almost gotten us into trouble at times. Ann Christian approached me a few years ago and asked me if we would be willing to help out in another jurisdiction and open an office if the need arose. I almost committed ourselves to doing that. It wasn't until a few months later that we ran into each other and I raised the issue again that she mentioned: "You know Jack, I might have neglected to mention that, if you open that office, it is going to be doing PCR work and nothing else." So what I learned from that is sometimes you have to watch your good friends the closest. I really do strongly disagree with the idea that there is any reason for skepticism. We not only can fill a niche as the primary contractor that might typically be done by a public defender or a consortium; I think we are already doing it. And I think we are meeting most of the best practices that the Commission is interested in pursuing. I do agree, as Peter wrote in the preliminary report, that, given the percentage of income that we have from the state contract, it is probably appropriate for indigent defense to be a little bit more involved in our affairs than in a typical law firm. To the degree that there is any hesitancy, and perhaps there is not as much as I think, I think the hesitancy of having a private law firm is this idea that here is a firm with 10 attorneys and maybe a couple of guys are doing criminal defense and some appointed work and everybody else is doing divorce and that kind of thing. That is not us because we are strictly criminal defense. The only difference is we do a little bit of retained work on the side, which is basically the icing on the cake. Our salary scales for staff and attorneys both – and one of the side benefits of this hearing is I went back and looked at the salary scales for Metro again – our attorney's salary scale was right on the mark. They are virtually

identical. Our staff salary scale was lagging a little bit behind, so just this last week I made some adjustments to that so both the scales are basically identical now. The beauty of it is we have the same salary as our colleagues in Metro; but on top of that, there is a little icing, and that little bit of icing makes the difference. I think it has made the difference in being able to retain the really talented lawyers that I have, so it has worked well. In any event, I guess I do agree with Peter to an extent that perhaps you guys should be a little bit more involved with us. I think personally the way to do that is when there is a question you pick up the phone and ask. One of the things that Peter mentioned was that historically, for instance, salary scales haven't been available. If you want to know what we make, pick up the phone and ask. It was just up until a few years ago that part of the contract, the RFP, included a budget; and it also included salary figures that were dropped for some reason. I'm not privy to why that was but I never had a problem with that. We are doing the job that you want us to do, and the fact that we are a private firm shouldn't cause you any concern.

- 384 Chair Ellis It sounds like your hiring has been more lateral than entry level.
- 386 J. Morris I don't think that is accurate.
- 387 Chair Ellis How do you handle training?
- 388 J. Morris As I mentioned in the materials, one of the ways that we handle training is that there are always colleagues talking to each other in the office. When I started at Metro, I was one of six misdemeanor lawyers. I learned real quick that it is nice to have a trainer and all that kind of stuff to look to. But you learn from each other the most, so we encourage that. The biggest red flag that I ever see with a new attorney in the office is somebody that doesn't ask questions. If they are not asking questions, I am asking them why they are not asking questions. The other thing – again this is partly because we have a little bit more leeway budget wise than other folks – we send our lawyers to probably more OCDLA conferences than anybody else. We typically go to at least four a year. Those registration fees are paid by the firm and there are usually or sometimes a little bit of a housing allowance. I think you will see us at more conferences than just about anyone else.
- 408 Chair Ellis One question I have is, I'm not sure I know the percentage, I think your firm does the majority of the defense work in the two counties –
- 411 J. Morris I'm just guessing about 80 percent.
- 412 Chair Ellis As a firm, you are subject to the unit rule for conflicts. Judge Hull seemed to believe you are doing okay. You are able to identify these conflicts early and resolve them; but I want to get your take on that.
- 416 J. Morris I think Judge Hull's comments were right on the mark. I think we identify them early and, a good portion of the time, we identify conflicts before we ever pick the case up and we simply don't pick the case up. We take a look at the possibility of conflicts when we get the in-custody list in the morning. Hood River is particularly easy to deal with that issue because we are extremely fortunate to be able to get discovery at the first appearance. We go up, we get a charging instrument, we get discovery on the spot. If we have a conflict, often times we are aware of it before we ever leave arraignments. One thing I would disagree with Judge Hull on, he was saying maybe that day or maybe the next

day. Often times it is addressed before we even leave the courtroom. Conflicts are just not a big issue for us.

- 429 Chair Ellis Apparently, not at the stage of identifying the conflicts early in the process but, given the high percentage of the volume that your firm does, what is your observation on the ability of the system to represent the conflicted party?
- 437 J. Morris Are you talking about co-defendant situations?
- 438 Chair Ellis Could be a co-defendant or a key witness; or it could be any number of things that created a conflict. In your observation, does the system have enough alternatives in it that the party you can't represent gets decent representation?
- 443 J. Morris That is kind of several different questions. I don't think we have any more problems with conflicts than we would, for instance, if we were a public defenders office. The same rules apply in the same situations.
- 447 Chair Ellis That is true. I'm more concentrating –
- 448 J. Morris You are asking me about resources?
- 450 Chair Ellis Right.
- 451 J. Morris I don't think there is a shortage of attorneys in Hood River, but Wasco County is another matter. It is difficult to get good people in Wasco County. And it is also difficult to get them anywhere, but Wasco County is a little bit tougher. I was kind of surprised to hear some of the figures that John Sewell tossed out as far as applicants. Ten, twelve, thirteen years ago when we had a vacancy and ran an ad, we would get 30 or 40 resumes. The last vacancy, I think we had fewer than 10; and that has been the way it has been for several years. That has changed dramatically. I don't think you can under-emphasize the fact that there has been a huge philosophical change with people coming out of law school. It is not just a money issue. The pool of people who are interested in doing criminal law and the sub-pool, which is much smaller, of people wanting to do criminal defense has shrunk dramatically. Out of that shrunken pool, it has narrowed even more by the fact that people are coming out with huge student loan debts and they can't afford to accept an offer. We have also in the audience, and I am so appreciative of the fact that she reminded me of this, Ginger Mooney, who actually has a home in Hood River and commutes to Salem. Last time we had an associates position open, we made her an offer – and again, our salaries our commensurate, almost identical with public defender offices. As much as it made sense for her to accept that offer and work for us, and we would have loved to have had her, she had to turn it down simply because of money. So it is an issue. Does that answer your question?
- 484 Chair Ellis Partially. The issue I am trying to make sure I am comfortable with is the percentage of the volume that one firm is doing and whether that creates problems.
- 489 J. Morris Well, I think we do about 80 percent, and I think that is a huge advantage for indigent defense.
- 490 Chair Ellis It is, unless you have this problem of conflicts and an inadequate ability to represent the conflicted parties.

- 493 C. Lazenby You live in a small community and you are doing 80 percent of it. You are bound to come up with a lot of witnesses in some of the cases that you have represented.
- 499 J. Brown That provokes me to wonder about the Judge's comments on the impact of your freeway. How many of your clients are actually county residents? Is that a factor?
- 501 J. Morris It is, and we get a fair amount and it has changed dramatically since I first started up here. We used to get a whole bunch of folks that were here seasonally. These were folks coming up from Mexico to work the orchards. That population has been assimilated quite a bit and they are here more year round. But we do get a lot of folks from out of the county. You have to remember that, geographically, these are tiny counties. So it is not uncommon to have folks who have no relationship to a county here. It is not like we are in Lane County and you have a population that never crosses the county line. It makes sense that it might seem to be huge issue, but isn't hasn't proven to be one. I think Judge Hull's comments were completely accurate.
- 517 Chair Ellis I asked him and I'll ask you, any suggestions how we can do our job better? Any thoughts on how Kathryn and Peter can do their jobs better?
- 523 J. Morris When I was asked that question in the questionnaire the answer was, you could always do things better. I guess the one suggestion that comes to mind is, you have already in most areas identified key people or key persons, or someone you can talk to find out what the situation is locally. I think maybe that should be pursued a little bit more. If you are going to think about bringing somebody else in, or something of that nature, make a phone call and find out what is going on. Other than that, I can't think of a lot of things that I would suggest. I think PDSC is doing a decent job.
- 541 Chair Ellis You strike me as one who really has your lines out around the state –
- 542 J. Morris My lines out? Is that like a fish analogy?
- 543 Chair Ellis Your trap lines. You seem to have pretty good communication. Are you getting advice, help, or ideas from other public defender groups around the state?
- 550 J. Morris As to management?
- 551 Chair Ellis Just straight criminal law practice.
- 552 J. Morris Barnes, I am glad you asked me that too. That ties into the fact that we spend a lot of time at conferences. As most of you know, at the annual conference, I make it a point of meeting people out by the pool and getting advice. No Barnes, seriously, every one of my newer lawyers I have ever had is told, "Go to the conference, we are footing the bill. I expect you to go to classes but not every one. It is really important, and this is on a serious note, that you meet lawyers from other areas." I make it a point to try and introduce my new lawyers to other lawyers around the state. That way, when they get a case where there is someone that needs particular expertise, instead of having to reinvent the wheel, or feeling kind of lost if they pick up a sex case, I can say: "Call Shaun. She had that issue three weeks ago in a case of hers." Or if it a traffic case, "Call David McDonnell." That works out real well. I am a firm believer that informal training and informal passing of knowledge really works better than formal.

- 577 C. Lazenby Go back to the private law firms. One of the things the Commission has been wrestling with, and it permeates a lot of our conversations, is: what is the best form to deliver the services and how do we structure those in different places? We have obviously learned that every county is different. What strikes me about this conversation today regarding private law firms is that it really is a matter of form over substance because, substantially, you function as the local public defender. And I appreciate what you said about the private sector part, allowing you to build a little bit of a cushion. Do you think that that is a unique development with your law firm and this location, or is it something that might be transplanted elsewhere – where you have a private law firm that predominantly provides criminal defense services with a modest amount of privately retained, but largely a publicly supported firm; or are you in a unique circumstance?
- 601 J. Morris No offense, Barnes, but I think that is the best question that has been asked so far. My feeling is, quite honestly, that in an area similar to ours that, what we have been fortunate enough, in all honestly to kind of stumble into; it works well enough that I think it should be copied in other parts of the state. We are in a sense a de facto public defenders' office will all the good things that go along with that, and we get a little bit of extra money. What can possibly be wrong with that? I consider ourselves really fortunate.
- 615 Chair Ellis How do you handle cases within your group? Is it who is available or by subject matter specialty?
- 619 J. Morris It is a little bit different in the two offices. In The Dalles office, we have four attorneys and they rotate a pick-up week and then adjustments are made. So, if the new attorney picks up a serious case, of course, it goes to a more experienced attorney, and vice versa. That is a little bit of a variation from one of my goals, which has always been that the attorney who actually picks up the case sees it all the way through. In the Hood River office, there are three of us. Usually, two of us are here, if not all three of us, for in-custody arraignments; and we pick them up as they come down the pike. One of the things that has been really nice with my experience and the other attorneys in the office is, if there are three of us there, there is never any of this "you pick it up, I've got too many cases." I have lawyers that are willing to jump up and take a case, and I am real appreciative of that.
- [Tape 2; Side B]
- 052 J. Morris One of the things we have always done is to be present at first appearances. Years ago, when I first got here, that was a challenge in Wasco County because they never did arraignments at the same time every day. We fought for a couple of years, at least to get the court to set it at the same time so we could be present. Before that, attorneys had not been present at a first appearance. The compromise position that we originally reached was they would still do arraignments whenever they wanted to, but they would call us. That didn't work out all that well. Sometimes when they called us, arraignments would already be starting and we would have to drop everything and run over there. But we finally got a system now where they are at a set time; so we are there. I could be mistaken about this, but I brought this up before. I thought the contracts before provided that a contractor had to be present at first appearances. Maybe I am imagining that, but I thought they did. I think that should be in there now. I think it is important to be there at first appearances.

- 066 Chair Ellis If there is a particularly serious case and you got someone less experienced who happens to be at arraignment, does that find its way to the more experienced lawyer?
- 068 J. Morris Every time. And usually we know if there is a serious case on the docket. “Serious” is a relative term, but we take a look at the dockets before arraignments and we have a pretty good idea of what is on before we ever go to court. So the appropriate attorney is there.
- 071 Chair Ellis You heard the district attorney’s response to my question about cases being tried and cases being pled. Do you have any thoughts on that? I thought he gave a very interesting answer.
- 075 J. Morris I would like to think that we are trying the right amount of cases. That is one of those things that you debate internally all the time. I think John and I both give a lot of thought to that. Are we being too easy or are we being too hard? I think we’ve struck a pretty decent balance. John [Sewell] and I have, on occasion, beaten the hell out of each other in court. I think we have both learned that the other one can do some harm if we let them. So I think that helps resolve cases. In Wasco County, I think we may try a few more cases; but that varies by lawyer, of course. John [Olson] probably tries more cases than any of the other folks, and I think that is partly due to the unbelievable success that he has. Looking at him, he never says a word; but when he tries cases, he wins.
- 090 Chair Ellis The Chauncey Gardiner of the trial bar. One of the things that we are interested in on the appellate side and the LSD group handles that –
- 093 J. Morris You know, I just can’t get past that analogy.
- 094 Chair Ellis I can’t either. I am interested from your perspective on the trial side how that relationship works. Are you okay with how the appellate part of the practice is being handled?
- 097 J. Morris You know, we don’t have all that much contact. But I guess the thing that strikes me is I am impressed with how efficiently they take on cases. You make a call down there or go to their website and you get an immediate response, and that is real nice. I think they work really well from what I see, and I know there are some real talented people there.
- 104 Chair Ellis A lot of lawyers, at least on the civil side, hate to give up cases when they go on appeal. Do you feel we should continue this relationship we have now where the appellate work is all done or primarily done by FTE in Salem, and trial lawyers kind of lose touch with their cases when they go on appeal?
- 110 J. Morris I think that is the best system because I think appellate work is real specialized just like trial work, and I don’t think the two necessarily lend themselves to cross-pollination or whatever.
- 112 Chair Ellis You don’t feel like they screw up your case?
- 112 J. Morris I have found the appellate counsel in Salem to be extremely helpful. If I have a particular issue that I want to talk to them about, I get the impression that they are real appreciative of that.
- 115 Chair Ellis Even before the appeal is started and you have a hot legal question in a case that you are dealing with, do you get support from them?

116 J. Morris Absolutely. I always thought there has been a real good exchange.

117 Chair Ellis I had actually not heard of much of that occurring.

119 J. Morris Well, technology isn't my strong suit. I don't like to e-mail stuff down there. I like to talk to a human being. Maybe that is why I feel there is a good exchange. But I found that they have been really receptive to ideas and, if I have a case or issue that I am excited about, then they get excited too.

123 Chair Ellis I should know this, but has your office been involved in the site visit program?

126 J. Morris As a recipient?

126 Chair Ellis Either as a recipient or as a participant.

127 J. Morris I participated on the site visit team that looked at the PDC consortium in Multnomah County.

130 Chair Ellis Would you welcome a site visit, or would you resent it?

133 J. Morris In a jurisdiction where we are the primary contractor, I see this as a site visit, basically. There is not very much difference from what I did in Multnomah County. So if you want to do it again, sure, come on down.

141 J. Potter The line of succession: can you do a little historical review for us? You took over from Pitcher & Wright?

143 J. Morris I did.

144 J. Potter They were the primary provider here before you took over?

145 J. Morris The reason that I am here is because Paul Crowley went on the bench back in 1989 or 1990 and Ken and Ellen had an associate position open. I applied for it, they gave it to me and I had to turn it down because they couldn't pay me enough.

148 Chair Ellis You were at MPD at the time?

149 J. Morris It was actually even less than MPD, so they had the same problem back then that we have now. There was some competition for that judicial seat. There were actually four people in the firm there was Wright and Pitcher, who were the partners and two associates. Paul Crowley was one of the associates and he got the judicial seat. Understandably, there were some feelings that you might not want to appear in front of your former associate, so they decided that they wanted to make a change and called me up and asked me to take over the firm. Initially I said "no," but they eventually talked me into.

158 J. Potter If we were to ask you -- were there any hiccups in the system between the transition of Pitcher & Wright and the new Morris firm?

160 J. Morris Oh, I would have to say there were. But that was a real unique situation too because what happened is Ken and Ellen left and moved to the Metropolitan area. Paul went on the bench and the other associate was his wife who, for whatever reason, didn't want to be there anymore. So basically, all four people left. I took it over, but how often is that going to happen?

- 165 J. Potter You understand that some of these questions that have been asked before about private law firm and public defenders is about continuity. We just saw this in another county: a long-time public defender there leaves and gets replaced by someone else; but there is not a hiccup in the system. The public defender office was still intact. So what happen when you decide that Mexico calls?
- 173 J. Morris Oh, you are on thin ice there. I don't see a problem because I have three very capable shareholders, and I think any one of them is capable of stepping in.
- 176 J. Potter Have you talked about that? Would that be something that would be the most feasible scenario? It would seem to be to me, but have you talked about it? When you say, "I have had it and I'm done with this," and you ask the shareholders if they are interested in taking this over, is there is a succession plan?
- 180 J. Morris Have we sat down and written out a plan? No. Do I have three capable attorneys, all of whom I am confident could step in and take over? Yes. We make management decisions together, at least to some extent, even though physically we are in two offices. The attorneys get together every Wednesday morning and talk about management issues, as well as other things. I just don't envision a problem there at all.
- 187 J. Potter Is it reasonable for me to be asking the question? Is it one of the things that should be addressed by a Commission like this when we are looking at service delivery in a community?
- 189 J. Morris Is it a reasonable question? Sure. Have we got it covered? I think so.
- 191 J. Potter Who is going to be the head?
- 192 J. Morris Well, that would be decided by a democratic process among the three of them. I have always considered John to be my senior partner and I suspect it might be him. But there is always room for democracy.
- 195 J. Potter There is going to be a buyout, right? This is a private law firm. It just wouldn't be turned over to someone.
- 198 J. Morris Would there be a buyout? That would nice.
- 200 J. Potter I'm trying to help you, Jack.
- 201 J. Morris I don't know, John. Like I said before, you have to watch your friends the closest. So far, these three folks that I call shareholders have not had to buy anything. It is basically their status, for whatever it was worth, in recognition of their contribution to the firm.
- 208 J. Potter I think it is a legitimate concern for the Commission. What happens when we have a major provider, who is doing a great job in the community; and then the lead partner goes on to do other things?
- 211 J. Morris Number one, I don't think it is clear that I am the lead partner. I am up here by myself because Peter took the other chair. I was thinking of having John come up as well; but I don't see that as an issue. I like to think that I have created an

office or culture where the way we do things now follows with the other people. You have probably noticed that I have referred to Jim Hennings' office a couple of times. I do the things the way I do things in large part because of the experience I had there. I would like to think, and I feel relatively comfortable with this, that things would continue in the same vein here because of the fact that we have worked together as long as we have, and because we have done things the right way for a long period of time.

- 224 C. Lazenby Is your concern, John, springing from the perception that perhaps Jack is the key to this and, if he were suddenly to decide that he was going to have his new address, that we would be left with having to grapple with succession; or are you moving that the Commission should start thinking about, in some of these circumstances where there are key people, that we contractually require them to give us a substantial amount of notice before there is any significant management changes? Is that what you are asking?
- 231 J. Potter I am not even suggesting a solution. If Jim Hennings leaves, they will go out and recruit a replacement for Jim Hennings. When Jack Morris leaves, it seems to me to be different. Do we now have one of the partners, who steps in, takes over and buys out; or does the partnership go up for sale and somebody else steps in?
- 238 J. Morris I guess the way I envision it is – to kind of answer that scenario – if Jim drops dead on the way home today, there is a recruitment process that is going to take some time. There is an application process that is going to take some time. If I drop dead walking down the steps of the courthouse, I have got three guys who can pick up the ball tomorrow. That is the way I see it.
- 243 S. McCrea It is really a philosophical question that we have talked about previously: that is, who is our contract with? Is our contract with the person or with an entity because whoever signs the contract is doing so on behalf of the firm, right?
- 249 J. Morris Right.
- 250 S. McCrea So it comes down, I think, to a philosophical question for the Commission. Are we going to insist that the entity be the same entity that we contracted with, or is it up to that entity to fill the requirements of the contract? I am not claiming that I have an answer to this, but this is what we went through with some of those other contracts that we have dealt with at our last meeting. I'm not sure how far involved with our providers we need to or should get.
- 258 Chair Ellis Jack, the answer to that is you have been doing this for 16 years and there is not a whole lot of indication of instability here. I am sure you will give us indications if there are going to be some major shift, and then we will just have deal with it. One of the largest assets your firm has is the goodwill and the relationships you have with us. If things take any wild or drastic turns, then we will have to look at what we do.
- 267 J. Morris I would agree with that.
- 268 Chair Ellis I am interested in the fact that to practice at the level you do there is a fair amount of capital investment required. I am sure you have computer systems. I gather that such an asset is essentially yours?
- 274 J. Morris John is also a part owner as well.

- 276 Chair Ellis That creates its own complication when we get to transition.
- 278 J. Morris Are you asking for a bequest in my will or something?
- 278 Chair Ellis No, I am just stating an observation and will leave it at that. Any other questions for Jack?
- 280 J. Brown Judge Hull reminded me of the days many years ago when I thought I had an impact on the criminal justice culture in a county. A couple of years we went in that county and, as far as I could see, there wasn't a trace of it left. I think as we look at building on the effort and energies of folks that have gone before us – Barnes and the study group he chaired and all of that – it seems to me that part of what we have to be looking at is how do we imbue a statewide system with persisting values? I would be curious about your thoughts, now or in the future, about how you see what is going on here and how in your absence you would have a sense that, when there was an issue of a client that thought he or she got less than a real defense – and we are all very, very mindful of how many of those complaints are groundless and one of the things that a client gets told is go to the law library and file a complaint against your lawyer – in terms of the quality of services, how in a small operation there can be a feeling of both comfort and candor in terms of whether people are free to tell the leadership that the services aren't quite what they should be, especially in a small community. How do you stay in touch with community values? What I am leading up to is, when we look at the model that has the board of directors outside the organization that represents different interests in a community, or even an advocacy of different parts of a community, how does that sustain itself when you are gone?
- 326 J. Morris I don't think by any means that I am not irreplaceable, particularly with the other partners that I have. I am just really, really valuable, but not irreplaceable. I think again, if I were to leave tomorrow for some reason, I think they would pick up where I left off. And I think that is a certainty because, if you have a good practice and do things the right way, I think that carries over. Again, I guess the thing that I can point to is that I got my legal education, and John did to some extent too, at the PD's office where things were done a certain way. You can find pieces of Jim Hennings all over my office in the way that we do things. From our team approach with staff to just the way we feel about clients. I think there is a carryover and I think that, when you have a positive culture in the office that it can't help but carry over. I'm not sure if that actually answers your question.
- 345 J. Brown I think I am sort of answering with your help my own question – that a culture is created and maintained by associations, through relationships. By selecting people that you are comfortable working with, you have confidence that you have the capacity, talent and commitment and the same kind of values. Maybe that is enough of an answer. If the leadership of your firm got wiped with one drunk driver – maybe we will all agree not to travel again, but Barnes is in the will so it is covered – then maybe the staff works closely with a successor, try to remind them of the way it used to be and trust for the future, rather than look to an institutional thing.
- 362 J. Morris Well, I think the relationships that we have in the office and the fact that we share the same values will carry over. I think that is more effective than any outside influence. We know what the day-to-day thing is and I think that is what is important. More importantly perhaps, we know what the attitude is.

- 371 S. McCrea I have a question as part of the scenario of wiping out the firm. What I want to ask you about, Jack, is what Jim is talking about: imbuing values. One of things that you talked about here today is your concern about being able to attract applicants and good people to the firm. I am looking at the response that you made on page five of the questions that we gave you. You said: “We have found over the years that, while an opening in the firm may attract a number of applicants, many of those applicants are applying simply because they need a job and have been unsuccessful in finding one.” You go on to talk about looking for people who have an interest in criminal law –
- 385 J. Morris A demonstrated interest –
- 387 S. McCrea Is it getting harder to find those people; is that what I am correct in inferring from what you have written?
- 389 J. Morris Absolutely, it is much harder. As I said before, ten years ago if we ran an ad, we would get 40 or 50 responses. Now we typically get less than 10. Things have changed dramatically, and I think there is a natural assumption to think that it is all money. Money is a big part of the issue, but it is not all money. Law school, back when some of us went, was sort of a culture in itself for people that had a commitment to ideas. I am painting with too broad of a brush but, just for purposes of looking at it, it seems to me that it is much more of a substitute anymore for an MBA. Those same social values aren’t there to the same degree. There has been a huge drop off in interest in doing criminal defense. I think what John [Sewell] was saying is that there has been a huge drop off in interest in criminal practice period. But it has been more extreme on the defense side.
- 405 S. McCrea So what can you suggest to us that we can do? Obviously, money would be one thing. Are there any other suggestions you can give as to how the Commission can attempt to generate interest in criminal defense?
- 410 J. Morris I think programs like the program at Lane County Public Defender are good. The Certified Law Student Program that Jim has at his office is good. But I think the reality is that you can try to come up with a lot of different ideas to stir up interest; but really, to a large degree, that interest is either there or it is not. What you are left with, and I think it is just a fact, is a much smaller pool of applicants. And you cannot afford to have a situation where those applicants who are interested cannot accept jobs for monetary reasons. I think that is what is happening. We have a much smaller pool of applicants and some of those folks, based on the stories that I hear, have student loan balances that are just frightening. They are like house mortgages and they can’t go to work for \$37,000 or \$38,000 a year. They shouldn’t have to. Indigent defense will always be under-funded. That is just the nature of the beast. But it has always been subsidized by idealism and that idealism, for the most part, is gone. For those few people that are left, there is going to have to be a monetary situation where they can join in, and it is just as imbalanced now as it ever was. I heard from a good source that one of the district attorney offices in Central Oregon is starting people right out of law school at \$60,000 a year. I know people who have been doing criminal defense for 20 years that aren’t making that.
- 437 C. Lazenby I think there is another unspoken piece that I know I experienced early in my career when I tried to make the transition out of being a criminal defense lawyer into doing other kinds of law. It was much more pronounced twenty years ago when I was doing that, but it still exists. There is just this sense that, if you choose to do criminal defense, then there is either something inadequate about your skills as a lawyer or you have inadequate values to make the transition. I

have seen other criminal lawyers in Portland having a difficult time making a transition out of criminal defense into other kinds of litigation. They almost end up trapped there. That is a little inarticulate, and I see the Chief Justice shaking his head, because I know he made that transition. But I think you are probably the exception rather than the rule. I have watched a lot of criminal lawyers in Portland, young criminal lawyers, struggle to get out of that field. It is sort of unspoken, but there is this resistance to them migrating over to places where maybe they can make more money. Out of the prosecutor's office, I have seen prosecutors that I started out practicing with easily make the migration over to insurance defense, and then on to other more lucrative types of civil work. I think that is unsaid, but I think the law students and younger lawyers coming out of schools feel that. It is a resistance for them going into this practice as a career path.

- 461 J. Morris I agree with all of that. I also think there has always been an attitude on some fronts that, if you make the choice to do criminal defense, then you should be prepared to make a sacrifice. Why should we have to make a sacrifice if want to do criminal defense? Why should I get paid \$40 an hour doing criminal defense, when the guy that cleans my drain from Roto Rooter makes \$80? It doesn't make any sense. We shouldn't be expected to make that sacrifice. We make sacrifices in terms of our families, time with them and our emotional and mental health. We make enough sacrifices as it is without having to make monetary ones.
- 473 Chair Ellis Do you have good relationships with your legislators?
- 475 J. Morris I can't honestly say that. I have been involved in a number of things on the state level.
- 482 Chair Ellis Other questions for Jack?
- 483 J. Potter Are we brainstorming here a little bit?
- 483 Chair Ellis I thought we were philosophizing and we were doing estate planning. We were doing virtually everything.
- 484 J. Potter I want to get into the will too. Jack, you had mentioned that maybe what you are doing should be a model for the system and that we should use your model around the state in other places. Take that a little bit further. Do you think it would be constructive to have the legislature allow public defense or public defenders to do retained work and still maintain a non-profit status, so that they can –
- 499 J. Morris That wouldn't be possible if they were a non-profit.
- 500 J. Potter But if you could change the way that it was defined, would you advocate for a system that did allow public defense to move to a model like you have? You would have Jim Hennings' office doing what they are doing, except they could take up to 11 percent of privately retained work, thereby paying their people more and letting the legislature off the hook.
- 510 J. Morris I don't think that would work in a number of respects. One, the first that comes to mind is the size of the office. I just don't think, as a practical matter, it would work. The beginning of your question, would it be political suicide? I can't answer a hypothetical involving non-profits because that is pretty far-fetched. But would I advocate that something like my firm be copied and would that be

political suicide? I don't think so at all. I think it could be presented as: "We can pay these people enough because indigent defense is under-funded. We have to give them and we want to give them the opportunity to have at least a small part of their caseload at the going market rate." If you use the \$40 figure – and I realize we are not using that a whole bunch around the state anymore – then that is 20 or 25 cents on the dollar. I think the system that we have set up works, and I think it works well. Can you apply it to Lane County Public Defender? No. Can you apply it Jim's shop? No. If it can be presented the right way, and the right way is saying that we can't pay these people enough and they have got to be allowed to make a living some other way.

- 534 Chair Ellis What percent of your personal time is spent on direct lawyering versus management? How do you divide your time?
- 538 J. Morris All seven of the attorneys, including myself, has a full caseload.
- 542 Chair Ellis The management that you do?
- 542 J. Morris I do that in my spare time.
- 545 Chair Ellis I think it is pretty obvious that one of the talents you have brought to this process is management skills that not every lawyer has.
- 547 J. Morris I have never been accused of that before.
- 548 Chair Ellis This is an important day in your life. Anything else? Thanks a lot.
- 551 J. Morris Thank you very much.
- 551 P. Ozanne Barnes, there are a number of people here I think the Commission would like to hear from.
- [Tape 3; Side A]
- 001 P. Ozanne Tom Cutsforth has come here from Wheeler County.
- 004 T. Cutsforth I hate following Jack because he is so astute and has so much experience in this area, that he is so hard to follow. Mr. De Muniz, Your Honor, and others – I think I met Mr. Potter somewhere because he looks familiar -- but the rest of you I have no clue. Mr. Lazenby I have heard your name, but I don't believe I have ever met you.
- 009 P. Ozanne Well, we can go down the line and provide introductions.
- 010 J. Brown Jim Brown, I am a lawyer out of Salem.
- 010 Chair Ellis Barnes Ellis, nice to see you.
- 010 S. McCrea Shaun McCrea, based out of Eugene.
- 011 J. Potter John Potter from the Oregon Criminal Defense Lawyers Association.
- 012 T. Cutsforth And Justice De Muniz. I'm Tom Cutsforth and I am one of three part-time attorneys in the State of Oregon – or at least we are called part-time, although none of us carry a private practice now because we don't have time – to serve as a district attorney. I think I may be preaching to the choir here. I have already

heard all of the things that I was really going to talk about. And even though the \$40 per hour that Jack said wasn't used around the state much, I know we are using that figure, and it is insane. If you use that figure, and let's say you can bill eight hours a day – and we all know better than that; you are not going to bill \$40 an hour for eight hours a day – you make \$1,600, \$6,400 a month and \$76,800 a year. And guess what? That is \$2,000 less than John Sewell makes and John Sewell's secretary is paid for and his office is paid for –

- 022 Chair Ellis I was going to say, you hadn't talked about overhead yet.
- 023 T. Cutsforth All of his overhead is covered and his medical benefits are paid for. This guy, who just spent all of his time doing criminal law and made \$76,800, has to come up out-of-pocket for his secretary, for his office. It isn't right and, if there is anything I can do to support the defense bar and get that number changed, I am all for it.
- 027 Chair Ellis I understand you have been hard at work with Senator Wyden recently?
- 028 T. Cutsforth How do you know that?
- 029 Chair Ellis Well, I have my sources.
- 029 T. Cutsforth I have been trying to get some forgiveness for student loans because I know that these people are coming out of law school with a \$100,000 debt and they can't come work for us. They can't come to work for the district attorney. Not in my position. I only make \$53,000 and some change. In this part of the state, 15 years ago, I would say, was one of the most stable. If you were a DA in this part of the state, you were probably a lifer. Boy, has that changed. We have got a DA in Gilliam who came practically right out of law school without any trial experience and still has none or very little. We have a DA in Sherman County who has very little law practice and very little trial practice. In Grant County, you can't put a DA there and make them stick. In Morrow County, he gets a \$36,000 stipend and he has so much to do that he threw his hat out. He is gone and going back into private practice. You are paying them that. What about the poor defense attorneys?
- 041 Chair Ellis Is he going back to private practice there?
- 042 T. Cutsforth He is going back to the private practice there. He is going to take on the County Counsel, which is going to pay him a little more, and then he is going to do a private practice on the side.
- 044 Chair Ellis You describe yourself as a part-time prosecutor –
- 045 T. Cutsforth I did private family law practice for 10 years. I gave it up in 2000.
- 046 Chair Ellis How do you divide your time now?
- 046 T. Cutsforth Well, right now I am doing almost all criminal and county counsel work. Back when I was doing private practice, it was a very difficult. There were lots of conflicts because most people who I was representing either got beat because they were the woman or they were beating them because they were the man. Then I would have to prosecute one or the other. It just wasn't working because the conflicts were incredible. I didn't have a Chinese Wall or somebody else I could go to when the other offices became unstable. It would be like Jack having a serious murder case and turning it over to his new graduate from law

school, who is an associate. So I go to the AG. If you go to the AG, you lose your home court advantage. Now you have a Salem attorney and maybe John Olson shows up. You have a Salem attorney against somebody the jury might know. If you lose your home court advantage, you lose a lot of ground.

- 061 Chair Ellis We are obviously interested in the defense side. From your prospective, how would you describe the quality and adequacy of defense services in Wheeler County?
- 064 T. Cutsforth Okay, let me just back up a bit. I have been doing this for 19 years. I started in Lane County as a law student. I prosecuted Jesus Christ and John Lennon on the same day, at least that is who they said they were. But, of course, then they went to the mental hospital. They had a public defender there and it was a meat grinder. Then I went to work for Union County. What I did in Union County is they had a bunch of private attorneys that had a law practice, and they would just go down a list and pick one. They did it that way and sometimes you got good services and sometimes you got bad, and it just wasn't necessarily their main area of practice. They weren't necessarily really experienced in that area. When I came here, except for maybe two occasions when they threw somebody brand new at me, and I know it wasn't intentional and they didn't last long, I have been very, very pleased with the people that show up for criminal defense. I feel that the defendant has his constitutional rights adequately represented and that the defendant has been adequately represented.
- 079 Chair Ellis How is it handled at the early stages in the less populous county where you have remote providers?
- 080 T. Cutsforth Well, it is a problem. I run two justice of the peace courts and neither one of the justice of the peaces are attorneys. Gilliam County has one justice of the peace court and she is not an attorney. Sherman County has one and he is not an attorney either. Then I also have a juvenile judge who is not attorney. He is my county judge; same in Sherman County and in Gilliam County. So you end up in the original proceedings with no attorney except me on those cases. On circuit court cases, if I get lucky and I happen to already have somebody on the docket so that John is out there – and he is good about coming out there; it is 110 miles from here – I am lucky, and then we can get that case rolling. If not, we are stopped. “I want an attorney here.” “Fill out the form.” A month later we are back for a re-arraignment with an attorney. So now we have already lost a month. Then a month later, we do an entry of plea. The case is three months old now. The victim isn't interested in the case. Age is not good for the prosecutor and the victim; and the defendant may be in Mitchell and Mitchell is 160 miles from here. So the ability for attorneys to contact their clients is difficult. They do well, considering the hurdles they have to get over.
- 100 Chair Ellis What advice do you have for us as to how we should be looking at the Eastern Oregon low population counties?
- 102 T. Cutsforth I think what I see with Jack Morris and his law firm is they have done and handled what the legislature thought they would do. They should be allowed to do criminal practice as a public provider and then carry a private caseload on the side to make up the difference. The reality of the situation is, I wish our crime rates hadn't gone up, but they have gone up tremendously over the last 15 years. I have been the district attorney in Wheeler County for 16 years now.
- 109 Chair Ellis Is that all drugs?

- 109 T. Cutsforth It is drugs, domestic violence, sex offenses that you wouldn't believe could happen in small communities. And it is transients that are going through mainly for drugs. But in that entire 16 years the defense attorneys' rates have remained the same. I don't know how they drive and make it work, unless they subsidize the practice. I use to subsidize mine that way, until it got to the point where I just couldn't handle it anymore. I don't know whether Jack will burnout on his core group, but they at least have the ability to say "I would like to go to Hawaii for a week." If I go to Hawaii for a week and I come back, everything that happened that week is right in the middle of my desk. If somebody was in custody in front of John and has to be arraigned in 24 or 48 hours, good luck. They have to release them, unless they can get a hold of me and do it by telephone. We do a lot of telephone work and, with this video thing, I have seen more of the judges in the last two months since they put that in than I had in the last five years. I don't know whether that is good or bad, but that is how it is. The video thing has really helped and I want to thank Chuck Wall for that. I don't know why, and maybe it is not in the court budget, to set up one of those in a room where the defense can use it, and then I could just leave the room. The defendant is in the room, so they can have a face-to-face over this couple of miles, so that John doesn't have to drive. I don't just mean John either, because Mr. Hashizume drives out there and he has volunteered to do some of our juvenile cases; which is wonderful because we have to appoint those straight out of the bar book. John comes and does one of those for \$40 an hour, I can't believe he would do that, but he does sometimes. That should be pro bono. He should get a big plus for pro bono because that is what that is for him. It is outside the contract for \$40 an hour. Like you said, you can't get the Roto Rooter man for \$40 an hour. I think what Jack has is working. I just hope he doesn't burn out a bunch of his people. I hope they can get some money for this because it is a mess.
- 141 Chair Ellis Well we have already decided to take out a new life insurance policy. Any other questions for Tom?
- 144 T. Cutsforth Somebody was talking about wages and I brought a list of all the entry level deputy district attorneys for the State of Oregon. I brought how many deputies each county has and also how much they pay the office managers, which exceeds my salary. Thank you.
- 149 Chair Ellis They don't have the prestige that you have.
- 150 T. Cutsforth Oh, prestige, that is what I have. I'm all for that. There are only three pay scales for the elected DA's. One is roughly \$54,000. The other is \$78,000, and the last is \$92,000. They are subsidized variously by various counties.
- 155 Chair Ellis Is Senator Wyden ready to help us get relief on the student debt?
- 156 T. Cutsforth Yes, he is ready to push that one.
- 157 Chair Ellis We're ready to push him. We'll tell him you said that.
- 159 T. Cutsforth Good.
- 161 P. Ozanne Tom, thank you for traveling all this way.
- 161 T. Cutsforth You're welcome. Thank you for having me.

- 165 Judge Kelly My name is John Kelly and I am one of the four judges in the district. I can't tell you how much I hate being a witness.
- 168 Chair Ellis I can't tell you how much we enjoy being judges.
- 169 Judge Kelly I came without remarks, but I am happy to answer your questions.
- 171 Chair Ellis Maybe you can give us an idea of how Wasco County varies from Hood River?
- 172 Judge Kelly It is prettier. Very little, I would guess. I think the spread is a little broader here. There are more secondary contractors, and I'm not sure if that is even the appropriate term. We all have the same primary contractor, Morris Olson Smith & Starnes. We in Wasco County then go to a secondary contractor, which is the Wasco/Sherman Indigent Defense Corporation and Mr. Hashizume primarily the attorney there. It has been other folks over the years. Then we just start looking around to see who will do the indigent defense work. In The Dalles itself, there are only three or four other lawyers who are willing to take appointments. We often go to them looking for a lawyer and, when that fails, we are off to Portland, Salem or wherever we can find somebody.
- 186 Chair Ellis How often does it happen that the two principal providers either are conflicted or for some reason not available?
- 188 Judge Kelly Daily to weekly we are looking for a third lawyer where there are co-defendant and conflicts. The inability to find someone for a single defendant, that doesn't happen very often. When it tends to happen, conflicts seem to be greater for both. So the more difficult the defendant and the more difficult the case, I think the more likely you are to find a conflict. But that doesn't happen very often. I would guess a few times a year where we are actually going further than Hood River to find a lawyer. I am not sure I addressed your question.
- 198 Chair Ellis Well, you are close to it. When you say a few times a year we are talking five times?
- 199 Judge Kelly I would think that is a fair guess. I don't have a number, but I could probably get you a number.
- 201 Chair Ellis It is almost always in the multiple-defendant case category?
- 201 Judge Kelly To go further than Hood River? No, I would say it is mostly in the type of the case, especially if Morris Olson has had a conflict, a significant Measure 11 case, a murder case or a extraordinarily difficult defendant case; that tends to be when we have to go further.
- 207 Chair Ellis The latter group you are talking about are defendants that reject their lawyers?
- 207 Judge Kelly Turn them into the Bar. I may be wrong about this, but my experience is that an affidavit of prejudice against your lawyer is a conflict because you can't stay on the case with that.
- 211 Chair Ellis Have you had many instances where you have had to have substitutions part-way through the prosecution?
- 213 Judge Kelly Yes, less than 10 percent of the time.
- 213 Chair Ellis I would hope so.

- 214 Judge Kelly Sure, defendants will dislike lawyers and all of a sudden – and I’ll pick Jack because he is here – everybody will decide, and it gets round our local jail, that Jack is not the guy you want. So all of a sudden everybody wants a new lawyer. We are not required to let lawyers out simply because a defendant doesn’t like that particular person. But eventually, that reaches the point where the lawyer wants out and, generally, when the lawyer asks to be excused, it is allowed.
- 230 Chair Ellis How you would describe the communication between the court and defense counsel? We have been in some communities where that is not going well.
- 233 Judge Kelly My sense is it is good. Now, if I left the room and you asked the defense lawyers, you might hear a very different story. Now let me ask you a question that will probably give you a better answer. What do you mean by communication?
- 236 Chair Ellis We have had some instances where lawyers are not appearing on a timely basis and there are defaults on cases.
- 240 Judge Kelly We have that problem and I will begin that by saying, when I look around the room, I don’t see anybody in this room who I have that problem with. There are certain lawyers who are chronically late, not only by not being to court on time, but by not making pleadings on time and not seeing their clients on time. That is a problem. It tends to be a greater problem the further you go from the contractor defense lawyers, like Morris Olson or Wasco/Sherman. Generally speaking, I think we have a fairly decent relationship between the judges and the defense bar. One of the characteristics of being a judge is everybody tells you you are funny and wise. They never tell you how poorly you are doing. So we may not be doing as well as we think, but it seems okay.
- 256 Chair Ellis Other questions for Judge Kelly?
- 256 P. Ozanne I don’t suppose the Commission knows this fact but I understand that you do most of the juvenile work in Wasco County. We have found, though we haven’t found anything like this in your county, around the state that the quality of juvenile practice varies. While there are many able lawyers, sometimes there is an attitude that you take juvenile cases because you have to or, when you become a “real lawyer” you will leave this practice and become a criminal defense lawyer. How do you feel about the quality of work in your court?
- 266 Judge Kelly It is very high. There are primarily three groups of lawyers that we are using for juvenile work. Morris Olson usually gets one of the parents. The Wasco/Sherman group gets the other parent and Jennifer Hinman gets the child. That is the way we have worked it lately. I don’t see any problem with the level of service and the level of dedication. It is very different because it is less technical. There is less procedure and tends to be less motion practice and usually a faster time limit. In dependency cases, we are federally mandated to get things done at a certain speed. The lawyers that I am dealing with have a really good sense of significant differences between what juveniles need and what adults need and what resources are available. I am really pleased with what I see in the court.
- 291 C. Lazenby You mentioned the further you get away from the established firms that there was chronic lateness. Are those lawyers compensated by our system?

- 294 Judge Kelly Yes, and I don't mean this as a criticism of indigent defense. But retained lawyers are usually punctual. Yes, these are lawyers who are being paid on the indigent defense budget. In small communities, I don't think it is any surprise that lawyers are a limited resource and lawyers who are willing to do criminal defense are a really limited resource. People who have done trial work for years and years don't want to do criminal defense. I'm sure that is no surprise to you. They don't want appointed criminal defense and, if you have your choice of working for a guy who is middle class and has a good income and kids like yours, and went to schools like you did, or working for some crack addict out of a trailer park, you will favor the middle class client even if the money is the same.
- 314 Chair Ellis When you have that experience, do you know how to find us and let us know that is happening?
- 315 Judge Kelly Well the honest answer is "no." I am aware of your existence.
- 318 Chair Ellis Peter give him a card. That is an invitation to let us know.
- 318 Judge Kelly I will, but let me tell you what my reservations might be about that. I am talking probably about a group of three to five individual lawyers. It is a small community and, if all of sudden I don't have those three to five individual people available, I don't know where I would go next. Then I would have to get a lawyer from Hood River and, frankly, Hood River lawyers never get the nice cases. They get the dogs and usually the mean dogs too. They burn out and they don't want to drive to The Dalles, if they can stay in Hood River. So then I have to go to Portland probably. That would be the next closest lawyer, and that creates more problems than having a lawyer that is late from my point of my view. But I'll call.
- 342 J. Brown Speaking totally for myself, one of things we have struggled with, in terms of dealing with the legislature and seeking adequate funding for indigent defense, is from time-to-time there have been statements made that have been derogatory about indigent defense. Some relate to inappropriate use of funding and excessive or unneeded experts. Believe it or not, there are actually people in the political community that enjoy being critical of the indigent defense function. I am sure that is a shock and is appalling. But when we express a concern about lawyers being punctual and the like, it is from that kind of perspective, again not speaking for the Commission.
- 358 Judge Kelly I don't mean to make light of it. Obviously, it is unprofessional to not show up on time and not file pleadings on time. I try not to give folks a free pass on that. These folks are underpaid, making \$40 an hour. My primary practice 20 years ago was criminal defense, and I think then I was making \$40 an hour. It is a bargain. Experts can be used and they probably are overused at times.
- 378 P. Ozanne Judge, what you identified poses the same problem for us when you call Kathryn or me and ask for a solution. We are faced with the same shortage of lawyers that you identified. It is a supply issue again and, of course, that is related to inadequate defense funding. I have learned over the three years I have been here that, when I see unacceptable lawyering from time-to-time and I say, "This has got to end," Kathryn or someone else on our staff says "There is no alternative!" So I certainly appreciate your perspective. And we can't magically create a new supply of lawyers in the district when you call us.

- 388 Judge Kelly Let me back up one step. The fact that some lawyers are late or not punctual, actually, they are pretty good advocates for their clients. They know the law, they know the facts and they do a good job. I don't want to leave the impression that these people aren't good lawyers. That isn't fair to them.
- 396 Chair Ellis Thank you very much for driving over here. Let's take about a 10 minute break.
[Break at 2:45 p.m.]
- 403 Chair Ellis [The meeting was called back to order at 2:55 p.m.] The Chief Justice said he wanted to meet with some of the court staff people, so that is why he will not be here for the rest of our session.
- 407 P. Ozanne Kevin, do you want to come up, and your colleague too?
- 416 Chair Ellis Welcome. Maybe you can tell us a little bit about yourself and your background.
- 417 K. Hashizume My name is Kevin Hashizume and I'm not sure how I got in charge of Wasco/Sherman Indigent Defense Consortium. I think it is because the other attorneys left and I was the one that was left at that point in time. Prior to that, my first job was working with Jack Morris, doing work in The Dalles. After a little bit of time, I went off and started working for Meredith Van Valkenberg. At that point in time, one of the attorneys that was working there had just left and gone to the district attorney's office in Wasco County and was working there as a deputy district attorney. Shortly thereafter, one of the other partners left and went down to California.
- 433 Chair Ellis So how many years have you been in practice?
- 433 K. Hashizume Since October of 1999; so maybe five or six years, somewhere around there.
- 435 Chair Ellis How many of those were with Jack?
- 436 K. Hashizume Right around a year or maybe a little less.
- 439 Chair Ellis Describe where you are now?
- 439 K. Hashizume When I went to Meredith Van Valkenberg's office, part of what their work was involved in a share of Wasco/Sherman Indigent Defense. Wasco/Sherman Indigent Defense is a separate corporation that has the contract with the state to provide public defense services when Morris Olson has a conflict. In the past, that was made up of a lot of different attorneys from different firms. When I first went to Van's office, there was basically Van's office and one other office. Andy Carter worked there. He took half of the contract and our office took half of the contract. In the past, it had been split up among other offices as well. About a little over a year ago, Andy decided it was no longer financially feasible for him to keep the contract and he wanted out. Right around that time, I had actually left Van's office and gone out on my own. So for a short time, we were splitting up the contract work with my own office, Van's office and Andy Carter's office. I ended up going back to Van's office to help out and Andy left the contract. Now, Van's office is the only office that is taking any cases from Wasco/Sherman Indigent Defense. We have tried approaching some of the other attorneys in the community that take the hourly appointments, but none of them were interested.

466 Chair Ellis So you are functioning essentially as a two lawyer consortium?

471 K. Hashizume Yes, right now.

471 Chair Ellis You are the manager?

471 K. Hashizume Yes, I ended up with that.

473 Chair Ellis What percentage of your personal time is spent on this? 100 percent?

476 K. Hashizume I would say probably 60 percent of my time.

477 Chair Ellis The other 40 percent is private?

477 K. Hashizume I am one of the only people that will take the cases in the municipal court in The Dalles. That probably takes up another 10 or 20 percent of my time. The remainder of it is private retained work.

482 Chair Ellis How is the municipal court funded?

482 K. Hashizume It is out of the city's budget and they pay us \$40 an hour.

486 J. Potter Private retained criminal work?

486 K. Hashizume No civil.

487 Chair Ellis How are you able to keep current from a CLE point-of-view.

489 K. Hashizume I let my membership in the OCDLA lapse. Then about a year ago, I got back on again and am starting to go to the seminars again. In the meantime, I subscribe to the newsletters to get the updates on criminal law. Van's office has a season ticket for the State Bar CLEs, so we go to those CLEs; although, granted, there are very few of them that have anything to do with criminal law.

499 Chair Ellis One of the things we have been talking about with Jack and others is the difference between a public defender structure and a private firm structure. The PD model, certainly it's true with Metro and Lane County and I believe it is true with the other PDs, that they often will share their resources with the other practitioners. How does that work here?

509 K. Hashizume Whenever I have an issue that I wasn't familiar with or I felt another attorney had more experience with, the attorneys in The Dalles office of Morris Olson have always been very welcoming to me when I have questions. Other attorneys in private practice have also always been willing to assist me as well, when I hit a point that I don't know the answer.

517 Chair Ellis Given your experience, which is good but not as much as some others, the cases you end up doing, do you feel comfortable doing?

522 K. Hashizume I feel comfortable because, through the years, whether I liked it or not, I ended up involved in cases. I think it was real early on and it was a retained case, I ended up with Meredith Van Valkenberg co-counseling a kidnapping, robbery and a few other charges out in Pendleton. I think it was second or third year and I was assisting at the trial. When I was at Morris Olson, right away I jumped in with both feet doing trials in the first month. I think all along I have always been used to having to try cases and kind of learn on the run and ask a lot of

questions. Quite honestly, Mr. Van Valkenberg doesn't do a lot of criminal law anymore. In the past, he did work for the district attorney's office and he did do criminal defense work. Judge Kelly used to be one of the partners as well. The office has always done a certain extent of criminal defense work. But when I needed moral assistance or somebody to sit there with me and help me with clients, he has always been willing to do that. And he has been very good about working through personality problems, when one develops between a client and myself.

- 556 Chair Ellis Did you grow up in the area?
- 556 K. Hashizume I grew up in Los Angeles.
- 558 Chair Ellis When did you move to the Northwest?
- 559 K. Hashizume I moved to Portland after I finished law school and took the Bar and then I happened to really like the way the Gorge looked.
- 564 Chair Ellis Other questions?
- 567 K. Hashizume One of things, and I am very new to this idea and process of meeting with all of you, but I did find the initial report – I guess it wasn't everything I would have liked for it to say about us. But at the same time, I appreciate seeing the comments and I was going to talk to Peter more about it in the next week. After seeing the report, one of the things I did today was I saw that there were some concerns, so I went ahead and made phone calls to both of our local judges to see if I could sit down and find out what their concerns are explicitly, and then figure out how we can try to address them.
- 579 Chair Ellis We have actually had the experience in two or three communities that it helps to have us come to a county. I think it gets people talking.
- 585 K. Hashizume The court has been good because they have had some concerns in the past about certain things. They brought it to my attention and I have tried to address them. I think there has always been a very comfortable and open relationship there. I have always been very open to listening to what they are trying to implement. I have been trying to work very closely with the court when there are areas of concern.
- 601 Chair Ellis We would obviously continue to encourage you in that direction. Any other questions? Thank you very much. We appreciate it.
- 609 B. Aaron I am one of the lawyers that is doing the conflicts contract; and is transitioning out, primarily because of the money. I have hired a new associate and I am embarrassed to tell you what I am paying her right now. I would really like to be able to go back to my office and tell my staff that she is getting a raise. I can't do that. It is driving me out right now. My retirement plan is to work until I die because that is what I am going to do.
- 624 Chair Ellis Give me a little of your history.
- 627 B. Aaron I was born in Southern California. When I was very young, I moved to a town that was smaller than Hood River, so I have always wanted to live in a rural area. I went to law school in the Bay Area at Santa Clara and did undergraduate there as well. My first job was with the Metropolitan Public Defender. I worked there just about two years starting in 1990. Then, in 1992, I came out

here and worked briefly with Jack Morris' office. In 1993, I hung out my own shingle and contracted with the state to do conflicts and have been doing that ever since.

- 641 Chair Ellis So currently you are in private practice here in Hood River with one associate. What percentage of your work is indigent defense?
- 645 B. Aaron For about the first six years of my practice, I had an associate with me at the time, but I was doing strictly contract work or privately retained criminal work. You get by on it. The \$70,000 would be fine, if I didn't have an office and support staff. I was doing predominantly criminal defense work. I dabbled in a little bit of domestic relations, but my heart was with criminal defense and I am sad that I am leaving it now. I am transitioning out if it.
- 663 Chair Ellis What will you transition to? Will it be predominantly retained criminal?
- 666 B. Aaron I will still be doing retained criminal, but the associate I was working with most recently, before I hired Sherri here, did the civil end of the practice. He went out on his own and many of those cases stayed at my office. So I am going to be focusing on the civil end. Working at the contract rate of \$320 per case, or even outside the contract at \$40 an hour, I look at that and say, "I could be doing that, but I can make \$150 to \$200 in civil." I would rather stay doing criminal work, if you guys give me some more money.
- 692 Chair Ellis Don't be surprised if we use you as an example of what the state is facing?
- 697 J. Potter Brian, is your associate going to be doing court-appointed criminal work?
- 699 B. Aaron Yes she will. She is an '05 graduate, and right now she is handling some juvenile and some misdemeanors. I also have her doing some court appointments. I have her signed up for some CLEs coming up. I have to echo what Jack says and that is, if she wasn't there asking questions every day, I would be very concerned. She has been real good about asking questions.
- 718 Chair Ellis Will she do that as an associate for you? So your firm will still be taking the cases. Who is taking the work?
- 722 B. Aaron For the next year, I will be transitioning out of my caseload.
- [Tape 3; Side B]
- 002 B. Aaron What I am reading is there is a problem with some of the conflict attorneys and you are not getting the quality of attorneys. There were some attorneys here in town that quit taking court-appointed work because why would they continue at \$40 an hour work when there is \$150 an hour work out there? You are losing money to do that. What you should probably do is set up a consortium, where there is a group of attorneys who are doing criminal work and, where there is a minimum requirement, have standards set and then pay them a decent amount of money to come in and take these cases.
- 011 C. Lazenby I don't want to put you on the spot, but I will. Earlier, Tom Cutsforth was talking about the possibility of a federal program, and he didn't flesh it out. But it sounded like Americorp for law students. Basically, they would get some sort of federal compensation to cover their law school debt in exchange for working in the criminal field either on the defense side or the prosecution side. On the

defense side what concerns me about that idea is the supervision piece. Do you think that practitioners such as yourself, that is where I get you off the spot, practitioners such as yourself would be willing to sort of pro bono supervise those law students or would you want to be compensated for supervising them and teaching them the ropes.

- 021 B. Aaron We do that pro bono as it is. Of course we would love to get compensated for that. I know Jim has offered his office to new attorneys coming to train them. If there could be compensation for it then yes and I am certainly more than willing to answer any questions. Jack's office has always been very good about that. When I have had questions his attorneys have always had an open-door policy that I can call them and ask them questions and I think most people that do criminal defense are that way. I think you can go to the bigger public defender's offices and get the mentoring and training there.
- 031 C. Lazenby I think I just saw Greg volunteer.
- 031 B. Aaron The philosophy has been changing as noted earlier. I think there are more recent grads coming out and I don't know whether it is television or what it is the philosophy now that they want to be prosecutors. Twenty or thirty years ago it would have been public defenders. I think some sort of forgiveness program, and I don't know what pull you have, but it would certainly be beneficial to talking to state law schools about some sort of program for them to forgive student loans.
- 037 Chair Ellis Thank you very much.
- 037 B. Aaron Thank you folks for being here.