

**Members**

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



**Ex-Officio Member**

Chief Justice Thomas Balmer

**Executive Director**

Nancy Cozine

**PUBLIC DEFENSE SERVICES COMMISSION**

Thursday, December 10, 2015  
1:30 p.m. – 4:30 p.m.  
Mercy Corps  
45 SW Ankeny Street  
Portland, Oregon, 97204

**MEETING AGENDA**

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|--|-------------------|
| 1. <b>Action Item:</b> Approval of minutes - PDSC meeting held on October 23, 2015 ( <i>Attachment 1</i> )   | Chair Ellis       |
| 2. <b>Action Item:</b> Approval of Updated PDSC Schedule of Compensation effective 1/1/16 ( <i>Attachment 2</i> )  | Caroline Meyer    |
| 3. <b>Action Item:</b> Approval of contract adjustments ( <i>Attachment 3</i> )  | Caroline Meyer    |
| 4. <b>Action Item:</b> Washington County Service Delivery Review - Final Report ( <i>Attachment 4</i> )  | Paul Levy         |
| 5. PDSC 2013-15 Biennial Report to the Legislature ( <i>Attachment 5</i> )   | Nancy Cozine      |
| 6. OPDS Monthly Report <ul style="list-style-type: none"> <li>• Appellate Update</li> <li>• November Legislative Days</li> <li>• Juvenile Dependency Task Force</li> <li>• Executive Director Annual Review</li> </ul> | OPDS Staff        |
| 7. Thank you to Barnes Ellis   | Vice-Chair McCrea |
| 8. Strategic Planning – Commission Perspective   | Geoff Guilfooy    |

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

***Next meeting: January 21, 2016, 10 a.m. – 2 p.m., at the Office of Public Defense Services, Salem, Oregon. Meeting dates, times, and locations are subject to change; dates are posted at: <http://www.oregon.gov/OPDS/PDSCagendas.page>***

# Attachment 1

PUBLIC DEFENSE SERVICES COMMISSION

OFFICIAL MINUTES

Friday, October 23, 2015  
1:00 p.m. – 4:00 p.m.  
Sunriver Resort  
17600 Center Drive  
Sunriver, Oregon 97707

MEMBERS PRESENT: Barnes Ellis  
John Potter  
Per Ramsfjord  
Shaun McCrea  
Janet Stevens

STAFF PRESENT: Paul Levy  
Amy Miller  
Caroline Meyer  
Billy Strehlow  
Angelique Bowers  
Ernest Lannet  
Shannon Storey  
Cynthia Gregory  
Josh Crowther  
Ingrid MacFarlane

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The meeting was called to order at 1:00 p.m.

**Agenda Item No. 1 Approval of Minutes—PDSC meeting held on September 17, 2015**

**MOTION:** Commissioner Ramsfjord moved to approve the minutes; Vice-Chair McCrea seconded the motion; hearing no objection the motion carried: **VOTE:** 5-0

**Agenda Item No. 2 Strategic Planning Regional Reports**

Chair Ellis introduced Geoff Guilfooy, noting that he previously served as a consultant in connection with the creation of the Commission and the Office of Public Defense Services. Mr. Guilfooy described his role in the creation of a new strategic plan for the Commission. He said the plan would serve as a roadmap for the next four years. It will be created by first conducting what is called an environmental scan, which looks at the major issues that are likely to impact public defense in the next three to five years. This phase of the project is conducted by getting input from system stakeholders, some of which just occurred prior to the Commission meeting in facilitated meetings of public defense providers from around the state, the results of which will be reported to the Commission. The second phase of the project will involve discussions with OPDS and the Commission about, given what is learned in the environmental scan, how best to deal with the emerging issues. The third phase will involve goal setting for what needs to be accomplished in terms of budgets and capacity

within OPDS, the Commission, and the provider community. Mr. Guilfooy said meetings with OPDS staff will occur in November, and discussion with the Commission will begin with its December meeting. He then explained that the Commission would hear reports from four regional meetings, where the questions presented were: What changes do you anticipate in your operations because of developments in the law and developments in performance standards? What challenges will you also be facing in terms of how you provide quality services for the next three to five years? How can PDSC and OPDS better support us as we are trying to deal with these things? And, how can the public defense community work together better with other justice system partners?

Dan Stephens, who administers the consortium in Pendleton, then reported on the meeting of Central and Eastern Oregon public defense providers. He reported that the group was concerned that if individual attorney caseloads are reduced as new standards are implemented, the existing payment model will need to change. He also identified the need for increased training and oversight, increased demand for expert assistance, and additional non-attorney paraprofessional support. He said the group also talked about more and better grand jury practice, and the challenge of managing significantly increased discovery as a result of the proliferation of police officer body cameras. In addition, he mentioned funding for new technologies and assistance with implementing them as needs identified by his group. He also stressed the importance of having OPDS analysts visit their counties, and had particular praise for Amy Jackson, the analyst for his county. He reported that the group felt the RFP process should be more transparent, explaining that a lot of work goes into preparing a response to the RFP but then it appears that very little of the information provided was actually considered. The group felt that it would help to have the management conference scheduled before responses to the RFP were due. He said the group discussed the importance of public outreach, both to legislators and the general community, to increase understanding about the importance of public defense. The Chair asked if the group's concerns were seen as unique to Eastern and Central Oregon. Mr. Stephens responded that they were not so much unique as enhanced. Commissioner Ramfjord commented on how the use of paraprofessionals can increase the efficiency of law practice. Mr. Stephens agreed, and said this was something the group discussed.

Jason Mahan, who administers the consortium in Douglas County, then reported on the discussions of the Coastal and Southern Oregon counties. He began by acknowledging that his group also discussed the need for increased support from paralegals. He also stressed the dramatic increase in workload resulting from the advent of police body cams. For example, he said a disorderly conduct case previously might have involved reviewing a police report of less than one page, but now it might require reviewing lengthy videos from cameras worn by many responding police officers. The Chair commented that he thought part of the idea for body cams was reducing disputes over what happened. Mr. Mahan said that does appear to be happening, but the cases still require the defense to review all of the available evidence. The Chair also commented that body cams were supposed to encourage better police conduct. Mr. Mahan reported that he has notice a decrease in client complaints about police conduct. The Chair also suggested that the review of video might be an appropriate use of paralegals. Again, Mr. Mahan agreed, but said securing such support is a challenge, especially for consortium attorneys. He also reported that the new eCourt system, which makes for a largely paperless court, has increased the time that each case takes in court as all of the "paperwork" now needs to be done online, which actually takes longer. He also reported that recruitment and retention of attorneys will continue to be a challenge for rural counties which aren't especially attractive to new lawyers. He reported that increased drug use, especially involving heroin, and the attendant mental health issues, poses a big challenge for providers. And he too reported both a wish for a greater presence of OPDS staff in the counties, and for greater transparency and "give and take" in the contracting process. He also talked about the difficulty with access to clients in the Douglas County jail, where visiting opportunities for attorneys are limited. The Chair asked whether there was a "cross-jurisdictional" justice committee in the county. Mr. Mahan deferred to Dan Bouck, the executive director of the

Umpqua Valley Public Defender, who said that such a committee does exist and, in fact, would soon be taking up the issue of access to clients in jail.

Jamie Troy, who contracts to provide representation in juvenile cases in Multnomah County, then reported on the Multnomah, Clackamas, and Washington County group. He started by describing a concern that changes to federal rules governing the classification of employees who are exempt from overtime pay, which significantly increases the salary threshold for employees who are presently deemed exempt, may have a major financial impact on providers. He said the implementation of eCourt has required an increase in attorney and staff time to complete routine tasks. He said other case demands, especially in dependency cases, are requiring more staff time. He echoed earlier comments about the need for a new payment model as caseload standards require attorneys to handle fewer cases. He said the increasing reliance on electronic discovery presents technology challenges for providers, including the storage of massive amounts of data. He reported concerns that cases are becoming more complex. He said attracting new attorneys to public defense is challenging given the law school debt load of new attorneys. He talked about other cost drivers, such as increased overhead expenses, the demands for holistic defense, and the increased reliance on forensic science. He said that the demands of each case are increasing, especially in juvenile dependency cases, which means that unless the payment model changes attorneys face a dramatic pay cut.

Greg Hazarabedian, the director of the public defender office in Lane County, reported on the discussions of the Willamette Valley providers. He said his group talked about many of the same issues identified by the other groups, such as the expected increase in time each case will require as a result of the use of police body cams and the anticipated availability of grand jury recordings or transcripts. He said effective supervision and training will continue to be challenges, especially for consortia. And as with the other groups, he reported that the “per case” payment model can pose challenges for providers as case assignments fluctuate but overhead costs still need to be met. He also identified new technology costs as a concern for his group, and that attorneys are finding it difficult to retire from public defense with any sort of financial security. He echoed other comments in wishing for greater presence of OPDS analysts in the counties. He also talked about the need for greater transparency in the contracting process. Vice-Chair McCrea, who attended this group’s session, noted that one person stressed the importance of attending PDSC meetings in order to understand more about the contracting process. She also stressed the importance of being at the table when system-wide discussions are occurring, which sometimes means inviting yourself to be present. Commissioner Potter asked Mr. Hazarabedian whether some of the “front-end” time consuming events, such as review of body cam videos or other transcripts, might not result in “back-end” savings. Mr. Hazarabedian responded that it might result in better back-end results, but not necessarily time savings.

**Agenda Item No. 3**

**Implementing Caseload and Workload Standards**

Paul Levy introduced Professor Norm Lefstein to talk about how PDSC might go about establishing Oregon-specific caseload standards. Mr. Levy described Professor Lefstein as the dean of modern public defense and the author of the definitive treatise on achieving reasonable caseloads.

Professor Lefstein began by explaining that the most commonly cited and widely used caseload standards were established in 1973, possibly during a discussion at a bar, and were not based upon any evidence. He said the numbers aren’t defensible and wouldn’t convince any court or funding authority today. He said the importance of empirically-based and defensible caseload standards has become increasingly apparent as a number of lawsuits have alleged the constructive denial of the right to counsel, in part because of allegations that the number of cases defenders are asked to handle interfere with their ability to discharge basic obligations to their clients. He has been an expert witness in these cases, where the question

of what is an appropriate caseload inevitably arises. In large part due to this litigation, the ABA and others have sought to develop a sound and defensible methodology for determining jurisdiction-specific caseloads. The method arrived at involves a combination of time studies that focus on the amount of time defenders currently devote to case-specific tasks and the convening of a Delphi panel, which involves obtaining the opinions of criminal defense experts about the amount of time that case-specific tasks should require. The process requires that public defense providers keep time records, which is developing as a best practice for managing public defense work. These case-weighted caseload studies, so named because they look at the time required for different case types which typically result in different caseload recommendations for different case types, have been managed in some cases by public accounting firms in order to ensure the integrity of the results. Inevitably, the studies demonstrate that public defense attorneys are not devoting sufficient time to their cases because they have too many cases to handle in the amount of time they have available. The results of a study in Missouri were so convincing that a Republican-controlled legislature approved a dramatic increase in funding for the public defense system there, only to have the authorization vetoed by the Democratic governor. Although the veto was overridden, the Governor continues to hold up the funding.

Vice-Chair McCrea expressed her concern that weighted caseload studies could result in limits to the amount of compensation allowed for certain case types. Professor Lefstein explained that the caseload studies have not created this consequence in other jurisdictions, but have demonstrated that defenders need to spend more time on their cases and need to have fewer cases in order to do so. He noted that in Missouri, the studies showed that attorneys were devoting, on average, 2.3 hours to misdemeanor cases and 12 hours to felony cases and that the Delphi panel of experts established that such cases should, on average, require 12 hours for misdemeanors and 47 for felonies. He explained that the problem with current practice is precisely that attorneys are required to triage their cases because of chronic underfunding and excessive workloads, and that the benefit of weighted caseload studies is the establishment of reasonable caseload standards that are empirically based and defensible.

#### **Agenda Item No. 4 Oregon & National Developments**

Mr. Levy provided the Commission with a brief summary of state and national developments affecting public defense. He told commissioners that the meeting materials included an amicus brief filed by the U.S. Department of Justice in a Pennsylvania case referred to earlier by Professor Lefstein in which the issue is whether plaintiffs can state a cause of action for prospective injunctive relief by showing a constructive denial of the right to counsel rather than being required to litigate ineffective assistance of counsel claims on a case-by-case basis in post-conviction relief proceedings. He also described the unfolding scandal at the State Police crime lab that potentially affects thousands of cases and may require public defense providers to devote significant time and expense to reviewing those case, most of which are closed.

#### **Agenda Item No. 5 Representation in Juvenile Delinquency Cases**

Amy Miller reported on several issues concerning juvenile delinquency representation. Contract analysts inquired during the contracting process whether attorneys were consistently present a first appearances in delinquency cases. They learned that this is not happening in a handful of rural counties where there may not be a set time for these events and the court has not made attorney presence a priority. Presence of counsel at all first appearances is a requirement of the general terms of the PDSC contract with public defense providers, and Ms. Miller has offered to facilitate improvements in the counties where that is needed. She also addressed the issue of waiver of counsel in delinquency cases. There is a very high rate of waiver when youth are presented with formal accountability agreements, and waiver continues to be an issue in other proceedings. Ms. Miller reported that 31 states now have safeguards in place that seek to limit indiscriminate waivers. She reported that the U.S.

Department of Justice weighed in on the issue with a statement of interest in a Georgia case, arguing that the systematic waiver of counsel without prior consultation with counsel amounts to an unconstitutional denial of the right to counsel. Nancy Cozine has raised the issue with the Chief Justice, and he supports convening a multiagency task force to examine Oregon practices. Amy suggested that Commissioner Welch would be a good choice to serve on the task force.

**Agenda Item No. 6 & 7 Approval of 2016-17 Statewide Contracts & Death Penalty Contracts**

Caroline Meyer then presented the contracts for public defense services in 2016-2017 to the Commission for their approval. She explained that there were no significant changes from the plan previously explained to the Commission in executive session. She reminded the Commission that the contract amounts reflect the addition of moneys approved in a Policy Option Package that sought to equalize rates between consortia and public defender offices, and acknowledged that there needs to be improvements in how OPDS calculates rates that account for investigative services provided by public defender offices that consortia do not provide. She also said that OPDS staff will be reviewing the concerns expressed by contractors about transparency in the contracting process.

**MOTION:** Commissioner Potter moved to approve the death penalty contracts, statewide contracts, and non-death penalty contracts; Commissioner Ramfjord seconded the motion; hearing no objection the motion carried: **VOTE:** 5-0.

**Agenda Item No. 8 Approval of Personnel Rules changes and AFSCME Contract**

Cynthia Gregory, Human Resources Manager for OPDS, first explained the changes to the agency personnel rules that the Commission was asked to approve. She said that most of the changes were made to align the rules with current Oregon and Federal personnel policies or employment laws concerning Federal and Oregon family medical leave, Americans with Disabilities Act amendments, military leave, bereavement leave and leave for domestic violence and stalking protection.

**MOTION:** Vice-Chair McCrea moved to approve the Personnel Rules changes; Commissioner Stevens seconded the motion; hearing no objection the motion carried: **VOTE:** 5-0.

Ms. Gregory then presented the AFSCME contract between the Commission and the represented attorneys in the Appellate Division to the Commission for approval. The Chair asked about the surprising number of leave types granted in the contract. Ms. Gregory explained that they were all pre-existing leaves found in the personnel policies. She also said that the cost of living increases aligned with those granted by the Executive and Judicial Branches, and that they would also be provided to all OPDS employees.

**MOTION:** Commissioner Potter moved to direct Nancy Cozine to sign the contract as presented; Vice-Chair McCrea seconded the motion; hearing no objection the motion carried: **VOTE** 5-0.

**Agenda Item No. 9 Approval of 2015-17 Compensation Plan**

Angelique Bowers, the Financial Services manager at OPDS, presented the agency compensation plan to the Commission for their approval. She explained that the plan attempts to mirror the changes for 2015-2017 provided in the Executive and Judicial Branches, which was a little challenging because of the slight differences in the contracts negotiated by the two different unions representing Executive Branch employees.

**MOTION:** Commissioner Potter moved to approve the compensation plan; Vice-Chair McCrea seconded the motion; hearing no objection the motion carried: **VOTE:** 5-0.

**Agenda Item No. 10      Approval of 2016 PDSC Meeting Schedule**

Mr. Levy presented the proposed meeting schedule for the commission in 2016. He agreed with the Chair that this did not require a vote of the commission. Commissioner Potter noted that he and Vice-Chair McCrea would likely not be available for the planned May 19 meeting. Mr. Levy said that Nancy Cozine would work with commissioners to see if they could find a different date for the May meeting.

**Agenda Item No. 11      Washington County Service Deliver Review Report – Commission Discussion and Recommendations**

The commission then discussed the hearing in September on the Washington County service delivery review. The Chair noted that the commission just acknowledged, in its contract approvals, that one of the contracts with providers in Washington County would not be renewed. He also noted that both the public defender office and the major consortium serving Washington County agreed that there was a good distribution of cases between the two entities. The Chair also expressed concern that the issue of late withdrawal from murder cases by the public defender office, which the District Attorney complained about to the commission, was viewed very differently by the executive director of the Metropolitan Public Defender, who thought it was a deliberate attempt by deputy district attorneys to remove MPD from cases. The Chair said the DA should know what is being said about his deputies. Paul Levy suggested that he follow up on that suggestion with MPD to see what would be most helpful in addressing the issue and then provide a summary of the executive director's remarks if that would be helpful. The Chair agreed with this course. Commissioner Ramfjord suggested that the issue is best presented as a cost concern for public defense. The Chair also said that the final report of the service delivery report should note that MPD appears to be managing relations between its two county offices appropriately, but that it is something that should be watched to ensure that continues to be the case. He noted that overall the climate for public defense in Washington County appears to have improve, and agreed that the peer review process may have helped with that in some respect. Mr. Levy suggested that the final report should also address the need to seek improvement with the practice of shackling in juvenile court.

**Agenda Item No. 12      OPDS Monthly Report**

Mr. Levy said that the completion of contracting for 2016-2017 was the major staff report. He also said that a peer review site visit had just been completed in Clackamas County for an evaluation of the criminal defense consortium there, and that the Commission would be following up on that later in 2016.

Shannon Storey reported that the Juvenile Appellate Section received 72 applicants for an open attorney position. She said briefing was now complete on a case to be argued in November concerning whether a parent's claim of inadequate assistance of counsel in a dependency case may be raised in the first instance on the direct appeal of the dependency case. She also reported that JAS lawyers had just made presentations at the Juvenile Law Training Academy and would be making other presentations at upcoming Oregon State Bar and Oregon Criminal Defense Lawyers Association seminars. And she is also participating at co-editor on a major revision of the OSB juvenile law manual.

Earnie Lannet introduced Ingrid McFarlane and Josh Crowther as two of his three chief deputies, noting that the third chief deputy, Marc Brown, was not present because he was preparing for an appellate argument to be held in Milton-Freewater. He also said that the Oregon Supreme Court would be having oral argument on 15 cases in November, eight of

which are handled by AD attorneys. The Chair remarked that this is one of the reasons there are so many applicants for positions in the office.

**MOTION:** Commissioner Potter moved to adjourn the meeting; Vice-Chair McCrea seconded the motion; hearing no objection the motion carried: **VOTE:** 5-0.

**Meeting Adjourned**

PUBLIC DEFENSE SERVICES COMMISSION

UNOFFICIAL EDITED TRANSCRIPT

Friday, October 23, 2015  
12:00 p.m. – 4:00 p.m.  
Sunriver Resort  
17600 Center Drive  
Sunriver, Oregon 97707

MEMBERS PRESENT: Barnes Ellis  
John Potter  
Per Ramsfjord  
Shaun McCrea  
Janet Stevens

STAFF PRESENT: Paul Levy  
Amy Miller  
Caroline Meyer  
Billy Strehlow  
Angelique Bowers  
Ernest Lannet  
Shannon Storey  
Cynthia Gregory  
Josh Crowther  
Ingrid MacFarlane

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The meeting was called to order at 1:00 p.m.

**Agenda Item No. 1 Approval of September 17 Minutes**

0:07 Chair Ellis The first item is the minutes from September 17, 2015. Are there any additions or corrections? I'd entertain a motion to approve the minutes. **MOTION:** Per Ramsfjord moved to approve the minutes; Shaun McCrea seconded the motion; hearing no objection the motion carried:  
**VOTE:** 5-0

**Agenda Item No. 2 Regional Reports**

0:27 Chair Ellis The next item is Regional Reports and Geoff is here. For those who don't know it, Geoff goes back a long way with this Commission. In fact, I think you were the midwife in some way. You helped us get born back in 2000 and we've taken advantage of Geoff's talents at least one time since then that I recall and now a second time. So, welcome back, we are glad to have you. Paul, I don't know which contractors were involved in this.

1:07 P. Levy Geoff will call them up.

1:09 Chair Ellis He will be the emcee. Okay, we are ready.

Thank you Mr. Chair and Commission members. It's nice to be back and I was pretty excited when Nancy gave me a call and asked me if I would work with you all on this process. We put together a strategic planning process that is going to hopefully provide a good road map for the next four years and we decided four years was the right horizon because that is about two biennia. In doing that what we wanted to do was, although the Commission has had a strategic plan and went through a more formal process several years ago, it has tended to be more refreshed every year rather than redone and looked at in that way. What we wanted to do was start the process with doing what we call an environmental scan and that is strategic planning jargon for what it is that we are anticipating are going to be the major issues that will impact us for the next three to five years. There is really only one way to do this and that is to get out and talk with people. Part of the reason we started this process over here, which worked out perfectly timing wise because we have just started the process, is to take a look from the perspective of the people that you are contracting with and to see what it is that they're seeing. We had a session this morning and you will hear the results of that session from each of the groups. The second phase of this will then be working with OPDS and also with you all [the Commission], which we hope to take a little of your time in December to work on this, and is that given this environment that we're anticipating is going to come, how prepared is OPDS and how can OPDS be best prepared to deal with and to be helpful in dealing with those emerging issues that are coming out. The third phase then will be the goal setting phase where we actually sit down and say for the next four years what are the major goals that we need to accomplish and those goals are going to deal with things like budgets, capacity within OPDS, PDSC and the provider community. They're probably going to deal with relationships in the system as a whole so all of the other state agencies, the courts, all the other players that are impacting public defense one way or the other, and we will have other goals I am sure that will come out of this process. Again, we are really at the very beginning of this process. This is sort of the first official work that we have done. Later in November we will be meeting with the OPDS staff and not only talking with the contract staff but also with the appellate division staff because they are going to need be part of this process as well. The purpose of the report today is simply to report back to you and it will be a little bit raw and we hope that you are understanding about that because we have literally just come from having this session. What we did today was this: we broke the state into four regions, into central-eastern is one, coast-southern is a second, tri-counties is the third, and then the valley and statewide is the fourth region. We had two facilitators for each of those groups. Those were people, for example Amy Jackson, Paul Levy, Caroline Meyer, Ed Kroll, John Potter, Amy Miller, Billy Strehlow and myself who actually took the groups through a series of questions. Then we had the people who had to do the heavy lifting which not only had to report back to the large group but report to you and we call those our reporters and those are Dan Stephens, Jason Mahan, Jamie Troy and Greg Hazarabedian. What we'd like to do then would be to present to you the results of this morning's session, but to put into context around that session. What we asked to groups to do in those regional meetings were take these four questions, and I want to spend a moment on each question to explain why we are asking the question we are asking. The first question is: concentrating on their operations, what changes do you anticipate in your operations because of developments in the law and developments in performance standards? There are things that are changing and you will see that when they do the debrief when they start to raise these kinds of things that are coming up that are going to in many ways impact their operations internally. It will impact their capacity, their ability to do their jobs, how they do their work and so forth. Those are things like technology, law changes, expectations of OPDS in terms of contracts, and their expectations of other providers in the public defense system. The second thing we wanted them to do is to say then: what challenges will you also be facing in terms of how you provide quality services for the next three to five years? We do know that these changes that are coming out are going to impact the type of cases that they have, the expectations about how quickly or slowly things move through the system and so forth. So, we wanted to hear from them. The third question has to do with the relationship with OPDS and with PDSC, not in the sense of 'we don't like this and we don't like that' but really looking at it and saying 'how can PDSC and OPDS better support us as we are trying to deal with these things.' So, we are really looking for their ideas

about how in a positive way we can work together as a community of interest and as partners in success. Then finally, looking at the larger public defense community in terms of working relationships, it was pretty evident there is a lot of extra work that comes, not even just from the work with you all but the work with the other partners, the expectations that they will be present in meetings and so forth. You will hear about this region by region, what we thought that would be the best way to present this to you would be to have them go region by region through the four questions and the answers and then give you an opportunity then to ask any clarifying questions that you may have. They will try not to duplicate each other, so if it was the same issue in all four they may say a word or two but they won't drag you through a long explanation. We imagine about ten minutes per group if that works with your schedule.

7:59 Chair Ellis

Go for it.

8:00 G. Guilfooy

We would like group number one and this is Central and Eastern Oregon, Dan Stephens was good enough to take that role. That included Baker, Crook, Jefferson, Deschutes, Grant, Harney, Hood River, Malheur, Umatilla, Morrow, Union and Wallowa Counties.

8:18 D. Stephens

Good afternoon. Launching right into those questions, our group when it came to what changes that we are looking at in our operations, one of the big issues was because of the enhanced standards in representation we would be seeing a reduced caseload per attorney. The issue with that is it would create a challenge for us because the value of the cases will stay the same but we will have fewer cases per attorney so that would be a real change that we need to work on. We need to increase our training and oversight. There's a difference between public defender organizations and consortiums in terms of how you do that. There is less control over a consortium model and there would be some oversight for sure to be sure there is adequate training about the new standards that we are facing. Increasing utilization of communication with experts, there is going to be a greater need for experts in some of these cases and we wanted to enhance our communications with them for our representation. Additional non-attorney staff support professionals, we are looking at involving other professionals that we could utilize in our cases to better meet the needs of our clients. Additional attorney staff, again we'd need additional attorneys. There is going to be a major change regarding grand jury procedures and practice and so we would have to find some way to address that within our organizations. Increased time demands to our office, based upon a lot of discovery demand issues which will be coming forth with this body-cam video which will create a lot demands for our equipment and our time. As far as the challenges regarding service quality, we are going to need to work on retaining the attorneys we have now and recruiting new attorneys is always difficult is fairly static and the expenses go up. We have to find ways to recruit attorneys. We have new attorneys coming in with high loan issues; whether they owe money out we will have to figure a way to work on that. Adequate case funding due to increase expenses and higher standards, again it is a theme throughout. I don't want to hammer it because it is always a theme throughout. We have to also look at funding new technologies and new enhancements. There is going to be some paperless offices. Many people are moving to that so we are going to need increased ways to deal with that. In terms of PDSC and OPDS support, this is really a big one. Everybody felt that OPDS should really have more presence of an analyst in the county and I can say that in our county that was a dramatic example. We had a case where we have a public defender and consortium in our counting and the judges were appointing all cases to the public defender thinking that was the primary appointment organization, including co-defendants, including cases where there was clear conflicts which created delays in terms of...

11:41 Chair Ellis

That's why we have consortiums.

11:46 D. Stephens

No matter how many times we expressed that they can't appoint the conflicting contractor, they wouldn't listen. I called Amy Jackson, she came down, talked to the presiding judge, talked to the DA's office and it was fixed. Now they appoint directly. That whole thing though was because we had a presence of OPDS and I think we have less and less now that

makes it way more difficult. So we really want to increase the analysts support. Whatever you do, don't take Amy Jackson from Umatilla County. There was a lot of concern in terms of support from OPDS about the transparency in our contracting. We put a lot of effort in putting our RFP's together, a lot of inputs requested and there is not much feedback. That is not to say that there are not good reasons why the contracts end up the way they do, it's just that we don't know that and we can't communicate to our members what the process was. There has got to be more transparency in the forming of contracts and perhaps having the management conference well before we have a contract finalization. Also, there was some concern about how we actually pay, rather than having a case payment model per case we are looking at exploring other methods on how to compensate for the caseloads. The fourth question about public defense outreach, there was some discussion about working with the Oregon State Bar to see if there is some grant money that could be available. This is particularly true with new attorneys with loan repayment. Also, we know of course to increase our presence with our local legislative representatives. There has got to be more of a willingness to be involved with media communications and public outreach. A lot of times, defense tends to shy from that due to confidentiality. Other issues we really need work on is getting our message out there. We'd like to increase our participation with community organizations that are involved with our clients. Focus efforts on juvenile cases. There are a lot of state folders in the juvenile dependency cases and delinquency cases. We need to be actively involved in that to give our input because we have a unique perspective that a lot of these community providers don't have so there needs to be more deliberate involvement to get our message out. That is what our group came up with. Any questions on this?

- 14:12 Chair Ellis I'm interested. You are reflecting Eastern and Central Oregon which are less populated areas. How much of what you recited is unique to circumstances to the low population big geography area?
- 14:31 D. Stephens I wouldn't say so much unique as maybe enhanced. In terms of case value, in Umatilla County it is a 92 mile round trip down there and that is a lot of mileage. So, that affects case value more than perhaps when you are in a county where you are closer. I think it is the same concerns throughout but it is more enhanced in some areas.
- 14:54 Chair Ellis Some of what you said sounded to me like there is some hope of reducing case cost like by having paraprofessionals do more which might free up some resources to either increase compensation for the lawyers or reduce caseload for the lawyers. Can you respond to that? Are there any other rays of hope in here?
- 15:24 D. Stephens Right, and understand, I am the scribe. There was someone that felt that way and I think it might well with the public defender model than the consortium model where they have maybe the more opposite economy of scale in terms of multiple attorneys in one office they could maybe afford to hire one person that could do that. That was the thought that if we have more non attorney staff that could help support that would help.
- 15:53 P. Ramfjord Along those lines, just in my own practice I find that more and more often I am going to online files from other cases where you can find pleadings or motions that have already been prepared. Was there any discussion about using paraprofessionals to try to facilitate collecting knowledge that has been gathered in other cases in a way that has only recently become available through the online filing of cases in Oregon?
- 16:24 D. Stephens There wasn't a lot of discussion about that but yes, I think the attorneys do. Within the public defender's office they have a motion bank that they share from. When it is a consortium model it is a little more difficult because we are independent in that sense but they do email frequently.
- 16:48 Chair Ellis Other questions for Dan? Thank you.

- 16:54 G. Guilfooy Thanks Dan, appreciate your work on that and the group's work as well too. They did an amazing amount in a short period of time. They only about ten minutes per question and with twenty people in the room and they have done a very good job on capturing the essence of that. The second area is the southern-coast area and Caroline Meyer and Ed Kroll were the facilitators and Jason Mahan was the reporter so he will come up and talk about that and that coast-southern area is Clatsop, Columbia, Lincoln, Tillamook, Coos, Curry, Douglas, Josephine, Jackson, Klamath, and Lake Counties.
- 17:32 J. Mahan Good afternoon. There is a little bit of overlapping but in regards to question number one, there was a lot of discussion about the possibility of having to have paraprofessionals or additional support staff of new technology. That is coming forth. Body-cam videos are one of the big things that are coming out. I can only speak to Douglas County but I think every law enforcement agency except the county sheriff is using body-cam videos.
- 18:13 Chair Ellis Help me understand the implications of that for what we are doing.
- 18:19 J. Mahan Sure.
- 18:20 Chair Ellis Do you think it increases work or decreases work?
- 18:23 J. Mahan It increases work. The best way I can explain it is I have right now a disorderly conduct case and it used to be that you get three quarters of a page police report and it says 'we talked to Beth, she said so and so is out there screaming in the street' and they just have these little capsules of what happened. Now you have the optimum of these things, potentially, two to three law enforcement agencies or officers responding to the scene and they have evidence that this entire period of time in every contact that they have with somebody until they show up and they provide all of this information on a DVD and you can even play it on your t-v but it takes a lot more time now to go through these things.
- 19:06 Chair Ellis But the irony is I thought the whole push for body-cams was to reduce disputes over what happened.
- 19:15 J. Mahan I think in many ways, over all I think it is a great thing that they have these body-cams. I don't think it will be a complaint because I think it does really reduce the disparity between a criminal defendant and law enforcement because you really have complete evidence of what happened during the stop. I think overall it is a great benefit but it does come with one downside and that would be that it creates the amount of information that an attorney would have to process in preparing a case, if that answers your question.
- 19:53 Chair Ellis It does in part. The other argument I've understood on body-cams is that officers who know they have them tend to behave better than officers who think it's just going to be 'my word against the defendant.'
- 20:11 J. Mahan Well, I can say from my experience I think I have seen a correlation between the use of body-cam video and a drop in my clients' complaints about being mistreated by law enforcement. Where that comes in, I don't know. Is it the officers are behaving better but you also have clients knowing at the same time that there is a video of it so if they say 'officer so and so was being rude to me' and low and behold you put in the video and he says 'hey, how are you doing tonight?' But, I see that dropping.
- 20:50 Chair Ellis But, isn't this scenario where the use of paraprofessionals would be a very logical thing and the lawyer only has to get involved when the paraprofessional identifies a segment that really is germane?
- 21:05 J. Mahan Absolutely, but I think that in foreseeing that possibility, and it is hard for me to sit there and speak for every county, but I think that's what they were getting at was this concern of

additional cost of maybe having to bring on people to review through all this evidence. How a small consortium like I am a member of, how you work that is a whole other thing. I don't know how you would, but with a large public defender's office sure they could bring in paraprofessionals that are trained to identify issues when observing these videos and perhaps evaluate stops and evaluate searches.

21:41 Chair Ellis Even in the consortium model, I would think there is no reason why you couldn't share a resource like that. Each member of the consortium use what time he or she needs. We've interrupted you, sorry.

21:57 J. Mahan I am here to answer your questions. That is one thing that they brought up. Also, I haven't seen this issue in Douglas county, but somebody was discussing the transferring of things over to Odyssey and you have all this e-filing and everything is going paperless with the courts and they were saying that there are certain times where having everything paperless, multi-use count indictment, seems to slow down the process and took what used to be, take a plea and sentence on a multi-count property offense case, in their county they are finding that the judges are having to go through all the charges on the computer screen and find them and dismiss them. It really takes a lot of time and it increases the amount of time that they are in court.

22:47 Chair Ellis Why does that take more time than hard copy?

22:50 J. Mahan Like I said, we all had about ten minutes to discuss all of this so a lot of stuff is just kind of flying through. I personally haven't had that same issue and I don't know how it is laid out for the judges. They have two screens and they are trying to find everything and I don't know if it takes a lot longer to scroll through things or to click things. I don't know exactly what they are looking at when they are going through, but that was just something that had come up. Those are the issues that we discussed in terms of question one and it ties into question two. One of the things that came up was recruitment and retention of qualified staff. There is still that concern and mostly when dealing with somewhat small counties that were part of the group, and there is a general concern about the ability to attract staff as well as to keep them. I brought up my personal experience as the Umpqua Valley Public Defender's office; I know Dan Bouck is back there. They have this issue with attracting them in the first place but then they come down to their county, they hold onto them for maybe a year and a half or two years, get them trained up and then they move onto places like Lane County and Multnomah County seems to be where they tend to be going after serving some time in Douglas County. So, I think there is some concern in some of the smaller counties about getting people just out of law school that want to go those smaller locations whether it is lifestyle choices, regardless, that seems to be an issue and that came up in discussions. Other things they found in terms of increasing time with clients, it seems like drug use is only getting worse. You deal with in particular some of the small counties methamphetamine is still a really big deal. But, furthermore heroine has just gone off the charts, its unbelievable. I remember when I started as deputy district attorney in 2003, I had been there for maybe a year, I went up to grand jury and it was a possession of a heroine case and I was like 'heroine, wow' I had never seen a heroine case and now it's absolutely amazing how frequent it is. It was pointed out by some people that when you have people that have significant drug issues and you tie in underlying mental health issues, those clients get very difficult to deal with and it requires more face to face time and a lot more time spent with them when they are in that kind of state. In terms of, especially with mental health resources but also with drug treatment, there is a lack of resources in our counties to address that. In particular, mental health, there are just inadequate resources. So, those are the complications that we see. Going on to question three, it was also discussed that it would be helpful if people from ODPS would come down and maybe visit some of the various counties and meet with maybe court staff to the local practitioners to discuss and figure out some of the local concerns to figure out how things are different from county to county.

26:43 Chair Ellis                    Let me just ask, I thought there was a lot of that happening and the Commission has been in Roseburg, we've been in Klamath Falls. We have tried to maintain real communication with the communities. I am disappointed to hear that it is not enough.

27:04 J. Mahan                        That is one of the things that did come up was that they thought that there should be more visits to the local communities.

27:13 P. Ramfjord                    I am curious of what areas of concern there might be. Are they focused on billing, on questions about how things are processed, are they more practical matters than we are sometimes addressing when we're visiting as a commission?

27:28 J. Mahan                        Like I said, this all took place in a short amount of time. I think maybe it was several different issues. I got out of it in terms of if you are determining appropriate caseloads to what those cases should pay, and then maybe you have some better understanding of what time each case takes based upon various issues within several counties. I know that it was brought up, especially in very rural counties where you have distance issues, but of course in my understanding there is going to be some mileage reimbursement in these circumstances, it could be factoring in low case credit for a relatively minor criminal case but you find out that they actually give the person in custody it takes an enormous amount of time to work that case due to problems with the local jail and the local law enforcement agencies and things like that. That is what I think I get out from that. Finally, as was discussed earlier, they described it a little more as give and take in terms of contracts. Somebody had brought up that they ask for proposals, proposals are sent out, and then it's basically an intent comes back that says 'look, this is what your contract is' and some individuals wished they could have some more discussion in that contract process. The last question was dealing with what can the public defense community do better in working with justices systems and stakeholders to enhance public defense services. We talked a little bit about this. Time was running short. One thing that came out was working with different government agencies that are just naturally built into the system. There are a lot of disagreements on how you're going to work together. One of the things that was brought up was easier access to the jail, in particular that maybe there could be some sort of video conferencing set up. In today's society even with i-Pads you have video conferencing that is available. I can only speak for Douglas county but it sounds the same in other counties, visiting clients in jail is an extremely time consuming experience and it is getting worse all the time. We have a whopping four visiting rooms set aside for us to visit clients. It takes sometimes multiple trips to the jail to hopefully hit a time when maybe a room will be available. They are doing jail visits with non-attorneys at the same time, chaplains and things like that, and sometimes if you get a room you can wait around 30 to 45 minutes until they bring out your first client and sometimes it is 20 to 30 minutes in between clients. That is a big waste of time, it really is. If there was some process, and I think that they could, that would be really helpful and that was one thing that was identified.

31:17 Chair Ellis                    Do you have a cross-jurisdictional justice committee in your county?

31:23 J. Mahan                        I would ask Dan that, apparently we do.

31:29 Chair Ellis                    That would be a great place to present this because we totally support what you are saying.

31:39 D. Bouck                        That committee and that issue is actually set for this coming Tuesday.

31:43 Chair Ellis                    Good.

31:44 J. Mahan                        There you go. They put down community college staff and support training which in Douglas County it has been nice. There is a paralegal program. I don't know if county by county there are similar programs but that has actually been good for our county in terms of getting volunteers while they are in college to come and help out, we've used that service, as well as

our last staff member that we hired came out of that paralegal program and she has done wonderful for us. That's what I have.

32:22 Chair Ellis

Thank you Jason.

32:24 G. Guilfooy

Our third group reporting it tri-counties and that was facilitated by John Potter and I and Jamie Troy is our reporter for that and that is Clackamas, Multnomah and Washington County.

32:50 J. Troy

Good afternoon, Jamie Troy here. So, we talked about the changes on the horizon in the next three to five years. One is starting in 2016 the federal salary mandate for exempt employees, it is taking it from around 25 to 50 something for a lot of rules aren't in place and there were concerns from some of the larger groups like Metropolitan Public Defender about whether or not that will trigger overtime pay for some of their legal assistant supervisors and staff.

33:22 Chair Ellis

Remind me the issue, the issue is not the classification but?

33:29 J. Troy

As I understand it, if you are a professional you can be exempt as long as you are making 25 something and they are raising that up to fiftytwo-ish.

33:45 Chair Ellis

So, some people that have been qualified as exempt because they use judgment discretion and so on, and now won't be...

33:56 J. Troy

Unless you raise their salaries to the threshold to meet the federal guidelines.

34:04 J. Stevens

Exempt from what?

34:05 Chair Ellis

Overtime.

34:06 J. Stevens

Alright, okay thank you.

34:10 J. Troy

We talked about in the tri-county area only Multnomah county has embraced e-court yet so it is still coming to Washington and Clackamas counties. There was sort of a one sided discussion about how complicated this can be and how it impacts your staff from one of the three counties present in the discussion but, there are staffing adjustments that a lot of the offices have had to make relating to e-court. There is a file and serve process where you have to make sure that you are in putting yourself or your staff so that you will start getting e-discovery and e-filings related to particular cases and there are blips in the system like you have done file and serve and suddenly you're off of it and you don't find out until you are missing data so you have to go back and do it again. I have finally figured out how to do file and serve and then they upgraded the page and so the next time I went in, and the deadline was that day, I had to relearn it and I had to get them on the line and my staff couldn't help me out because it was a whole new page and a whole new interface and it was time to get it filed. It was an exciting day at Troy and Roseburg on that particular day.

35:23 Chair Ellis

Now, you know that those of us who are older have felt for quite a while now.

35:30 J. Troy

So, increased staff time and then just shifting staff responsibilities. So, some things seem to have been on the states to perform previously or on DHS to perform previously are now things that you need to deal with internally so you need to have your paraprofessionals, if you have them, taking on those additional responsibilities and is there enough bandwidth within your office to have them to go out and do the home visits and attend the meetings and take on this added responsibility created by this e-court system and if not, do you have the salary ability to bring in additional paraprofessionals or do you need to make sure that the attorneys are doing more of this? You've heard this already, caseload standards, enforcing those standards that are coming down the pike and this is going to require increased staffing and

more lawyers with the associated overhead and equipment needs to meet those obligations. Then, the rest of what I would talk about that is coming down the pike is really just responding to rapid technology changes. We are having to figure out if we are having to take a laptop or iPad, did you buy the right i-pad, have we gotten the wrong i-pad, is it going to break? So, there are those costs and then there is the case management system and a case management database that OPDS has gotten through and I think it's now called E-Defender. That upgrade has been incentivized but there is associated staff training with that and we are working through data conversion and data flow to the new system. The fiscal impact of increased data discovery so we need to have either Cloud storage capacity or we need to have greater capacity within our offices to manage the videos or other very larger files, trying to get the video discovery from the DA's office to your office. Sometimes they have to break it down into separate files so that you can get it, sometimes you have to come up with a new way of sharing it from the way you used to do e-discovery just because the files themselves are so large it is hard to have the capacity just to get them. Then, every time I am turning around the video that I used to play can't be played because they have to download a new whatever just to play it and I am in my mid-forties so I wouldn't consider myself to be too old and these aren't supposed to be too complicated by I am constantly calling a young person into my office to help me figure this stuff out because I don't have time, I don't understand, I don't know what is going on. Everyone else just folded theirs over, I ripped mine off.

38:22 Chair Ellis

Da gone technology for you.

38:27 J. Troy

What are challenges you face in providing quality public defense services during the next three to five years? I think both in the criminal world and in the juvenile world there was a feeling that the cases that are being filed are far more complex, more mature, more complicated to try to handle when you are getting them. The system is requiring more time per case and the funding model needs to adjust accordingly. In the criminal defense world they talked about HB3194 Justice Reinvestment in Multnomah County. It requires different meetings and different hearings and different strategies all towards a goal in which we support which is our clients not being imprisoned but it is more complicated and there was funding within HB3194 for additional DA's to handle that, for additional sheriff staff and additional law enforcement to go out on these warrant task forces to pick up the folks when they are having problems but there wasn't increased funding for the public defense aspect of that. It is not funded in the bill, so it is an unfunded mandate shifted onto public defense and the providers which is difficult to swallow at times. That is similar to the differential response that the Department of Human Services Child Welfare is rolling out through their system. I have talked about some of the fact patterns of preliminary hearings that I used to deal with and the fact patterns of juvenile court hearings that I am now dealing with and you really have to have your game face on when you are going into some of those prelims because the facts are pretty sexy and if you have a parent that you are representing it's difficult. There was discussion about full time consortium criminal defense lawyers needing to have an extensive amount of specialization and their caseloads make it difficult for them to do retained work. There is the theory that if you are a consortium member you are supplementing your public defense funds with private work that you take on top of that. The experience of many of those consortium members is if you want quality representation that is not what is really happening in the field and so could we look at funding us to do the full time work that we are actually doing and not assuming that we are all making bank on top of that. There's a lot of discussion about trying to get new people on board and spinning the need to work on the grain of the bar and even if you have motivated young people whose hearts are in the right place, they can't afford to take the job because of the crushing law school debt that is imposed upon them and what are some creative debt relief options that we can work through as a system to assist us in recruiting new lawyers. There was some discussion about...

41:37 Chair Ellis

Not just recruiting, but it's retaining. We have heard the pattern of young lawyers who come out of law school and want to do defense, they are good at it, and then they want to have a

family and a home and the rest and it just becomes untenable. So, it is not just recruiting its retaining.

41:57 J. Troy

As I understand it, if you are doing the Loan Repayment Assistance Program (LRAP), you have to have something like 10 years in before you are going to get that debt relief. So it does allow, it gives them something to work for and it helps with the retention portion of that equation because if they want the \$80,000 debt relief then they are going to have to put 10 years in to get it. I don't know if that helps with people going to more rural communities and then wanting to move out of them but, its staying in public defense and then maybe redefining what public defense means in order to qualify for the LRAP program is something that could be looked into further. Supporting a holistic defense model, increasing forensic science expertise is really something necessary to do quality defense representation. There's an increase in cold cases. So these are all challenges that are coming down the pike for public defense. Any questions? So, better support from OPDS, the need for the possibility of redefining public interest lawyer so they will qualify for debt relief, better communication around provider costs and how those impact our bottom lines, getting that information into our budget proposals. I think there was some concern that our overhead goes up. When I contracted with my building for my space, all of these commercial leases have a bump up so each year I am paying more money for the same space over a six year lease which I signed. Every year, my insurance costs are going up. That has gotten a little better with Obamacare, I am getting a little nervous to see what is going to happen soon but I have to pay for insurance for these folks and I can only put so much on my legal assistants out of their paycheck and it doesn't seem like that is necessarily being fully embraced in the budgeting process. Budget construction transparency I think you have heard a lot about that. Prior to setting the numbers, the providers were hoping they could have more one-on-one meetings. There was a comment made that sometimes they will get the numbers and they'll have discussion after the fact when it is too late, 'well this assumption is wrong or this detail is wrong,' then they'll hear 'great, we'll deal with that in the next budget cycle.' If there was better communication before the final number was made perhaps we could address it then. Closer scrutiny of incidental costs, one of the providers talked about, I think it was Clackamas County, where they will email you an offer and that doesn't cost anything but when they drop it electronically to you the state has charged three dollars. So we are wondering whether or not the state paying those discovery costs, is anyone scrutinizing that because they seem out of all proportion to what we are being delivered and if there was less money put upon the state to fund those expenses there might be more money within the criminal justice or the justice system in general to fund indigent defense expenses. We need OPDS staffing's adequate to address these increasing complexities, credit questions, complex case questions, things of that nature. In working with other justice systems and stakeholders there is increased judicial staffing to facilitate necessary hearings with the end goal of enhancing public defense services. It seems like sometimes we are not setting hearings based upon when they are needed but instead based upon limited court staff availability. There was a discussion about juvenile shackling and having a broader discussion among the different stakeholders to see how we can limit that overall and not always assuming that it's just the defense that needs to be bringing that up or taking that on. It really is a broader community discussion that needs to be had. Developing memorandums of understanding with various state agencies to deal with complex cases and we talked about in the juvenile system the cross over youth model and in the criminal justice system the justice reinvestment program. Raise awareness of importance of defense presence at policy meetings, so there are a lot of policy discussions going on and it seems that sometimes we are not invited to the table to take part in that and we have an important perspective to share. We have a lot of stories from our clients, we know what works for our clients and what doesn't work for our clients and that is an important message to add to the discussion. There was a lot of discussion about unfunded mandates, so educating partners about how their changes impact us. One of the things I said from the juvenile system is in Multnomah County it used to be quite standard that there would be a review hearing once every three months. The agency felt like that was too frequent. They weren't able to go out and do the social work they needed to do, so the court had discussions with them without

really understanding how the contract works and so now we have a review hearing about once every four to five months. So, really what you have done is you have given me a dramatic pay cut because the amount of work I used to do in three months was funded at a certain level and now I am paid the same amount of money to do five months of work, and it's not like I am not having to go to meetings with my client, do advocacy for my client, work with the agency to increase visitation etc, and it's like the left hand does not know what the right hand is doing. I also find that the courts often don't understand how we are funded and I can only speak from the juvenile system but that's what I know. So, they'll set a permanency hearing and they are not ready to make a decision and so they will punt and they will set a continued permanency hearing for three months out, so essentially it's now six months of work for one credit versus three and I have found that if you can educate the court the about how the funding works they are happy to say 'so we are going to complete this permanency hearing, we are going to defer certain decisions and we will conduct a supplement permanency hearing which meets all of the federal criteria necessary.' It doesn't delay permanency for children, but it allows the public defense providers who are doing the advocacy to get two different credits as opposed to half of the money for twice the work. I think there needs to be better communication and understanding among the different stakeholders about how we are funded so that we can work together to not have public defense always starving.

48:40 Chair Ellis

Go back to your first chart and the change in the federal labor law. It does seem to me that maybe one of these unattended consequence cases because if the effect of that is to make it too expensive for PD's to use paralegals for a lot of what the paralegals are now doing, because time and a half is expensive, that will shift back onto the lawyers some of that work that could've been delegated to paralegals.

49:18 J. Troy

I don't understand it well enough but I think if you look at the salaries for some of the young lawyers, there may be overtime required to be paid. I am not sure of this. I don't think it matters what your title is, it matters what your salary is. If they did actually pay me for how much time I am doing on these cases they would be paying me 40 to \$46,000 as a starting attorney and then you have to start paying me time and a half.

49:43 Chair Ellis

At least it used to be that the quantity of hours required varied inversely with age.

49:56 J. Troy

Right. Any other questions? Thank you.

49:59 Chair Ellis

Thank you.

50:00 G. Guilfooy

Now we have group number four and that was the valley and statewide group containing Benton, Linn, Lane, Marion, Polk, and Yamhill statewide contracts. Amy Miller and Billy Strehlow were the facilitators and Greg Hazarabedian was the reporter. We added on your fourth one there is a bullet that your group didn't put on there that we added so I will cover that one for you.

50:23 G. Hazarabedian

Thank you, Mr. Chair, Commissioners, good afternoon. My report should be substantially shorter because most of what we came up with has already been said. I will touch on a few things. More discovery will increase our time on cases. Police body cameras have also already been mentioned and another idea that our group came up with is optimistically if OCDLA's grand jury bill is successful then grand jury transcripts and/or recordings will need to be reviewed in every case which will be additional time for us. Caseload standards, obviously if the amount of cases per lawyer goes down then there will be a need for more lawyers necessitating more funding for that. Performance standards pose issues for training and supervision of consortium lawyers and so the suggestion was made that more training would be done in the public defender's office and sharing those training resources that traditional PD's have that consortia might not. Moving on to the second question, again it was the money to implement the performance standards. There was a suggestion that funding of office overhead expenses should be disconnected a little bit from funding for case rates because case

rates don't allow for sudden drops or increases in case numbers. We are finding that our communities as well in the valley have mental health resources that are insufficient to deal with the demand, particularly an increasing percentage of our clientele who are not fit to proceed or have fitness issues. That seems to be growing. We also have to keep up with technology as other people have mentioned and one of the things we came up with was that it seems like we have a lot of homeless clients and communication with those clients is difficult and so one idea that came up was maybe a lot of them cell phones, maybe we can figure out a way to text with those clients because they just don't have a place you can mail them stuff. The third question was to fund office overhead including new technology as separate from the case rate as said before. One person suggested that consortium numbers nearing retirement be given some sort of assistance from PDSC to make retirement work for them. I wrote 'unclear' under here because there were no other suggestions that came to bolster that idea. We talked about a wider approach to quality representation than just measuring caseload; there are many other components such as case standards that go into quality representation than caseload alone. Again, funding overhead is somewhat different than caseload. In our group as well as the other groups expressed a little bit of frustration about the amount of work that we put into responding to the RFP process and we are not always sure exactly what purpose that went for at the end of the day, so more transparency regarding the RFP process was an idea. We also joined some of the other groups in thinking that having our analysts more regularly visit us in our places of business to show them how it works in our world.

- 54:21 Chair Ellis So, Greg I am sure you have shared with the others, because you have been around a while, how much progress has been made on the transparency and accessibility.
- 54:32 G. Hazarabedian Well, you know Mr. Chair I might have done so but my job as reporter was to write and not speak and as unusual as you may find that role for me...
- 54:50 Chair Ellis That must've been really hard for you.
- 54:52 G. Hazarabedian I stuck to the rules as given me by my friend Geoff. The last thing about inner system communication is that we should all be participating in local groups or readings relevant to our work and in fact when we have found on occasion meetings that are taking place about issues relevant to our clients where we were not on the invite list we have been proactive about putting ourselves on the invite list and encouraging others to do the same because often times it's an oversight not an exclusion. There was also mention, as other groups have talked about, developing and maintaining relationships within our community with our community partners in this criminal justice arena. Things mentioned were DA's, the Bench, DHS, CASA, county commissions, etc. The last item that we thought was that better communication among contractors might be helpful because as this process has shown there are a lot of good ideas thought of by different people. That's all I had unless you have questions.
- 56:03 S. McCrea I have a couple comments. This is not to fault you because you were the scribe and I was present and I didn't say anything because I was there as an observer but to follow up on the comment you made about the use of possibly cellphones to be able to communicate with homeless clients, I think that was in the context of it would be an increased cost because there would need to be mobile phones or devices provided to the attorneys or to a staff member or somehow a centralized situation like when you get a message from your doctor that you have an appointment coming up. It's to take it out of the arena of the defense attorney or her staff having to try to make this text message and then having the client bombard you with all these messages back. So, is that a fair summary of the context? It seems like a really good communication device, it's just the sort of the way to get to it.
- 57:09 G. Hazarabedian That's exactly right.
- 57:10 S. McCrea Okay, and again I am not faulting you, I am just expanding. In terms of your question, Mr. Chair about the transparency, there was something brought up by a person in the room, not

me, and I won't identify her because maybe she doesn't want to be identified and she supported this concern about the RFP process and transparency but also reminded those, and of course I am preaching to the choir here because all of you are here, but her point was that she figured out that it is important to come to the Commission meetings to see what we are doing, what we are dealing with, to look at the minutes, to know what's happening, and that will make a difference too which I thought was a very good point. Then, finally your point about the community partners and being proactive when we are not on the invite list I think is especially important because when we go back to 2003 and the BRAC when we ran out of money, that was really the first time that the other parts of the system, the DA's and law enforcement came to the table with us understanding that they can't do it without us and I am always reminded of the first time I had the television on at home and I wasn't paying attention and the t-v show Law and Order came on and I heard him say 'the people are represented by two parties' and I thought 'yeah, the defense and the prosecution.' But, no, it was the prosecutors and the police and so I just want to underscore that because I think even if we are not invited it is important that we invite ourselves. Okay, those are my two cents. I kept my mouth shut during the session.

- 58:59 G. Hazarabedian Thank you Commissioner. Any other questions?
- 59:02 Chair Ellis Do you have anything you want to say?
- 59:04 G. Hazarabedian Um, no.
- 59:15 J. Potter Others have mentioned what you have mentioned too about the grand jury and in at least one or two others there was mention about the body-cams and having to review the video. In grand jury you might have to review transcripts. So you front end load the work of the defense lawyer, but might there be back end savings as a result of these technologies being available and these transcripts being available either with client management because now the client is aware of what is really going on you might be able to put together a case a little faster, or the state is saying based on the transcripts in the grand jury or the video from the police 'our case isn't as strong as we thought and we will dispose of this more quickly.' So, is there any back end savings even though there might more front end work?
- 1:00:05 G. Hazarabedian I guess I would personally answer that by saying I think there may be a back end better result but not necessarily any labor savings. I see more work being represented by these things, I see it being better for the system, I see it often being better for the result, I am not sure I see the economy. But, that is just me.
- 1:00:31 Chair Ellis Thank you Greg.
- 1:00:32 G. Hazarabedian Thank you.
- 1:00:34 G. Guilfooy Mr. Chair, just to wrap up quickly on this, this was again the first phase of the strategic planning process that we have done. We appreciate you accepting the raw reports back. The intention is that we are going to go back now and actually write these up and we will have a document back for the Commission and we also committed to OCDLA that we would furnish this information to them through John as well. Thank you all for your help. Next time we will see you is in December. It's going to depend on your schedule for the December agenda but we will try to spend some time on this with you as well.
- 1:01:11 Chair Ellis Okay.
- 1:01:12 G. Guilfooy Thank you very much.
- 1:01:13 Chair Ellis It's on December 11 and it's at Mercy Corps. The next item is Implementing Caseload and Workload Standards. Norm Lefstein?

**Agenda Item No. 3            Implementing Caseload and Workload Standards**

1:01:50 Chair Ellis            Paul, did you want to share with Norm or how do you want to?

1:01:53 P. Levy                I'll give a brief introduction. We consider ourselves very lucky to have Professor Lefstein here. I think of him as the dean of modern public defense. He has literally written the book on caseloads and achieving reasonable caseloads. That's the title of his book. I think his presentation to the management conference was very well received and we are very fortunate to have additional time for him to talk to you about how we might go about achieving Oregon specific caseload standards. Nancy has talked with him in some length about that and I want him to share that with you.

1:02:54 N. Lefstein            Thanks very much Paul. Good afternoon, it's nice to meet all of you. John, I met yesterday but the rest of you are new acquaintances. I had an hour on the agenda yesterday and probably some of the folks in this room may have heard me yesterday but you can relax, I am not going to cover all of what I talked about then. What I thought I would do, however, is hit a few high points and do it quickly and I am certainly happy to answer any questions that you might have. One of the things that I said yesterday is that there are really no standards for caseloads that are going to convince anybody these days. There were, and Paul told me he had talked to you about this, some standards that were published back in 1973 by a commission that was funded by the government. They had been used sometimes as a basis for maximum caseload numbers for a defender office like a maximum of no more than 150 felonies, not more than 400 misdemeanors, 200 juvenile delinquency cases. They were never based on any solid evidence of any kind. They are now more than 40 years old. They didn't divide any serious felonies between lesser felonies or similarly divide misdemeanor cases. They were simply the best judgement of some folks from the National Legal Aid and Defender Association that had a meeting, which Jim Hennings told me yesterday, may have been at a bar. I had always envisioned it in a meeting room of some sort and I know some other people besides Jim who were there and they told me matter of factly they just plucked these numbers out because they seemed reasonable. Well those numbers aren't going to convince a court in the event of litigation and they are not going to convince a funding authority. There has been some very important litigation that has developed over the last several years and actually in all of the cases I have been privileged to be the expert witness on behalf of the defense. I have testified now in seven or eight cases involving caseload challenges for the defense. The litigation is important because there is a growing recognition by several state supreme courts that you can make an argument there were constructive denial of counsel when there are serious deficiencies in providing effective representation basing those decisions both on the sixth amendment right to counsel and standards of legal ethics, the rules of professional responsibility, the need for competence and diligence, the need to avoid conflicts of interest which arise when you've got too many clients and you are devoting more time to one client and less time to another client we see as a form of a conflict of interest. The litigation is by the New York Court of Appeals in a 2010 decision, the Missouri Supreme Court in 2012, and the Florida Supreme Court in 2013; in all of those cases they said you can maintain a case as a constructive denial of counsel assuming you can establish it and you don't have to show prejudice. This was a concept that was originally mentioned in the Strickland decision itself which required in an individual case obviously, as you all know, in the event of a conviction you had to show to prejudice but this bypasses the whole prejudice issue and I talked in some length about that yesterday. There is a further case pending, and Paul shared with me that he has shared with you the brief that the Department of Justice filed in that case. That was a case that we asked them to file in and so did the Innocence Project in New York file in that case, the ABA filed in that case, as did the National Association of Criminal Defense Lawyers and we think we are likely to win that case. We thought...

1:07:20 Chair Ellis            On the procedural issue?

- 1:07:23 N. Lefstein Well, the issue is whether or not the complaint alleged of constructive denial of counsel and that is the issue in the case. We think Pennsylvania Supreme Court, which fortunately has changed over time, may well embrace the position that is being advocated here by the plaintiffs, a lawsuit brought by the Pennsylvania Civil Liberties Union and some private lawyers who work with them.
- 1:07:51 Chair Ellis Their opinion isn't likely to address what is an adequate level of representation.
- 1:07:57 N. Lefstein No, and that is precisely the point I want to make. You could not have asked me a better question. In all of the litigation that has transpired, all the litigation in which I've been involved there has been no real evidence of what is a reasonable caseload and how you determine it.
- 1:08:18 Chair Ellis Didn't the Mount Vernon case come close to that?
- 1:08:21 N. Lefstein No, they appointed a monitor and that was a remarkable case because it was really the government that was being sued that removed it to federal court. Otherwise, you can't get these cases in the federal court. The litigation has primarily been for abstention reasons in the state courts. They removed it to federal court and they got somebody appointed to oversee developments there. The New York case for example, which was settled by the way in October of 2014, the indigent legal services office which is for the state of New York is implementing changes in New York State that were part of the settlement. But, one of the things that they are going to do and the thing I am going to talk about most, is they are preparing an RFP to conduct a weighted caseload study. One of the things that is happening in the United States is a renewed interest, if I can call it that, in doing very sound methodological caseload studies that are defensible. In the book that I wrote, I didn't go into great detail about it but, I did say that if you are going to do a weighted caseload study you really need to resort to a Delphi panel and use the kind of Delphi methodology that was developed by the Rand Corporation beginning in 1962 and that has been used in a number of other disciplines. I work very closely with the American Bar Association. I have been a member of the ABA Standing Committee on Legal Aide and Indigent Defendants, I've been a consultant to that committee, I am now a special advisor to that committee. In one way or another I have been linked to them for literally decades and what the ABA has done in the wake of the Missouri Supreme Court decision was to work with the Missouri State Public Defender program to conduct what I re-termed a new breed of weighted caseload studies where we have used a Delphi panel consisting of the most senior public defenders with the Missouri program, which is about 500 lawyers as well as private practitioners knowledgeable about criminal defense and the kinds of cases public defenders handle. On the one hand the Delphi panel can through a series of online surveys, which I can describe, as well as an in person meeting ultimately come up with recommendations about what should be the amount of time devoted to a range of different cases and the tasks required regarding those cases. When they make those judgements they make them based upon performance standards looking at state performance standards. Missouri, for example, has state performance standards. They look at American Bar Association performance standards. So, it is really a standards-based inquiry that the Delphi panel engages in. Now, simultaneously with the Delphi panel consisting of experts in criminal defense, you have the line attorneys in the jurisdiction, whether it be an entire state or subdivisions within the jurisdictions, maintaining time records. Time records which will reflect how much time they spend total on a particular kind of case broken down between, for example, very serious felonies and lesser felonies as well as misdemeanor cases, and the tasks that they devote their time to. So, in the end we know here is the amount of time that defenders are devoting to different kinds of cases and the tasks within those cases and on the other hand here is what the Delphi panel says they should be spending on that work if they were to discharge their performance obligations which would then be and we used the term reasonable effective assistance of counsel, so they are discharging their sixth amendment obligations as well as their duties under rules of professional conduct. In the Missouri litigation which went to the Missouri Supreme Court they were very empathetic to the

position of the Missouri State Public Defender and the case was remanded, and as I explained yesterday, the state auditor from Missouri came forth and said ‘well Missouri has a protocol but it’s based on those old NAC standards of 1973 and there is no basis for those.’ As a result, working with the American Bar Association we undertook this weighted caseload study in Missouri. We engaged a public accounting firm to oversee the maintenance of the time records and to work with us with the Delphi panel. They had the econometric personnel who could crunch the numbers. We also wanted somebody who was completely neutral on the issue. In the end they issued a report which showed enormous differentials between the amount of time the Missouri State Public Defenders were spending compared with what the Delphi panel said was required. Rather than going back to court, which they certainly can and still do, they went to the Missouri Legislature and they basically said ‘here’s the report about what we ought to be doing, you’ve not funded us adequately for literally more than a decade, you’ve given us virtually no increases. We are in a hole and we know we can’t get out of it overnight so we want you to address it over time.’ The result was really quite dramatic with Republican finance committees in the Senate and similarly in the House. They gave the Missouri State Public Defender, based upon the data that was presented to them which the found compelling, the largest single increase they had had in their funding in well over a decade. I don’t remember the exact amount but it was significant. The governor vetoed it, ironically a Democratic governor as I explained yesterday. They overrode the governor’s veto and the governor has held onto the money under an authority he claims under the Missouri Constitution but we think the story is nonetheless one worth telling. We think in the end what has been done in Missouri will endure to the benefit of that program. One of the other things that we have done, and the ABA has been involved in most but not all of the workload studies that have been undertaken and I work closely with personnel working with the ABA who are on the ground in these studies; I edited the Missouri report before it was released. The other study that was done of a similar nature was in Texas which I also had some involvement in and it happened to have been mandated by the Texas Legislature. It’s in the only study that hasn’t involved a public accounting firm. The future studies that will be done, at least as far as the ABA is concerned, will be issued by the public accounting firm and the American Bar Association, which we hope and I certainly hope that’s true. Oregon carries some weight when you’re using it whether it be in litigation or with the legislative body. With time keeping, we have insisted upon permanent time keeping because we think it is a very important management tool for all kinds of reasons. We also think it is important if you ever want to replicate a workload study and we are not unmindful of the fact that it is something of a cultural revolution. We also think it carries a very important message to legislative authorities and perhaps the courts as well because you demonstrate that you are transparent, that you are the most responsible agency in the criminal justice system because nobody else keeps their time.

1:17:36 Chair Ellis

What level of granularity do you seek on the time keeping, just hours per particular case or tasks?

1:17:45 N. Lefstein

Well, you break it down into different kinds of functions per case. We don’t break it down with all of the potential categories, they are broad categories, but how much time is related to client consultations, interviews, in fact we have included letter writing. We have definitions of what we are talking about. How much time is devoted to investigation and so forth? The Missouri report lays it all out. All of this stuff is available online. We are constantly fine tuning the methodology incidentally and there are lots of methodological issues but we think we are doing it in a way that will withstand scrutiny whether it be before a legislative body or elsewhere. This is really a sea change. There had been some very few weighted caseload studies that have been done historically. I think they were flawed compared to what we are doing now. There was a group in Boston that did a number of studies but they never really used the Delphi methodology, in fact I have never, and the people that did it are good friends of mine...

1:18:56 Chair Ellis

That’s Spangenberg?

1:18:57 N. Lefstein Yes, and Bob is retired. He is one of my very best friends. But, Bob didn't believe in the Delphi methodology and when I wrote my book I was very kind because I didn't really offer a critique his studies but I never thought they could withstand the scrutiny and most people I don't think understood the methodology because it was never fully explained. I happen to come from a discipline with some social science background and I believe strongly that if you're going to do this kind of work you need to be willing to explain the methodology fully. In the Missouri report I actually had some arguments with the public accounting firm because they foresee the day that they wind up back in court and they didn't want to give discovery to the other side and my answer was 'it doesn't matter, you need to disclose it and I am expecting that in the future things will be disclosed.' I can tell you that we are engaged in workload studies in the state of Rhode Island, we are engaged in them in Nashville and Knoxville Tennessee. We are undertaking a workload study in Louisiana which is in terrible shape. We are also involved in Colorado and we expect to be involved in other jurisdictions as well. So, let me stop there.

1:20:22 S. McCrea So, you didn't, you weren't explicit but I am inferring and it seems sort of obvious but I want to make sure that I have got this right that between the amount of time that the Missouri were spending on the cases and what the Delphi panel found was the appropriate amount of time, the public defenders were not spending enough time?

1:20:44 N. Lefstein That's exactly correct. I gave some illustrations yesterday when I spoke.

1:20:48 S. McCrea Yeah, I missed your talk yesterday and I am sorry for that but I have been looking at your materials and they are quite impressive. I'm sorry Paul, may I ask one more question?

1:20:58 P. Levy Oh no, please.

1:21:00 S. McCrea I am on this Commission because I don't take state court appointed cases. That is why I am here. But, I do take federal court appointed cases and it has been a nightmare with what we went through with the sequestration and having sat on the national committee for 10 years I have this skittishness, if you will, about any kind of weighted caseloads and any time we have the terms 'reasonably effective assistance of counsel' because of where I saw the federal system going 10 years ago where we have kind of held it off going. That is, as one of the directors at that point put it, the question comes down to 'is the person a citizen entitled to a Cadillac defense or only a Volkswagen defense?'

1:21:59 Chair Ellis Pick another.

1:22:00 S. McCrea Well, you know, that's what you said.

1:22:06 Chair Ellis Mazda, Chevrolet, not a criminal company.

1:22:09 S. McCrea Well, that's what it means, a Volkswagen defense where they are cheating or whatever. So, where we had it come out with Missouri and going to the legislature, even though they haven't gotten the money yet, of course that's fabulous because I have a continual concern that the people who do public defense cases in the state of Oregon are having to engage, whether they want to or not, many times in triage that they have too many cases, that they are overburdened, that they are not getting paid enough. We want that to change. We've been working on it for the past 15 years. Obviously, we are not where we want to be but, I'm just concerned Dr. Frankenstein, can you assuage my concerns about where we are going here?

1:23:03 N. Lefstein I'm not entirely sure I understand your concern. I am certainly familiar with sequestration and how it affected the federal offenders. I also am concerned about the fact that within the administrative structure of the federal government they reduced the position of the defender program. You may be familiar with NACDL's report which was written by my colleague

from my law school for NACDL. Be that as it may, the federal defender program, which pays \$127 an hour, is vastly better funded for what it is doing. Your precise concern, I want to ask you a question about...

1:23:46 S. McCrea I can express my question. I sort of left out my question I suppose. Here is my concern is right now we have better funding in the federal system at \$127 an hour plus experts and what we would call non-routine expenses here in this state, but the problem that we have is that in terms of budgeting with having weighted caseloads and then there is this determination which I would analogize to what I think the Delphi panel is doing is saying 'for this kind of a case this is how much time it should take and this is how much it should cost' and my concern

1:24:33 N. Lefstein It doesn't get into the cost really.

1:24:35 S. McCrea Okay, well my concern is that with the federal system with where it has been going over the past 10 years is in effort to extrapolate and to systematize 'it's this kind of a charge and this is what it should cost.' Now, currently, there are limits on what a case is supposed to cost but routinely, especially here in the district of Oregon, because of the complexity of the cases and the amount of time the judges authorize fees and costs above what the cap should be. So, I guess I am analogizing here, is I don't want to get Oregon into a position which is where I am concerned the federal system is going where we say what we call Ballot Measure 11 'it's a mandatory minimum' and that's only worth X amount which is unfortunately kind of what we are dealing with right now the way we have it set up. The legislature is going to say 'we are not going to give you any more than some ridiculous amount' like \$1800 because that is how much time it should take you to be able to do this case.

1:25:45 N. Lefstein Well, I don't think your concerns are well founded in this sense.

1:25:51 S. McCrea Good.

1:25:54 N. Lefstein The difference between what the Delphi panels are recommending in jurisdictions in which we have been involved is vastly higher in terms of the hours which would then translate into more lawyers and a much higher payment than anything that you've got here now and virtually every other jurisdiction in America. For example, and I gave a couple of examples yesterday, in Missouri lawyers were spending 2.3 hours on certain misdemeanor cases. The Delphi panel said it ought to be 12 hours. In felony cases they were spending around 11 or 12 hours and the Delphi panel said it ought to be up around 47. To get to those kinds of increases would take you, you may never get there. My attitude is public defense in America has been underfunded for decades and it's disgraceful and we settled inevitably for triage, for doing things in ways that ought to embarrass the judiciary and in some ways the legal profession. You have moral blindness that sets in on the young lawyers. They go to a clinical program in law school and they get out and suddenly that are thrust into a defender program and it's a whole different world and they can never do what they were taught in law school they ought to be doing on their cases. My view is you need something really dramatic to catch the attention and I have kind of come to the resolution that you need evidence based recommendations that you can defend before a legislative body or before a court and I think timekeeping, though its controversial, is also an ingredient that ought to be given very careful consideration. The National Association of Public Defense just earlier this year embraced this recognition and some other people persuaded them, I didn't persuade them although I believe in my book I talk about the benefits of timekeeping. I can't guarantee you that these efforts in various states are going to pay off but I am encouraged by the initial response in Missouri and I think it is essential in response to this litigation that has taken place. I mean, the courts throw up their hands. I can tell them 'this is bad what is going on, here's what the lawyers are not doing.' You can't do anything more than triage when you've got, as a lawyer did in Florida where I testified handle 750 cases at the felony level post arraignment. I mean, it was absurd. He'd plead some of them at arraignment. But, I couldn't tell them what the number ought to be and if I had an opinion on the number they would say 'well what's your basis for that?' I

didn't have a basis for it, if I were to offer it and I didn't offer it for that very reason because I had no evidence to support it.

1:29:20 P. Levy Shaun, as I understand it, the weighted caseload, the study in the Delphi method ultimately permits us to end up with caseload standards so that if a particular type of felony requires 47 hours on average and lawyers are full time or you take the number of hours those lawyers have available you just do the math to find out how many cases that lawyer of that type should be handling which would undoubtedly be vastly fewer than the NAC numbers that we also use ourselves to some degree. So, I see only an upside to this process and it is a process that we want to embark on with the Commission's blessing here in Oregon and we will be talking more about how we will go down that road, hopefully involving Professor Lefstein.

1:30:27 J. Potter You're not going to retire are you?

1:30:30 N. Lefstein I don't think so. I am well past the age but I continue to work at this. I hadn't really intended to be anything other than remain totally calm, but with these questions I apologize for my excitement.

1:30:47 S. McCrea No, that's good.

1:30:48 Chair Ellis Right, you look like you've got a lot of tread left in your tires.

1:30:52 N. Lefstein Well, I hope so. I use it mostly on the tennis court these days but every once in a while in public defense.

1:30:58 Chair Ellis Any other questions for Professor Lefstein, not Frankenstein.

1:31:05 S. McCrea Oh, that was just metaphorical.

1:31:07 N. Lefstein There was a RAND study of the federal courts which I've not really spent a lot of time with but I don't think anybody in the federal courts thinks it's been harmful to you. Are you familiar with it?

1:31:19 S. McCrea I am not sure I am thinking about the same one.

1:31:21 N. Lefstein They did one on, there's a RAND study about death penalty cases in Pennsylvania but there was one in the federal courts for defenders.

1:31:34 Chair Ellis Paul, is there more you want to share on national developments?

**Agenda Item No. 4 Oregon & National Developments**

1:31:37 P. Levy Yes, I think we can do the next two agenda items really quickly because on Oregon and National Developments. We have tried to keep you up to date, not only have we talked to you about the Missouri study and the Texas study in the past, but also the United States Department of Justice statements of interest in a variety of cases, most of which Professor Lefstein has been involved with personally as a witness. I have in your materials the brief that they filed recently in the Pennsylvania case that Norm has just talked to you about. I don't really need to talk more about that, it is a critical issue whether you can state a cause of action for prospective injunctive relief by showing a constructive denial rather than having to litigate post-conviction relief petitions after a conviction, terribly inefficient.

1:32:37 Chair Ellis The courts have more leverage with legislatures on defense than they do on, let's say, education. That is if the legislature doesn't fund it adequately people are going to go free that maybe shouldn't and that is a big lever.

1:33:03 P. Levy                    Yeah, and it's nice to weigh the prospect of that out there because, well I will just stop there. The Oregon developments that I want to share with you very briefly is something you are probably aware of from just the news. I am sure Commissioner Stevens is very aware of it here in Deschutes County and that is what I can only say is the continuing development of Oregon State Police crime lab scandal and we can't call it anything other than that. Certainly there was one criminalist who is being investigated and who affected literally thousands of cases involving drug analysis who was tampering with that evidence and thousands of convictions are now in question and will need to be reviewed and we are working with our provider community to encourage that they do that, telling them that we don't expect them to do this for free, that we know there will be costs.

1:34:18 Chair Ellis                Who is doing the investigating? Is it the AG?

1:34:26 P. Levy                    There are a number, the state police is supposedly doing some investigation, the Department of Justice, there's a governor's task force that Ernie Lannet is on. DA's are committed to informing defense attorneys about those cases where this one particular analyst was involved. But, the Bend Bulletin just reported yesterday that there are other cases that this analyst was not involved with but she may have tampered with nonetheless. Our providers, defense contractors are doing investigation. But, it doesn't just stop with this analyst. There was another state police criminalist whose work has been drawn into question and prior to all this there were questions about the state police Question Document Unit which has now been shut down. It just continues to develop and this puts a significant burden on the defense community including our appellate division where we need to be identifying cases where these folks were involved. There is a meeting today at the conclusion of the Death Penalty conference sessions today which is going on concurrently with this meeting where Steve Wax with the Oregon Innocence Project and others, myself included, will be talking about the developing concerns and what can be done about it. So, that is something we are tracking and it really can have enormous implications.

1:36:15 J. Potter                    That meeting starts at five o'clock and anybody is welcome to attend that.

1:36:19 P. Levy                    Yes, and I have invited people to come to that even if they are not attending the Death Penalty conference. You will hear more about this from us. That's all I have on that. If you would hear briefly from Amy Miller and then you might want to take a break at that point and then launch into the contract portion.

1:36:41 Chair Ellis                Sounds good. Thank you very much. Nice to meet you. Hi Amy.

**Agenda Item No. 5                Representation in Juvenile Delinquency Cases**

1:36:53 A. Miller                    Good afternoon Chair Ellis, Vice Chair McCrea and members of the Commission. I am here to provide a very brief update on a couple of items we discussed when the Commission was in Bend back in June. Nancy had asked me to provide an update to you today so that is all this is going to be on a couple of things. One is on representation in delinquency matters, one on representation at first appearances, and two about waiver of counsel in these delinquency cases. Regarding representation at first appearances, I think after that meeting one of the things I tried to do was get a sense of the scope of the problem, how often were these initial appearances occurring in these delinquency cases where there wasn't counsel present. So, as part of the contracting process, the analysts asked the administrators how often that was occurring and we gathered data on the majority of the counties and in a handful there is not consistent attorney presence at initial appearances in delinquency cases. When we asked why scheduling was one. The counties where this is happening are small rural counties where there isn't a consistent date and time for these appearances. So, scheduling is a problem and notices are a problem when you have a limited number of attorneys and you have to drive a long distance it makes it a challenge. Also, the other barrier that was mentioned was the support of the court, when the court isn't making this a priority it makes it that much more difficult for

the lawyer to get the notice and to be there. I don't have historical data to know if this is different than it was two contract cycles ago or ten years ago but, as you might recall the model terms for this upcoming contract cycle require that the contractor shall provide representation at all scheduled arraignments, shelter hearings and other initial appearances in both criminal and juvenile cases. To the extent that I can be helpful in facilitating some of the process issues around this I have offered my services to the particular jurisdictions where this continues to be an issue.

- 1:38:39 Chair Ellis      How did you gather your input?
- 1:39:02 A. Miller      Thanks to the contract analysts. They contacted all of the administrators when the RFP's came and they were doing the contracting so they talked to them and they asked not only about this but they asked about shelter hearings and they asked about criminal appearances as well.
- 1:39:16 Chair Ellis      So, you feel pretty good that you were getting input from all over?
- 1:39:22 A. Miller      I do, we have four counties that we need to follow up with and I will do that.
- 1:39:27 Chair Ellis      Okay.
- 1:39:30 A. Miller      Regarding waiver of right to counsel in delinquency cases, I went back to 2010 when this Commission heard a presentation from the Oregon Child Advocacy Center down at the University of Oregon and I think it was Leslie Harris and then Jordan Bates who was a law student and who is now a lawyer at Youth Rights and Justice. They presented a report to you about this issue. They had surveyed juvenile department directors from around the state and they have found the 95% of the time youth waived the right to counsel in formal accountability agreements.
- 1:40:03 Chair Ellis      Without counsel representing them on that question.
- 1:40:06 A. Miller      Absolutely correct. The practice of waiver following a formal filing of petition varied dramatically across the state. As a result of that report and some of the momentum generated there was a law waiver colloquy that was developed in partnership with the Judicial Department and it was provided to judges in 2011. I did an informal survey of attorneys across the state this March and I don't think that based on that information there has been a significant change on this issue. Youth are continuing to waive counsel in formal accountability agreements without consulting with counsel, that in misdemeanor cases this is also occurring. I was informed today that it is occurring fairly regularly in judicial release decisions and so I looked at some national data to see what was happening. I have to say 31 states around the country have safeguards in place to limit this for juveniles. They either prohibit waiver in juvenile cases or its aged based waiver or at minimum it requires consultation with counsel before waiver is allowed. I also want to point out to you following up with Paul about sharing information on things that are occurring around the country, there was the US Department of Justice filed a statement of interest in a case called NP vs. The State of Georgia. It was back in March and that case is near where I went to college in Georgia and in that particular case youth were being arrested, a petition was being filed, and they were being held in custody for days and then they were told 'hey if you go ahead and plea right now you can get out, otherwise a lawyer might come to see you in the next few days.' So, that was what was happening and the Department of Justice filed a statement of interest and they looked specifically at juveniles and they said in some Supreme Court case law about the juveniles aren't to be treated differently and what they said was that systemically waiving counsel without first consulting with an attorney amounts to a system wide denial of the right to counsel. That was what they weighed it on. That case has been settled now and one of the requirements is in the consent decree is that a public defender is present at every appearance so that a youth has the opportunity to consult with counsel prior to waiving counsel. In Oregon, Nancy asked me to pull together some research on this issue

and she presented it to the Chief Justice. He is supportive of us convening a multiagency task force to look at this and make recommendations about the best way to address this here in Oregon and Nancy wanted me to communicate that with you. I have

1:42:44 Chair Ellis

Are you on that task force?

1:42:47 A. Miller

Well, I reached out to Judge Welch and I am not going to commit her because she is not here but I gauged her level of interest and I am hopeful that she'll be a participant and we will be able to convene a group to either look at a trial court rule which is the way this was handled in the State of Washington or if necessary a legislative fix. I wanted to just provide an update to you on where we are in that process and hopefully we will be back with conditional information as things continue to be answered.

1:43:09 Chair Ellis

I know when this issue has been presented to us before, this Commission has just been very adamant that this is unacceptable what we are seeing. Any opportunity that you see we have to influence the outcome of this, we are ready.

1:43:31 A. Miller

I very much appreciate that, I appreciate the encouragement. I will be back to share more information with you at a later date. Thank you.

1:43:40 Chair Ellis

Shall we take five minutes, not to exceed.

#### **Agenda Item No. 6 & 7 Approval of 2016-17 Statewide Contracts & Death Penalty Contracts**

1:49:20 Chair Ellis

Caroline, you're up on the next two. Take it away. We are going to do what Judge Solomon used to do, he'd start court without you if you were late. Believe me, there was nothing more embarrassing than to walk in and it's already going.

1:49:53 C. Meyer

Good afternoon Chair Ellis, members of the Commission. For the record, Caroline Meyer with OPDS. It seems surprising that it has been two years already since I was here before you to approve contracts for the current contract cycle but it has. Attachments number three and four are where we are at. Attachment three lists out all of the non-death penalty contracts statewide and attachment four is then the death penalty with both the attorneys up above and the mitigators down below. The only thing I noticed on the non-death penalty contractors is we put an asterisk next to all of the new contractors.

1:50:45 Chair Ellis

There are three right?

1:50:47 C. Meyer

Well, there are four but somehow Jess Barton's didn't get an asterisk, so the very last one that is listed is for the Professions Resource Center and that should've had an asterisk next to it because it is also new.

1:50:59 Chair Ellis

I think we knew that because that is a new type of contract.

1:51:05 C. Meyer

Right, and we discussed at the end of July when we met in executive session we went over that and I think we told you at that point that it was the plan.

1:51:12 Chair Ellis

Right, well Jess has presented to us.

1:51:15 C. Meyer

Yes, and we have a one year contract with him to work with the Lane County Public Defender's office and then at the one year mark...

1:51:25 Chair Ellis

But he's not limited to Lane County I thought, he's a statewide resource.

1:51:30 C. Meyer

Right, but that particular resource has been put into the Lane County contract similar to what we do with MPD and the Padilla project.

1:51:39 Chair Ellis He's got a fiscal sponsor but he's statewide.

1:51:42 C. Meyer Yes. I think that was the only change. Substantively there were no changes between what we presented to you in executive session and what you see before you. I did want to summarize briefly the high points for contracting. We do have a pretty good representation of our contractors here today so that is good. We received the pop money to bring the consortia and firm rates up to the PD rates. That was the 5.2 million and then we also got the mileage and you also heard about that, \$161,700 for mileage. Then we got the CSL increase which results in a 2% rate increase in 2016 and 3% in 2017. That is the first time that we are having different rates in the contracting cycle. We talked with staff about that this morning. There was also a real effort by our contracts team when we were meeting to talk about our statewide staffing models where we pay a flat rate for Padilla; there are some other things that we pay a flat line item rate for. We took a look at all of those and tried to better align those in other words, if we were paying 20,000 in one county for mental health court and similar time was being put in in other counties then that was something we tried to remedy this time. We were able to increase the death penalty rate from \$98 an hour to \$100 an hour. We talked about the new contractors; we have four new contractors on non-death penalty and I believe three new death penalty contractors.

1:53:32 Chair Ellis I know the, I want to ask about contractors that are not on the list. I know the one firm in Washington County has been discussed. Are there any others that have been dropped that it's not a cordial dropping if I can phrase it that way?

1:53:54 C. Meyer I don't believe we had any others. What you don't see on here are any which we extended their contract. We do have a few of those and there are various reasons why we might be extending rather than, for example with Brindle McCaslin and Lee, we will still have a contract with them for another year but we are not entering into a new contract with them so that is why they are not on here. What you have before you is just new proposals that we need your approval for.

1:54:24 Chair Ellis Are any of these ones where the contractors have expressed to you a degree of outrage beyond normal?

1:54:37 C. Meyer Are you asking if any of these expressed a degree of outrage beyond?

1:54:42 Chair Ellis Well, all contractors wish they were getting more, so that is what I call normal outrage. Are there any of these where there is a particular sense of tension between OPDS and the contractor?

1:54:57 C. Meyer I don't believe so. We did manage to reach agreement with all of our contractors, some of those as recently as this week. Some of that was just that some people were on vacation and didn't get back until this week or they were in trial. There were reasons for it, it wasn't so much that we were still trying to reach an agreement. I would say one of the bigger issues that we had this time was investigation and we recognize that we have more work to do there. That was one of the things that we have to do in terms of getting the rates the same, we needed to take investigation out of the public defender rates and so that was a calculation and I think going forward we have to look at that a little differently. We have certainly debriefed amongst our analyst team and when Nancy is back we will have a bigger debriefing about the entire contracting process and certainly what we've heard here today will help inform that, you know more transparency. We do feel like we have come a long way but we do have more work to do, but investigation was probably one of the bigger sticking points.

1:56:00 Chair Ellis The issue on investigation, I know it has been imbedded in the PD rates and not in the consortium rates and so you have an apples to oranges issue. Is the issue that or is it that investigation is more funded on PD's than it is on consortia?

1:56:22 C. Meyer I think really it was that fact that we've had the rate differential for years but it really wasn't, even though it was sort of an unwritten rule that that difference was for investigation...

1:56:37 Chair Ellis Well there were some other things too, it wasn't just investigation.

1:56:40 C. Meyer Well, it was mostly investigation but again, it was never tied directly to, we didn't say okay 'MPD you have 15 investigators we need to make sure that ties directly to the'...

1:56:52 Chair Ellis Just to clarify my comment, I think we have always felt PD's did a lot more in training and supervision that consortia do and PD's in most of the communities have been more involved in the law enforcement community structure. Paul is shaking his head.

1:57:15 C. Meyer Shaking his head no or yes?

1:57:18 Chair Ellis That has been part of the mix of issues we have discussed for a long time.

1:57:24 C. Meyer No, that's correct. On the investigation, and we started out calling it just investigation, but the concern by the public defender offices was partly it was a union issue. If we call it just investigation then it becomes money we can only use for investigation and because there hadn't been a direct correlation between what they were paying their investigators and what we were giving them at this rate differential I think the wording in the contract was investigator offset is what we called it so that it doesn't necessarily have to be used only for investigation or it can be used for investigation or if there are other costs associated with it. It was really meant for investigation, but again it was tied to caseload and so again those that had a shortage of caseload fared better than those that had an overage of caseload. So, going forward we want to make sure that it is directly, we have to come up with what a reasonable amount of investigation for a misdemeanor, for a c-felony and then you just multiply that times their quota and then really you can apply it fairly across the board. That is sort of the direction that I see this going.

1:58:39 Chair Ellis Any other issues that you think we should be aware of?

1:58:45 C. Meyer I don't believe so. That was really the key one and again we are looking forward to debriefing. You learn more things every time you go through this and this is just my second time through in terms of being in the contract manager role. We do have totals for Commissioner Potter. We include the statewide non-death penalty total because it truly is the amount of the contracts and we can do the same for the death penalty contracts but we just didn't have the figure there so if you want that I have it. With the mitigators, there is no total because their essentially all pay as you go now even though there are contracts, so we are contracting with them for the work and the hourly rate, but they are billing us on a pay as you go basis.

1:59:38 Chair Ellis Any questions for Caroline? Anyone in the audience have something they want to share with us on this issue? So you want a motion and approval? I would entertain such a motion.  
**MOTION:** John Potter moved to approve the death penalty contracts, statewide contracts, and non-death penalty contracts; Per Ramfjord seconded the motion; hearing no objection the motion carried: **VOTE:** 5-0

**Agenda Item No. 8 Approval of Personnel Rules changes and AFSCME Contract**

2:00:48 Chair Ellis Now the next item is personnel rules, I sure hope you are coming up here Cynthia this says Commission and we need your guidance.

2:01:00 C. Gregory Yes. Chair Ellis, Vice Chair McCrea, thank you very much. For the record, my name is Cynthia Gregory I am the Human Resources Manager for the Office of Public Defense

Services. Today, in the materials for you attachment five is the current OPDS personnel rules. Where we would like to have your action is on attachment 5B which is the proposal for changes to the personnel rules. You have a red line version and I will say that chiefly the changes in our personnel rules are necessitated by alignment with current Oregon and Federal personnel policies or employment laws including Federal and Oregon Family Medical Leave, Americans with Disabilities Act amendments, military leave, bereavement leave and leave for domestic violence and stalking protection. We did do some additional changes to remove references to the former public defender's office personnel rules and some updates to the definitions.

- 2:02:04 Chair Ellis Are there any particular issues that you want to flag for us?
- 2:02:10 C. Gregory No, I think that it's critical that we bring our personnel rules in alignment with current law.
- 2:02:19 Chair Ellis And I think you will find agreement here. We should obey the law.
- 2:02:22 C. Gregory We also are looking to align with some practice. We have removed some procedures in the policies in the personnel rules that were not in alignment with how practices have been carried out and to make things a little clearer.
- 2:02:38 Chair Ellis Was any of this impacted by your union negotiation?
- 2:02:42 C. Gregory Yes, actually we had prepared proposed changes to the personnel rules some time before we were notified of the contract negotiations with AFSCME so we have held off waiting to see if we needed to make any additional changes to the personnel rules. The additional change came in the form of the leave accruals. We added tenure for folks who have worked with the office for more than 30 years and some personal business leave.
- 2:03:16 Chair Ellis We are going to get to the AFSCME contract in a minute. Would it help if we talked about that before we approve this or acted on this?
- 2:03:26 C. Gregory I don't believe so.
- 2:03:29 Chair Ellis Any other questions for Cynthia? Is there a motion to approve? **MOTION:** Shaun McCrea moved to approve the Personnel Rules changes; Janet Stevens seconded the motion; hearing no objection the motion carried: **VOTE:** 5-0
- 2:03:45 Chair Ellis Okay, we are making much better progress.
- 2:03:51 C. Gregory Yes, despite the length of the attachments I was required to provide for you I was hoping to keep this fairly brief. The next attachment is 5C. This is the contract for the Oregon AFSCME which represents our Public Defender 1, Public Defender 2 and Senior Public Defender classes in our office. This contract has been ratified by the members of that unit so today we are looking for your approval so that we may finalize that contract with AFSCME.
- 2:04:24 Chair Ellis I had a question. It doesn't mean that this will lead to a different outcome, but there were a surprising number of leaves, at least surprising to me. So, there is a pre-retirement planning leave, a bereavement leave, a service award leave, a special recognition leave, a domestic violence leave and these were all unfamiliar to me as standard.
- 2:04:57 C. Gregory Those leaves are all in the personnel rules as a matter of fact.
- 2:05:01 Chair Ellis Well, that's why I thought the two might relate. Have they been there for a while?
- 2:05:05 C. Gregory Yes they have.

2:05:06 Chair Ellis Okay, and it's not something that management felt it had to yield to union demands to do, you already were doing it?

2:05:16 C. Gregory Yes.

2:05:19 Chair Ellis Any other questions? Those were the ones I wanted to ask about. Any other questions on the contract?

2:05:29 J. Potter How does this tie into attachment six and the compensation plan that is going to be commensurate with other state agencies?

2:05:42 C. Gregory Angelique Bowers is here with me. She is going to talk with you a little more in detail about the compensation plan. We are, as you well know, our goal is to align our pay practices as closely as possible with other state agencies. The Executive Branch agencies and the Judicial Branch for this year are mirroring the 2.25% COLA that will happen on December 1, which is payable on January 1. We are going to ask you to look at the 2.7% on December 1, 2016 for staff as well. That will be part of Angelique's presentation. This is our desire to keep these things cohesive and similar for all of the employees.

2:06:36 J. Potter I share the Chair's observation that it seems like these things are tied together a little bit and when he sees various leave things I see in section six or attachment six for example, the addition the special day of leave in lieu of mandating closure of OPDS the day after Thanksgiving. Is that discussed in 5C?

2:07:01 C. Gregory It is. It is listed under holidays.

2:07:07 Chair Ellis I want to commend you and management for negotiating the following clause, it is in section three; no employee may target, picket, strike, or engage in other disruptive activity at any personal space associated with a Commission member or employers management team member or at any professional space associated with a Commission member. At MPD when I was chair, I was subjected to that and I really resented it and I am so proud of you for knowing all of that.

2:07:51 C. Gregory I think we were mindful of that instance.

2:07:56 Chair Ellis Any other questions or comments on the union contract? Now, the union only represents essentially the appellate attorneys. Is that right?

2:08:10 C. Gregory Roughly 46, yes just the appellate and juvenile appellate attorneys.

2:08:16 Chair Ellis We have no discretion on that issue that non-union members still have to pay the union.

2:08:28 C. Gregory That is not our choice to make.

2:08:34 Chair Ellis That is under state law?

2:08:34 C. Gregory Yes.

2:08:37 Chair Ellis So, if we acquiesce in that it is only because, at least in my case, the state law requires it?

2:08:42 C. Gregory Yes.

2:08:48 Chair Ellis I just want the record to show. With that, if there are no other questions...

2:08:59 P. Ramfjord Though, I would ask that you ask the audience the same question about the contracts, if there are any comments.

- 2:09:05 Chair Ellis Oh yeah, that would be fair, although those of you who are union members you've already spoken, if there are any. Any other comments? Alright, I would entertain a motion.  
**MOTION:** John Potter moved to direct Nancy to sign the contract as presented; Shaun McCrea seconded the motion; hearing no objection the motion carried: **VOTE 5-0**
- 2:09:48 Chair Ellis We are zipping right along, that's good. Now the compensation plan, item six.
- Agenda Item No. 9 Approval of 2015-17 Compensation Plan**
- 2:10:06 Chair Ellis Hello Angelique, how are you? Nice to see you.
- 2:10:10 A. Bowers Like you said, attachment six in your handout are the compensation plan changes for the 2015-2017 biennium for OPDS. As in the past we have looked at Executive Branch and Judicial Branch for what they were doing for their compensation plan changes and tried to find something similar for OPDS employees. So, we've got examples here for what each branch is doing. For the Executive Branch for AFSCME represented employees they have already been at a 2.25% COLA in December 1 of 2015 and then a 2.75% COLA on December 1 of 2016.
- 2:10:54 C. Gregory I should say this year that the Executive Branch entered into a four year contract with SEIU and so the raises for SEIU over two biennia are rather different than what we usually see. They are getting a 1.48% this December, 2.75% on December 1, 2016 and then they are reopening in two years to renegotiate COLA's. So, it was rather difficult for not just our agency but Judicial Branch and Executive Branch to find a happy medium in where those COLA's were going to be for this biennium.
- 2:11:36 A. Bowers Then, as well as the Executive Branch for management service, executive service, and unrepresented employees they are getting a 2.25% COLA December 1, 2015 and then a 2016 COLA at this point they haven't made any decisions on that. We should be hearing at some point in the next year I believe.
- 2:11:57 C. Gregory I believe we will hear from Executive Branch where they're heading before June of 2016 and I believe the reason that they are holding off is that they are doing a major revamping of their classification and compensation system most of which they hope to have done in the first quarter or so of 2016. So, we are waiting to see what they do with salaries and then decide on COLA's.
- 2:12:21 Chair Ellis So, I think I am right. It used to be that COLA's were done with reference to an index of the cost of living and pricing. Now people are so smart they already know what the future holds and they commit to a fixed percentage of COLA?
- 2:12:38 C. Gregory We are committing to a fixed percentage for the December 1, 2015. We are asking to commit to a fixed percentage based on what we are doing with AFSCME so that in our agency all employees are receiving the same change. In Executive Branch, we don't know what 2016 looks like because we don't know where the salaries will be. They have not yet completed their compensation process.
- 2:13:04 Chair Ellis But, it used to be all done with reference to CPI and I don't see CPI in here.
- 2:13:12 C. Gregory You don't see CPI because they haven't set a salary for each classification to know where the CPI is. If I have been working as a Human Resources Manager in Executive Branch, my salary may change dramatically based on how they are making market comparisons with private sector. It is as confusing as I have said it.
- 2:13:44 Chair Ellis Any comments or questions on this?

2:13:49 P. Ramfjord So, as I understand it though, you were tracking essentially the same increases that were proposed that are being implemented by the Executive Branch agencies that are having employees be represented by AFSCME.

2:14:04 C. Gregory Yes.

2:14:05 Chair Ellis I thought it was SEIU.

2:14:07 P. Ramfjord No they're different. It's also similar. The first year is similar to Executive Branch employees in management services and it's similar to the Judicial Department in the first year and then those may have some undecided factors for the second year.

2:14:22 C. Gregory That's correct.

2:14:26 S. McCrea So Cynthia, we're being asked to approve the recommendation that is on page two, the five listed bullet points right?

2:14:34 C. Gregory Correct.

2:14:35 S. McCrea Down at the bottom of the paragraph, two from the bottom, it talks about OPDS management expects the majority of the recommended adjustments to be funded through its portion of its special purpose appropriation. Angelique, do we have a contingency plan?

2:15:00 A. Bowers I have set aside enough funds to pay for 100% of the costs for these recommendations that we have here. We do anticipate though, from what we are hearing for Executive Branch, that we will get the majority of those funded so there could be some savings.

2:15:21 S. McCrea Okay, that is my only concern. Thank you.

2:15:23 J. Potter Do you think you could explain to me, I don't think it's a stumbling block I just don't understand it. Number three, it's a 5% employee contribution to the employee benefits premium unless the employee enrolls in a lower cost medical plan, and then the employee contribution is reduced to 1%?

2:15:40 C. Gregory Correct.

2:15:44 J. Potter Then, if they do go into a lower medical cost you're saving money and they save money?

2:15:52 C. Gregory Yes, and this mirrors what Executive Branch is doing. We have agreed not only in the AFSCME contract to follow what PEBB sets, this year for this benefits year we are looking at those employees who choose the higher cost plan will pay 5% of the premium, those who choose the lower will pay 1% and there is a significant savings in premium based on those plans. Currently is it 97% and 3% that the agency pays. Now we are looking at a 99 or a 95.

2:16:38 J. Potter How many people are choosing the lower cost plan, or a percentage of your employees?

2:16:45 A. Bowers I would say right now, from the budget side of things what I am seeing there were not any employees that selected the lower cost.

2:16:52 J. Potter So you are budgeting based on everybody at the higher plan?

2:16:54 A. Bowers That is my assumption, yes.

2:17:00 Chair Ellis Do we have a motion? **MOTION:** John Potter moved to approve the compensation plan; Shaun McCrea seconded the motion; hearing no objection the motion carried: **VOTE:** 5-0

2:17:15 Chair Ellis I think that does it for you.

2:17:18 C. Gregory I just want to make sure that we are clear that this was also to make a change in the classification for the accounting technicians to allow for a progression of responsibility and an upward mobility for the folks who work in accounting. I just want to make sure that we don't lose that in the approval of the compensation. It is a no cost change, but we do want to implement two new classifications to allow for some growth for staff.

2:17:51 Chair Ellis We'd all seen that but I will ask, does that affect any one's vote? Okay, thank you. Alright, Paul the 2016 schedule.

2:18:03 P. Levy Yes, and we are now moving along quite expeditiously, so I will interrupt our program just before they leave. I know Tom Sermak who is here has introduced Jessica Kampfe to some of you but as you all may be aware, Tom has retired as the Executive Director of the Public Defender of Marion County and Jessica Kampfe is the new Executive Director.

2:18:35 Chair Ellis Welcome. Tom, I have memories of the process that led to your coming to Marion County and you have done a great job. That has been a big success and a lot of that is your doing, so we are very grateful.

2:18:52 T. Sermak Thank you Mr. Chair.

2:18:56 Chair Ellis Okay, schedule.

**Agenda Item No. 10 Approval of 2016 PDSC Meeting Schedule**

2:19:01 P. Levy So, you have a draft meeting scheduled that is an action item with the caveat that it is all subject to change it is usually does get massaged significantly throughout the course of the year. These are plans. There are some major items scheduled along the way. We have dates but here will be undoubtedly other incredibly pressing business opportunities to be inserted along the way. The only real changes are that Geoff Guilfooy is not available in January that is why we want to continue the strategic planning process that is why we want to shoehorn a little bit of that into December. We may well still do something in January but we are going to jump start that process a little bit in December.

2:20:07 J. Potter So, I have looked through this and checked dates on my calendar and can make adjustments except for May 19. I will be gone. There is a Possibility that Commissioner McCrea will be gone.

2:20:20 S. McCrea Yes, that's right. Thank you Commissioner Potter, what a nice reminder.

2:20:25 P. Levy I think we have been informed of that.

2:20:33 J. Potter It made no difference, is that what you're saying?

2:20:44 P. Levy Nancy needs stuff to do when she gets back and this will be high on her list is to come up with an acceptable date for all. With the provision that that date may need to be changed, if there are any other problems with dates we would like to know about them.

2:21:10 Chair Ellis Does this actually require a vote? It's called an action item.

2:21:14 P. Levy It is called an action item but, frankly I don't think it does.

2:21:18 Chair Ellis I don't think it does either.

2:21:21 P. Levy If you would rather not vote on that I am fine with that.

2:21:26 J. Stevens These are mostly Thursdays?

2:21:28 P. Levy I believe so.

2:21:40 J. Potter The one exception would be the October date which is usually a Friday as this is.

2:21:47 Chair Ellis Okay, the Washington County service delivery review, did you want to present on that?

**Agenda Item No. 11 Washington County Service Deliver Review Report – Commission Discussion and Recommendations**

2:21:55 P. Levy Yes, I would like to and I am quite familiar with this because this began with the peer review that we did well over a year ago and that report has been assuaged into a preliminary service delivery review. You have Commissioner Potter, Nancy Cozine and Caroline Meyer then conducted some interviews in preparation for the September Commission meeting where you heard from stakeholders on the record. The testimony from that meeting is now included in this report, so this is the time for the Commission to talk about what you heard, what is in the report and to decide if you believe there should be any changes in the service delivery plan in Washington County, mindful of course that you just approved contracts for those provisions for two years.

2:23:09 Chair Ellis One change has already been mentioned, that the Brindle Firm will not be renewed. The other couple of questions I had, not questions, I think we asked certainly MPD and the major consortium if they feel like the case balance between them was right and I feel like we got acceptance on that. Nobody was saying ‘he is getting far more than we are’ and vice versa. There was one issue, I don’t know if there is much we can do about it, but the contrast in perception was striking. You had the DA saying ‘oh it’s a bad thing we end up with these witness conflicts, it’s not true at the beginning but then a witness emerges and then the PD with the unit rule has to disqualify’ he was complaining about it. The PD said ‘yeah and we think it’s deliberate, that the DA generates these conflicts with jailhouse discussions.’ I don’t think that is an issue we can do much about but I think the DA ought to be given a copy of the summary of the PD’s statement. I am not sure that they are communicating with each other, but it did strike me as a remarkably ships passing in the night situation.

2:45:50 P. Levy I agree that I think it is not an issue that the Commission can address in a service delivery sense. I thought that Lane Borg at the meeting described some of the efforts that they are now undertaking to guard against the creation of witness conflicts. It seems as though they are now being proactive on this issue. It was limited to a few cases.

2:25:25 Chair Ellis But, it comes late in the case. So, from our point of view it is an expensive proposition when you have to change lawyers late in the case.

2:25:35 P. Levy It is expensive to us, it causes tremendous delay in the case and it is a problem but it is a very limited isolated one and what we heard is that MPD, which was the focus of these remarks, is taking measures to address it.

2:25:55 Chair Ellis Let me clarify; I don’t think the DA himself is doing this but he may well have deputies that are.

2:26:02 P. Levy That’s exactly Lane Borg’s comment. He tried to phrase it as diplomatically as possible for a quite undiplomatic remark but he did say it was the deputies.

2:26:16 Chair Ellis Where I was coming from is I wanted the DA to know that was a publically stated perception, that he might want to review that with his deputies.

2:26:32 P. Levy                   What I would suggest or like to do, and I think this is a good suggestion, is that there is nobody here from MPD right now, is to follow up with your suggestion of having this information conveyed to the DA. I'd like to follow up with MPD about that because since they are in the middle of this I would like them to have control in a sense of what would be most helpful to resolve the issue.

2:27:07 Chair Ellis               I am fine with that and I am not trying to get them into a tussle but it really was striking to me.

2:27:16 P. Levy                   Absolutely, I just don't want to inadvertently throw more gasoline on the fire.

2:27:23 Chair Ellis               You've got it.

2:27:24 P. Ramfjord              The only thing I might add to that, is that I think phrasing it in terms of an expense issue is one way of doing it. This is a problem for public defense, as Lane said this was an issue that the Commission had expressed some concern about because of the cost, not impugning anybody's ethics or morals or intentions but we think that both sides should exercise vigilance with regard to this issue to avoid unnecessary costs.

2:27:59 Chair Ellis               The other thing I think should be included when the last section of the report gets written, I was interested whether Washington County for MPD has grown to a quite large office and I tried hard to get both Lane and the current executive director in Washington County to address whether that is still working well. It seemed to me that it was. They had a Washington County commission appointee as chair of the whole board so it is not like they are a complete subsidiary. And, it seemed to me from their answers that the economies of scale on hiring and management were working and the Washington County ED attends the board meetings. But, I would include some reference to that issue, that we looked at it and I came away satisfied that there was no need to change that. I think it is something that we've got to watch as we go forward. There are very few of these where you've got multiple office PD's.

2:29:16 P. Levy                   We can certainly put that in the report. This was a concern of the peer review and the peer review report as expressed by people we interviewed largely relating to the issue that...

2:29:37 Chair Ellis               Turnover in Washington County.

2:29:40 P. Levy                   That has, as you've heard, improved and lots of folks told you that that has improved. We will include something about that in the draft final report.

2:29:53 Chair Ellis               I came away from that time with the providers and the other participants optimistic. I thought Washington County was doing much better than I remember it five, seven or eight years ago in communication and relating to each other. It used to be a very hostile climate.

2:30:15 P. Levy                   I think it is still no pick-nick there but personally I was quite gratified and in a way surprised that we heard from the presiding judge and others that the peer review process helped facilitate a détente of sorts. I think we shined a light on the court and on some defender practices that just needed to be brought out of the shadows and it has helped move them passed some of their troubles.

2:30:56 Chair Ellis               Well I would commend you and the others that were on the peer review team. I think that process continues to be one of the really significant value adds that we are able to get.

2:31:12 P. Levy                   I would like to point out just a couple of other things in the report. These are listed in the draft that you had in the September meeting about matters that the Commission should be concerned about and these were addressed. I think there still needs to be more discussion follow up on shackling. After the last meeting Amy Miller did follow up on that and we need to make sure we address that explicitly in the final draft.

2:31:45 Chair Ellis I thought that one juvenile judge was very interesting on that and I think we got his attention. Alright, anything else on Washington County that anybody wants to add? Alright, well I think the next step is to complete the report and then it can be adopted. It was a positive process, I thought. Anything anybody wants to share with us for the good of the order?

2:32:25 P. Levy We do have, if I may, there is on the back of your agenda one last agenda item.

2:32:34 Chair Ellis Oh, excuse me. I have to turn the page. Okay, you can tell I was winding up.

2:32:42 P. Levy This can be quite short because most of what the staff has to report is that they are exhausted by the contracting process which has just concluded. I will tell you that just last Wednesday, Thursday, Friday we conducted a very intense and interesting peer review of the criminal provider in Clackamas County and we will be...

2:33:18 Chair Ellis This is the CDC?

2:33:19 P. Levy CIDC, we will as I have told many people, don't hold your breath for our report. It is a process of me first going to Hawaii, I mean having to collate all the information that we received, reach a consensus of our group, because we try very hard to make these peer review reports and not general counsel reports, and then finalize that report with the provider.

2:34:00 Chair Ellis I saw you had on the schedule for '16 Clackamas County.

2:34:05 P. Levy Right, that's the plan is to follow up on that report, for the Commission to come and visit, hold a hearing, see what has changed and what is going on in the county. There are a lot of changes underway in that county right now and more that need to happen.

2:34:22 Chair Ellis Hopefully they are good ones but that is a county that has been somewhat unique. It is certainly the largest county with a single provider.

2:34:35 P. Levy That's all I have to say and I think Ernie Lannet may have a little bit of staff reporting to do.

2:34:45 Chair Ellis While he is coming up, we all miss Nancy. Are you able to give us a status report?

2:34:54 P. Levy Nancy is progressing, I think pretty much as expected, which of course is very frustrating to her. She wants to be back to work yesterday but we are all in communication with her and she is doing well and we expect her to be back as she planned.

2:35:15 Chair Ellis Which I think was early November?

2:35:17 P. Levy Early November.

**Agenda Item No. 12 OPDS Monthly Report**

2:35:32 S. Storey Hello, Chair Ellis, Vice Chair McCrea, members of the Commission, Shannon Storey from the Juvenile Appellate section of OPDS. Just a quick update, we posted for a JAS deputy 1 position. It closed last week. We got 72 applicants and they are engaged in the initial...

2:35:50 Chair Ellis You said 72 for one position? Let me see; is this a buyer's market or what?

2:35:57 S. Storey We are very pleased and I have surveyed them briefly and it looks like some very high quality people. We are happy about that and hope to have the position filled by the end of this year at the latest. The briefing in our Supreme Court case T.L. is complete. We filed the reply brief last week. Just a reminder, the issue in that case is whether the parents claim of inadequate counsel in a juvenile dependency matter is cognizable on direct appeal in the first instance or

whether the parent needs to raise it in the form of a motion to vacate the judgement at the trial court level first. Holly Telerant is handling that case and will be arguing that on November 12<sup>th</sup> of this year. Other than that, we continue to be very engaged in outreach which is a very big piece of what we do. We just finished two presentations at the Juvenile Law Training Academy. We have upcoming presentations at the Juvenile Law section CLE and at the OCDLA Juvenile CLE in April and we present at all three of those CLE's every year. We're also starting a process with the juvenile section of the bar, revamping and editing the bar books on juvenile law which are incredibly antiquated and actually a path to malpractice so it is hard to rely on them right now. We will be separating them out for dependency and delinquency, which has been part of the problem which has been melding these two areas of law which are really separate disciplines. Then, all of my team is always engaged on a daily level assisting trial counsel whether it's through answering their texts during hearings or helping them draft motions and just really being available as a resource to them. The juvenile practice is different from criminal because there is typically ongoing litigation and so we have an appeal and then the trial attorney is still litigating below, so there is a different kind of partnership that often is able to happen.

2:38:10 Chair Ellis

Great, thank you. Ernie?

2:38:14 E. Lannet

Chair Ellis, Vice Chair McCrea, Ernie Lannet for the record. First of all, I was able to bring two of my chief deputies to the management conference and it's a good chance to reintroduce Josh Crowther and introduce Ingrid MacFarlane who is new to the management team, she is not new to the office, she has had many years of service to OPDS and is bringing a lot of experience and a lot of enthusiasm to change things that she has seen that she thought could use some improvements, so it has been really good.

2:38:45 Chair Ellis

Anyone named Ingrid comes with a pretty good background.

2:38:53 E. Lannet

The third chief deputy, Marc Brown was unable to make it. He originally had planned but he got invited to argue a Court of Appeals case in Milton Freewater next week so he decided to limit his travel so he is going to be in downtown Milton Freewater.

2:39:10 Chair Ellis

Would that be greater metropolitan Milton Freewater?

2:39:16 J. Potter

Will Paul be in Hawaii then?

2:39:20 E. Lannet

It's that time of year when we are looking at our practice and procedure manual. We have been looking at changing and updating that. We have also just conducted interviews for the vacant senior deputy position that we needed to fill due to the passing of Robin Jones. We will be making a decision on that within this next week. I was told to keep it short and I will but as far as the Oregon Supreme Court practice, the Oregon Supreme Court is hearing 15 cases in November with the JAS case and OPDS is presenting in eight of those so it will be a very busy month for us. We have 7 criminal cases that we are presenting on. This year we have had 14 cases, 15 if you count the consolidated case, and we have had 14 attorneys working on those and four of those are new attorneys, deputy ones, it is their first experience litigating in the Oregon Supreme Court. So, it has been exciting time.

2:40:24 Chair Ellis

That's why you get 72 applicants.

2:40:27 E. Lannet

Yes, so it's a wide range of issues. The constitutionality of life without parole on a third sex offense to whether the state is arguing in one case for unlawful use of a vehicle whether there has to be any culpability, so a mental state with regard with 'no you don't have permission.' So, we are arguing that for it to be joyriding you actually have to have some kind of awareness that that is what you are doing, not that you are just riding in a car. We have some interesting points to make at the court and we are doing a lot of prep for those.

2:41:03 Chair Ellis

Okay, any questions? Thank you both. Now, anything that anybody wants to share? If not I would entertain a motion to adjourn. **MOTION:** John Potter moved to adjourn the meeting; Shaun McCrea seconded the motion; hearing no objection the motion carried: **VOTE:** 5-0

**Meeting Adjourned**

# Attachment 2

Public Defense Services Commission  
 Schedule of Compensation  
 For Purposes of Recoupment Pursuant to ORS 151.505(2)

<b>Case Type</b>	<b>Typical Contract Rate</b>	<b>Average Expenses (rounded)</b>	<b>Total Cost</b>
Murder	\$18,437	\$23,287	\$41,724
Measure 11 felony	\$1,908	\$2,797	\$4,705
Non-M11 A felony	\$1,146	\$593	\$1,739
Non-M11 B felony	\$955	\$320	\$1,275
C felony	\$604	\$157	\$761
Misdemeanor, contempt, extradition	\$368	\$61	\$429
FAPA/Support	\$604	\$32	\$636
Probation violation	\$230	\$7	\$237
Habeas corpus	\$2,415	\$573	\$2,988
Post-conviction relief	\$2,726	\$2,447	\$5,173
Civil commitment	\$368	\$58	\$426
Juvenile felony	\$853	\$676	\$1,529
Juvenile misdemeanor	\$360	\$131	\$491
Juvenile probation violation	\$230	\$23	\$253
Juvenile dependency	\$830	\$151	\$981
Termination of parental rights	\$2,711	\$413	\$3,124

*Effective January 1, 2016*

# Attachment 3

Public Defense Contract Adjustments Recommended for Approval by the Public Defense Services  
Commission at its December 10, 2015 Meeting

COUNTY	PROPOSED CONTRACTOR	CASE TYPES	VALUE
Marion	Marion County Assoc. of Defenders	criminal, specialty courts	\$6,762,998
	Public Defender of Marion County	civil commitment, criminal, specialty courts	\$3,474,613
Death Penalty	Jeffrey Erwin Ellis	death penalty, capital resource center	\$417,800
	Richard L. Wolf, P.C.	death penalty, capital resource center	\$369,800

# Attachment 4



# Oregon

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## Public Defense Services Commission

Washington County Service Delivery Review

Final Report

December 2015

### I. INTRODUCTION

**Background.** The Public Defense Services Commission (PDSC) regularly holds public meetings in counties throughout the state as part of its effort to evaluate the effectiveness and efficiency of public defense services. The reports from these evaluations, called Service Delivery Reviews, are based upon interviews and public testimony from dozens of local justice system stakeholders, and focus on the structure of public defense services. The goal has been to ensure that the best type and number of public defense organizations are serving each county.

Parallel with the Commission's Service Delivery Review process, the Office of Public Defense Services (OPDS) has facilitated nearly 50 peer reviews of individual public defense providers since 2004. For each peer review, teams of public defense leaders from around the state spend several days in a county conducting interviews with justice system stakeholders in the course of examining the quality of representation provided by the entity under review. Among the primary aims of these reviews are identifying successful local policies and procedures that might be recommended to other public defense providers, and making recommendations for improvement where needed. The overarching purpose of each review is to assist public defense providers in pursuing excellence. Until recently, peer review teams produced confidential reports provided only to contract administrators and managers at OPDS.

In 2013, OPDS merged the two review processes while preserving the core purposes of each review. With the revised process, peer review teams examine providers in a county much as it would in the past, except interviewees are no longer promised confidentiality and providers and other system stakeholders are informed that the Commission will visit the county approximately one year after the peer review report issues in an effort to follow-up on the findings and recommendations of the peer review team. Prior to the Commission's public meeting in the county under review, at which it receives testimony from stakeholders, OPDS staff issue a new report based on interviews with public defense providers and county officials. After the Commission's hearing, a draft final report is prepared for Commission deliberation and approval.

**Washington County Peer Review.** The Washington County peer review team looked at the six public defense contractors providing representation in adult criminal and juvenile court cases. Those contractors included the following: Brindle McCaslin & Lee, PC (Juvenile); Hillsboro Law Group, PC (Criminal, Juvenile); Karpstein & Verhulst, PC (Criminal, Juvenile); Metropolitan Public Defender, Inc. (Criminal, Juvenile, Civil Commitment, specialty courts); Oregon Defense Attorney Consortium (Criminal, specialty courts); and, Ridehalgh & Associates, LLC (Criminal, Juvenile, specialty courts).

The OPDS Executive Director asked James Arneson to chair the evaluation team, and asked attorneys Karen Stenard, Tom Crabtree, Sarah Peterson, the Honorable Robert Selander, and Amy Miller to serve as team members. Paul Levy served as staff for the team.<sup>1</sup> The team's site visit was conducted in June, 2014, and contractors received final reports in November 2014.

Prior to the site visit, the administrator for each contractor completed a questionnaire about the operation of their entity. In addition, attorneys working with the Oregon Defense Attorney Consortium, and the attorneys and staff employed by each of the other contractors received a survey asking about their experiences working with the contractor.

Historically, peer reviews have also employed an online survey of justice system stakeholders who are familiar with the work of a contractor. However, OPDS had asked all Washington County judges, the District Attorney, and others, for comments about the contractors as part of its annual statewide public defense performance review conducted earlier in 2014. The peer review team reviewed results of that survey prior to the site visit.

The peer review team received extraordinary assistance from the Washington County courts, in particular, then Presiding Judge Kirsten Thompson, and Trial Court Administrator, Richard Moellmer, and his staff. Dee Ann Meharry, the docketing specialist with MPD, also provided invaluable assistance in scheduling interviews for the site visit.

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<sup>1</sup> James Arneson is the head of a law firm in Roseburg that contracts with PDSC to provide representation in criminal and juvenile cases. He is a past-President of the Oregon Criminal Defense Lawyers Association (OCDLA), and also served as a lobbyist for that organization. He was the first chair of the Quality Assurance Task Force, which helped develop the protocols for peer reviews, and has served on other peer review teams. Karen Stenard is the administrator of the consortium that contracts to provide representation in juvenile cases in Lane County. She has served on past peer reviews. The Honorable Robert Selander is a senior judge who previously served as Presiding Judge in Clackamas County. He is the administrator of the consortium in Yamhill County that contracts to provide representation in criminal and juvenile cases. Tom Crabtree is the administrator of Crabtree and Rahmsdorff, a public defender office providing representation in criminal and juvenile cases in Deschutes and Crook counties. Sarah Peterson is an attorney in the Juvenile Appellate Section of the Office of Public Defense Services. Prior to working at OPDS, she was in private practice in Eugene handling appeals in domestic relations, juvenile dependency and criminal cases. Amy Miller is Deputy General Counsel at OPDS, and focuses on matters concerning juvenile dependency and delinquency representation. Previously, she was a staff attorney handling juvenile cases with Youth, Rights & Justice, and with Multnomah Defenders, Inc. Paul Levy is General Counsel at OPDS in Salem.

The Washington County peer review site visit took place on June 11, 12 and 13, 2014. Over the course of those three days, team members interviewed nearly 50 people including judges, court staff, prosecutors, Sheriff's staff, provider administrators, attorneys and staff, Juvenile Department personnel, representatives of the Probation and Parole Division, case workers with the Department of Human Services, a Court-Appointed Special Advocate (CASA) supervisor and others. Other telephone interviews were conducted after the visit.

At the conclusion of interviews, the team met to discuss preliminary findings and conclusions, and then met separately with the administrator of each contractor to provide initial feedback on the information it had received and some of the recommendations it was considering. A draft report was provided to each administrator, and after receiving comments and corrections, the team approved final reports.

**Service Delivery Review Procedure.** Over the course of three days - July 20, 21 and 22, 2015, OPDS Executive Director Nancy Cozine, PDSC member John Potter, and OPDS Contracts Manager Caroline Meyer, conducted follow-up interviews with Washington County justice system stakeholders and contractors to determine what developments had occurred in the county since the peer review. Nancy Cozine and Caroline Meyer held additional interviews, both by telephone and in person, on July 31, August 13, and August 14, 2015. All contract providers were interviewed, as well as Presiding Judge Bailey, former Presiding Judge Thompson, Chief Criminal Judge Knapp, Judge Menchaca, Trial Court Administrator Moellmer, court verification staff, District Attorney Hermann and his deputies, Sheriff Garrett and his jail commander, Juvenile Department Senior Juvenile Counselor Penny Belt and Drug Court Counselor Racheal Holley, Community Corrections Director Steve Berger and senior staff, CASA Director Lynn Travis and CASA supervisors, AAG Marcia Lance-Bump, DHS Program Managers Tom Vlahos and Shirley Vollmuller and Supervisor Katy Payne, and CRB Coordinator Sandy Berger.

The key findings and recommendations of the peer review reports, and the information gained from the follow-up interviews and meetings are related in the balance of this report. This report will be amended further following the PDSC meeting in Washington County on September 17, 2015. The report will be finalized following a subsequent PDSC meeting after deliberations on any specific findings and recommendations arising from the July meeting.

## II. WASHINGTON COUNTY

**Demographics.** Washington County has a population of about 554,996, making it the second most populous Oregon county after Multnomah (766,135). The total estimated population for Oregon in 2013 was 3,930,065.<sup>2</sup> The population of Washington County has increased about 19% between 2000 and 2010.<sup>3</sup> The county includes 15 incorporated cities, including Beaverton, Hillsboro, Sherwood, Tigard, Tualatin, Wilsonville, and a portion of Portland.

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<sup>2</sup> U.S. Census Bureau, State & County QuickFacts, 2013 Estimates.

<http://quickfacts.census.gov/qfd/states/41/41067.html>

<sup>3</sup> Portland State University, College of Urban & Public Affairs: Population Research Center, <http://www.pdx.edu/prc/census-data-for-oregon>.

According to U.S. Census data, the county is somewhat more diverse than the entire state population, with 68.9% identifying as white persons not of Hispanic or Latino origin (78.1% statewide); 2.1% identifying as black persons (2.0% statewide); 1.2% identifying as American Indian or Alaska Native (1.8% statewide); 9.3% identifying as Asian persons (4.0% statewide); and 16.0% identifying as persons of Hispanic or Latino origin (12.0% statewide). Census data also show the county has a slightly higher than statewide percent per capita of high school graduates (90.7%; 89.2% statewide), and a somewhat higher percent of college graduates (39.5%; 29.2% statewide). Nearly a quarter of persons over the age of five in the county speak a language other than English at home (14.7% statewide).<sup>4</sup>

Geographically, Washington County includes vast tracks of fertile farmland, where agriculture remains a major component of the county's economy. Elsewhere, the high-tech electronics industry is another major part of the county's economy, including the Intel Corporation, which is the largest for-profit employer in the county. Nike, Inc. is also headquartered in Washington County.

Oregon State Police profiles of index crimes for Washington County show a fairly consistent number of reported crimes over the five year period ending in 2012, with a high of 12,835 in 2008 and a low of 10,936 in 2011. Total reported crime for the county has also remained fairly constant over the same period.<sup>5</sup>

**Justice System.** With the exception of the Hillsboro and Beaverton branch offices of the Department of Human Services, and the juvenile detention facility in Portland where the county places youth in delinquency cases, the main places of business for the Washington County justice system are located close together in downtown Hillsboro. For the most part, lawyers are also within the downtown core. The Washington County Circuit Court includes 15 judges and one Juvenile Court Pro Tem Judge. Though there is a need for additional judges, space constraints in the courthouse resulted in a request for only one new judgeship, which was not funded in the 2015 legislative session.

Due to the significant demands on its limited judicial resources, the court sought and received grant funding from the State Justice Institute to engage the National Center for State Courts (NCSC)<sup>6</sup> in a "reengineering" effort. Following a 2013 site visit and report from NCSC, the Washington County Circuit Court adopted a set of guiding principles and a governance plan that set out the structure of an Executive Committee to provide input and advice to the Presiding Judge. The Executive Committee consists of the

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<sup>4</sup> U.S. Census Bureau, *supra*.

<sup>5</sup> Oregon State Police, 2010 Annual Uniform Crime Report, [http://www.oregon.gov/osp/CJIS/Pages/annual\\_reports.aspx](http://www.oregon.gov/osp/CJIS/Pages/annual_reports.aspx). The "Crime Index" was developed to measure crime on a national scale by choosing eight offenses that are generally defined the same by each state, which are: Willful Murder, Forcible Rape, Robbery, Aggravated Assault, Burglary, Larceny (Theft), Motor Vehicle Theft, and Arson. Total reported crime was 40,942 in 2006 and 33,270 in 2010, the last year for which data are available and a low for the five-year period.

<sup>6</sup> The State Justice Institute was created by Congress in 1984 to award grants for state court improvement projects. [www.sji.gov](http://www.sji.gov). The National Center for State Courts provides court improvement services. [www.ncsc.org](http://www.ncsc.org).

Presiding Judge, the Immediate Past Presiding Judge, the three Chief Judges of the Criminal, Civil and Family Law teams, and a new position of Assistant Presiding Judge.

On June 12, 2014, during the site visit for the peer review, the Washington County Circuit Court released the results of a major NCSC review of court docket management which included numerous findings and recommendations. Among other things, the report noted that the court “falls short of the state’s ambitious felony and misdemeanor case processing time standards,” although the report observed that most Oregon courts fall short and that the court generally met the NCSC’s own case time standards. More significantly, the report noted that jury trial rates for both felony and misdemeanor cases were dramatically higher than nationally and elsewhere in Oregon. The report suggested a combination of factors contributed to the high rate, including ineffective pretrial conferences where deputy district attorneys lacked authority to engage in meaningful negotiations and defense attorneys were not sufficiently prepared; lack of meaningful judicial involvement in pretrial settlement discussions; the siphoning of easily resolved cases onto an Early Case Resolution docket; and prosecutorial overcharging. The report also noted that a significant number of cases that resolve short of trial do so only on the day of trial.

The NCSC report included a number of recommendations aimed largely at promoting timely case dispositions. These included, generally, an effort to reduce unnecessary delay by creating the expectation that case events—most importantly trials—will proceed as scheduled. Specifically, the report recommended the creation of a criminal caseflow management plan with the expectation this would ensure that scheduled events occur in a predictable fashion and that those events are meaningful. The report also recommended that system stakeholders study further how to make pretrial conferences more meaningful and increase the success of resolving cases prior to the day of trial. Overall, the report emphasized the need to include representative from stakeholder groups in discussions about improving court processes.

**Criminal Cases.** All criminal cases in Washington County Circuit Court begin with a first appearance at the Law Enforcement Center, commonly called “LEC” (pronounced like “lecture”) which is two blocks from the main Courthouse. The LEC opened in 1998 and includes the county jail and Sheriff’s offices, along with two courtrooms.

Arraignments take place each day at 8:30 am for out-of-custody cases, and 3:00 pm for in-custody. Metropolitan Public Defender (MPD) covers the arraignment docket for all providers, except for Early Case Resolution (ECR) matters, which are addressed further below. Prior to morning arraignments, MPD’s docketing specialist will have spoken with the court verifiers, who make tentative assignments of new cases to contractors based upon a rotation schedule established with OPDS. The MPD arraignment attorney and legal assistant arrive prior to out-of-custody arraignments and speak briefly with clients likely to be assigned to MPD. Obvious conflicts of interest are avoided in the pre-arraignment assignment process, but neither MPD nor the verifiers have detailed information about names of complainants and likely witnesses. When cases will not be assigned to MPD, the attorney acquires basic contact and case information but does not inquire into matters that might touch on confidential information. Working relationships among the MPD attorneys, the court, and Sheriff are described as positive, with regular communication, including both formal and informal.

For non-ECR cases, as would be expected in a high volume court, arraignments move along quickly after the persons cited to appear<sup>7</sup> have all viewed a video explaining their rights. Defendants leave court with the next court date, the name of the appointed contract entity, and instructions to contact the provider.

Prior to the 3:00 pm in-custody arraignments, MPD tries to contact likely clients, though transport and holding processes make it difficult and infrequent. During arraignment, defendants are brought to an enclosed, windowed area where they may speak with the arraignment attorney, although the setting does not permit confidential conversations. The court will not entertain release motions at arraignment, allowing release only if recommended by the release officer. Though community corrections secured grand funding to hire a second release officer<sup>8</sup>, the hiring process has been very slow, and Washington County continues to function with only one release officer. Consequently, only a limited number of individuals are interviewed by the release officer prior to arraignment. The jail population is approximately 572, and while there used to be no forced releases, the county had already processed 200 forced releases by July 2015, primarily due to a larger than anticipated female population. Defendants typically receive a preliminary hearing date about five days after arraignment, and if the attorney wishes to request release for a client, a motion must be filed and a hearing scheduled.

In 2005, Washington County implemented an Early Case Resolution program as a way to alleviate significant jail overcrowding. The PDSC described it as a model early resolution program in its 2007 Washington County Service Delivery Review report.<sup>9</sup> Approximately 33% of the county's criminal case filings are processed (although not necessarily resolved) through the ECR program.<sup>10</sup> MPD and the Oregon Defense Attorney Consortium (ODAC) cover the ECR cases, and each entity has an attorney present for ECR dockets, which are called either before or after the regular morning and afternoon arraignment dockets. Defense attorneys review the available discovery prior to arraignments, and share this and a written plea offer with the defendant. For in-custody defendants, there are two secure rooms to conduct these conferences. Some negotiation is permitted, and attorneys can request additional time to investigate. Otherwise, the options for ECR cases are to proceed to plea and sentencing on the day of arraignment or to reject the ECR offer, which results in the case being set in the normal course for either misdemeanors or felonies. Some concern was expressed during interviews regarding the inclusion of prison-bound cases in the ECR program, but interviews suggest that these cases are resolved through ECR only when particular circumstances make it the best option (such as when a defendant has an existing prison

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<sup>7</sup> There are numerous law enforcement agencies for the various cities in Washington County, each of which will cite persons to appear for arraignment. There have been efforts to coordinate days on which particular agencies will cite persons to appear to avoid congestion on some days, but those efforts have not been especially successful.

<sup>8</sup> Greg Scholl, director of the Washington County MPD office, chaired a stakeholder group to develop the new pretrial services office.

<sup>9</sup> The Commission's report is available here:

<http://www.oregon.gov/OPDS/docs/Reports/washcoservdelplan.pdf>.

<sup>10</sup> The DA's office controls who is given an ECR offer, which is based entirely upon the nature of the charge. The offer will take into account a defendant's record and may, in the case of felonies, call for a prison sentence.

sentence and wishes to have case resolved with an agreement for concurrent time without disruption of existing prison programming opportunities).

The court also recently added the Diversion Early Case Resolution (DECR, referred to by many as “decker”) program. Through this program, defendants can enter a plea and agree to completion of certain conditions, with disposition scheduled one year later. If the defendant has completed all conditions, the case is dismissed. The DECR program was established at the suggestion of an MPD attorney, and with the cooperation of the District Attorney’s office and Chief Criminal Court Judge Knapp. All appearances in these cases are heard by Judge Knapp. There is a 50% failure rate, but it is still seen as an effective way to resolve cases and achieve an appropriate outcome.

When they happen, preliminary hearings in felony cases, which are usually set at 11 am, 3 pm, or 4 pm, are hearings where the state calls witnesses, subject to cross examination, in order to establish probable cause. Occasionally, the state will present a plea offer in return for a waiver of the preliminary hearing. A defendant may accept the plea at the preliminary hearing or the state will leave the offer open for a time, in which case the matter proceeds to arraignment at LEC on the DA information. Discovery in felony cases is generally received prior to the preliminary hearing, though lawyers report that there is often significant delay in receiving video and other non-paper discovery. A limited number of more serious cases proceed by way of grand jury indictment.

As part of its reengineering effort, the court recently discontinued its use of pretrial conferences and now holds a Case Management Conference (CMC) three weeks after the case arraignment. CMCs are held throughout the week and are scheduled based upon each judge’s preferred times. This means that scheduled CMCs can conflict with attorneys’ other regularly scheduled court matters. If the case does not resolve at the CMC, it is assigned a trial date and a Final Resolution hearing, which takes place on Friday two weeks before the scheduled trial date. Cases can be resolved at the Final Resolution hearing. Felony cases also receive a Case Assignment Day on the Friday before the assigned trial date, at which time a trial judge is assigned.

The new CMC model is reported by most as an improvement over the old pretrial conference system, but it is somewhat dependent upon the judge’s willingness to actively participate and explore obstacles to settlement. When the court is willing to get involved in order to address issues of delayed discovery and to have realistic discussions about whether charges are likely to be proved at trial, more cases are resolved earlier. While it is still too early to determine whether the new system has decreased the number of cases proceeding to trial, interviewees did describe some improvement. The state’s trial win rate is still low relative to other jurisdictions - reportedly around 50% - suggesting that perhaps more cases could be dismissed or settled earlier in the process.

Cases that proceed to trial are assigned by the Presiding Judge on the Friday morning prior to the week in which the trial is scheduled. Trials take place each week day except Monday. Most pretrial motions are heard on the day of trial, although occasionally some are heard earlier in the process. Continuance motions are generally not entertained at case assignment and must be made earlier by written motion supported by an affidavit that includes the opposing party’s position and a waiver of the 60-day speedy trial right

for in-custody defendants. At case assignment, lawyers sign in on a docket indicating the expected length of trial, whether it will be jury or court, and whether there will be any motions for change of judge (“affidavits”), or whether the case will settle. The Presiding Judge will then make assignments, including “call backs” for cases on standby and resets when there are not enough judges available.

### **Probation Violations and Special Courts.**

Most probation violation hearings are held at the LEC where one probation officer handles court duties. While some attorneys are reported to be more prepared than others, the court indicates that most public defense attorneys handling these cases appear to meet with clients before the day of court and have contacted the court prior to hearings, when necessary, to discuss proposed resolution of cases.

Washington County has a variety of special court dockets. In addition to the ECR docket described above, it has a long-standing drug court, a DV deferred sentencing program, a DUII diversion program, a Justice Reinvestment grant program (originally part of HB 3194) called the Integrated Reentry Intensive Services and Supervision, or IRISS, program, and a mental health court.

Drug Court involves a team including the probation and parole division, a treatment provider, a deputy district attorney and a defense attorney, who is normally Greg Scholl, with MPD. The team is described as working well together with a focus on healing the client. Mr. Scholl gets very high marks for his involvement in the program. The clientele are generally high risk offenders who might otherwise be sentenced to jail or prison time.

In both the domestic violence deferred sentencing program and the DUII diversion program, defendants who are identified as eligible by the DA’s office may enter a plea of guilty and agree to successfully complete a treatment program, after which charges will ordinarily be dismissed. Failure to successfully complete treatment will result in sentencing on the charges. For both the DV and DUII programs, PDSC contracts with the Ridehalgh firm to “staff” the programs. Typically, Mr. Ridehalgh, who ordinarily handles these duties, will advise eligible program participants in a group setting prior to court. Neither the court nor Mr. Ridehalgh consider him to “represent” any individual defendants. There remains some concern regarding the extent to which defendants have an opportunity for private, confidential case-specific consultations about the advantages or disadvantages of entry into one of these programs.

The county’s IRISS program is aimed at diverting offenders from likely prison sentences into intensive probation supervision, where resources are available to assist with housing, employment, treatment and other rehabilitation services. The program is described as dependent upon good working relationships among the court, prosecutors, defense attorneys, the probation and parole division and treatment providers. A screening evaluation and comprehensive, evidence-based case plan are prerequisites for participation in the program. Defendants in pending new cases may be referred for IRISS consideration either by agreement of the defense and prosecution. Probation officers can also make referrals for current probationers who face the possibility of a prison sentence in revocation proceedings.

The county has a robust mental health court managed by Judge James Fun and a team that includes a prosecutor, a defense attorney, a probation officer with mental health training, and representatives from the jail, the Sheriff's office, and social service providers. Jennifer Harrington, an attorney with MPD who is also a Qualified Mental Health Professional, is the defense attorney for the program. Ms. Harrington consistently receives very high marks for her contribution to the program. Persons are referred to the court after having been placed on probation following conviction, or as a result of a negotiated agreement between the state and defense following "prescreening" for the program, or by agreement to divert the case. The program seeks to coordinate and facilitate the provision of a variety of services to participants who also meet frequently with the probation officer assigned to the program and with the court. A person generally must have a diagnosed mental illness to participate. Other than treatment obligations, conditions of probation are kept to a minimum with fines and fees usually converted to community services, although any restitution obligations will continue to be enforced. Although the program is structured to last one year, some participants remain in it much longer if they have difficulty stabilizing and meeting the minimum program obligations. With successful completion, probation is terminated or, for those who entered the court on diverted offenses, the charges are dismissed.

**Juvenile Cases.** All juvenile delinquency and dependency cases in Washington County Circuit Court are handled by the juvenile court. The juvenile court is located in the Juvenile Services Building, across the street from the main courthouse, and has two judges, Judge Ricardo J. Menchaca and Judge Pro Tem Michele C. Rini. Limited space at the juvenile court makes confidential attorney-client conversations, which are often necessary in a court setting, virtually impossible.

**Delinquency.** Washington County does not have a detention facility. Instead, the county contracts with Multnomah County for 14 beds in the Donald E. Long Detention Facility (DEL) on the east side of Portland.<sup>11</sup> Youth are transported from DEL to Washington County for court appearances and are placed in a holding area behind one of the courtrooms. In-custody court appearances occur every day at 1:00 p.m., immediately followed by the 1:15 p.m. "cite-in" docket, which includes out-of-custody preliminary hearings on new charges, as well as probation violations and violations of conditions of release. Other types of out-of-custody cases are then heard throughout the afternoon.

New charges are initiated by petition. Probation violations (PVs) and violations of conditions of release are initiated by affidavits to show cause. Each youth is assigned a juvenile court counselor (JCC).<sup>12</sup> The Washington County District Attorney's Office has

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<sup>11</sup> The beds are often filled mostly by youth prosecuted in adult court on Measure 11 offenses. The only other detention facility is the Harkins House (HH), which is a juvenile shelter program located three blocks from the courthouse. HH is for youth (boys and girls, maximum capacity 14, almost always full with a two-week waiting list) who would qualify to be detained under ORS 419C.145(1) but stay at HH to stabilize while the case is pending. It is designed to be a 45-60 day program; it is level based, with school and family components. The goal of the HH program is for the youth to return home at the end of the stay there.

<sup>12</sup> Typically, the JCC decides to handle a PV or violation of conditions of release out of custody. Those appearances ("cite ins") are also included on the 1:15 docket.

two assigned juvenile court deputy DAs, who may also have certified law students assisting them.<sup>13</sup>

Some cases are resolved either informally, where a youth will never see a courtroom, or through Formal Accountability Agreements (FAAs). The JCCs advise youth of their right to counsel in connection with FAAs, and some youth request a lawyer. If a youth expresses uncertainty about whether he or she should have a lawyer, the court typically appoints counsel.

Either Judge Rini or Judge Menchaca preside at initial appearances (“prelims”). Attorneys are appointed in all delinquency cases unless a youth appears with retained counsel. On the morning of the prelim, public defense providers receive an email referral requesting confirmation that they will accept appointment to new cases. The attorneys are then present for the prelim hearing. If the youth is in custody, topics at the prelim include release and setting dates for both the pretrial conference and trial (“CJ” for contested jurisdiction) to comply with the statutory 28-day deadline. If the youth is out of custody, the court sets only the pretrial conference at the prelim (usually within 30 days); a CJ will be set, often significantly later, only if the case does not settle at the pretrial conference.

The DDA makes a settlement offer at the pretrial conference. Discovery is fairly forthcoming, and the DDA usually provides complete discovery by the time of making the offer at the pretrial conference. Sometimes the police reports are the only discovery, and they are usually attached to the petition.

The court does allow and sometimes grants motions for alternative disposition (including conversion of the petition to a dependency petition), but the court will not allow conditional postponements. In comparison, Multnomah County continues to utilize conditional postponements. Significant concern was expressed regarding pretrial advocacy for youth, particularly those charged with sex offenses. Several people suggested that lawyers may not be filing motions for alternative disposition or motions to find the youth unable to aid and assist, even when such motions are entirely appropriate.

If a youth is adjudicated, either by an admission or after CJ, there are three possible dispositions: discharge (no consequence), probation (bench, which is rare, or supervised by a Juvenile Department JCC), or commitment to the Oregon Youth Authority (OYA). An OYA commitment is either correctional (incarceration at MacLaren, etc.) or noncorrectional (in the custody of a treatment facility). As the result of a recent change by the Juvenile Department, in most cases a youth’s pre-adjudication JCC becomes his or her post-adjudication probation officer.<sup>14</sup>

Youth appearing in court while in custody are generally shackled in the courtroom, including during the hearings on their cases. The shackles consist of both leg irons and handcuffs attached to belly chains. For a time, according to the peer review, a risk assessment was employed to limit shackling to only those instances warranting

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<sup>13</sup> The same two DDAs represent DHS in dependency matters through the jurisdictional stage.

<sup>14</sup> “PO” is sometimes used, but “JCC” is more correct.

heightened security precautions. But attorneys have become complacent, failing to challenge routine shackling, and it has once again become ubiquitous.

Washington County has a juvenile drug court program called Keys to Success. Typically, the JCC identifies whether a case qualifies for drug court and does so early on. Judge Raines runs the program out of his courtroom in the main courthouse. The program is very structured; if a youth meets certain criteria and completes certain phases, his or her case is dismissed. The drug court program has existed in some form for more than 10 years, and the more structured program has existed for approximately three to four years.

Within the year prior to the peer review, the juvenile court created the PHASE Program for gang-involved youth. Judge Menchaca runs that docket on Tuesday afternoons. The program is two and a half years into development, and lawyers at the Karpstein and Verhulst firm indicate that improvements are still being made, including the recent introduction of weekly meetings with the PHASE team. The team is described as being very committed to the program, and there is a strong desire to build its number of successful graduations.

Overall, representation in juvenile court, in both delinquency and dependency cases, is said to be good. Still, attorneys should consider continuing to pursue conditional postponements, and administrators should ensure that lawyers are filing motions seeking alternative dispositions, inability to aid and assist, and unshackling. They should also be sure that attorneys are having sufficient contact with clients. At the time of the peer review, there was significant concern about the frequency of visits to detained youth. Interviewees suggest that there has been improvement, and the Juvenile Department indicates that youth are transitioned out of detention to electronic monitoring or to a placement in Washington County as quickly as possible, reducing the need for lawyers to visit the DEL facility.

**Dependency and Termination of Parental Rights.** In Washington County, when DHS files a dependency petition, it also seeks a shelter order. Shelter hearings occur every day, in the afternoon, and Judge Rini presides over most of them. The court notifies the attorneys to be appointed by approximately 11:00 a.m., and parents are told to arrive 30 minutes before the shelter hearing to meet their attorneys. By the time of the shelter hearing, parents have received a copy of the petition. During the hearing, DHS serves parents with a summons that includes dates for the status hearing (approximately 45 days later) and “CJ” (approximately 60 days later, to meet the statutory deadline<sup>15</sup>). Issues litigated or discussed at shelter hearings include return home, other placement, visitation, and continuing jurisdiction, though fully contested hearings on the latter are infrequent. The court dismisses very few petitions at shelter hearings.

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<sup>15</sup> 419B.305 requires, absent a good cause finding, that the court shall hold a hearing and enter a dispositional order on a petition within 60 days after the filing of the petition. In Washington County, for petitions filed between 10.1.12 and 9.30.13, 73% of petitions filed reach jurisdiction within 60 days or less of filing which is consistent with the state average of 73.18%. 17% of petitions filed do not reach jurisdiction until over 90 days which exceeds the state average of 14.94%.

According to peer review team interviews, the number of petitions filed has declined within the past year, largely because of Department of Human Services renewed emphases on their Oregon Safety Model which requires evidence of an immediate threat of harm to a child before DHS will file a petition. Even with the reduced filings, the county is very dependent upon use of a private bar list in order to provide representation for every party. Because all juvenile providers are firm providers, conflicts are common to the members of each firm. Court staff reportedly spends significant time calling lawyers on the private bar list before shelter hearings in order to find sufficient coverage. The use of private bar attorneys also makes it more challenging for system partners to distribute information to all lawyers providing court appointed representation in juvenile cases in the county, as it is an ever-changing mix of lawyers.

Admissions to allegations contained within dependency petitions most often occur at the status hearing, which occurs two weeks before the scheduled CJ.<sup>16</sup> The department provides most discovery prior to the status hearing and is seeking to routinely provide discovery, via electronic transmission, within 10 days of it becoming available.<sup>17</sup> A deputy DA represents DHS in the dependency proceeding through CJ.<sup>18</sup> Most commonly, if the court asserts jurisdiction at CJ, the court will proceed immediately to disposition. At disposition, the court sets dates for the six-month review hearing<sup>19</sup> and a later permanency hearing. At the time of the peer review, it was not uncommon for the court to enter a judgment asserting jurisdiction and ordering disposition as to one parent based on that parent's admissions, with the understanding that the judgment may have to be vacated if the other parent prevails at CJ. However, subsequent to the recent *W.A.C.* case,<sup>20</sup> this practice has all but ceased. The current procedure for handling cases in which one parent makes an admission and the other seeks CJ is slightly different depending on the judicial officer. However, both Judges advise the admitting parent that, until jurisdiction is established as to the other parent, services ordered by the court are voluntary but recommended.

The court typically reviews cases every six months, with Citizens Review Board hearings held before the first six-month court review. According to interviews, some attorneys consistently attend CRB hearings while others rarely or never do so. Many times an attorney's legal assistant will attend a hearing but not participate in any

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<sup>16</sup> Around the time of the shelter hearing, the case is transitioned to a different DHS caseworker, the "permanency caseworker." The parties participate in a "child safety meeting" (CSM) within 30 days (that is, before the status hearing) to develop an ongoing safety plan. At the CSM, the parties are introduced to the permanency caseworker.

<sup>17</sup> Unlike delinquency cases where all discovery comes from the DDA, discovery in dependency cases appears to be compiled and distributed primarily by the assigned caseworker, which results in some significant inconsistency across cases.

<sup>18</sup> Even if the court rules to assert jurisdiction, the department is not represented by an attorney until an AAG is assigned to the case shortly before the permanency hearing.

<sup>19</sup> The court will schedule more frequent review hearings in cases that require greater oversight and attention, including when the court has made a certain order and wants to ensure that the parties comply.

<sup>20</sup> In *Dept. of Human Services v W.A.C.*, 263 Or App 382 (2014), the Court held that jurisdiction over a child may not be based on the admissions of one parent when the other parent properly contests the allegations in the petition.

meaningful way. Several people interviewed cited recent and specific instances in which a parent needed advocacy during a CRB or other non-court setting, but was accompanied by a legal assistant who said nothing. DHS court reports are generally provided at least three days in advance of the review hearing, in compliance with the requirements of ORS 419B.881(2)(a)(B). Attorneys were described as being more effective at review hearings when they had personally met with clients in advance of the hearing. Several interviewees indicated that lawyers who have their staff visit with child clients prior to the court hearing often do not have the level of detail needed to effectively represent their clients. Several interviewees suggested that while a few attorneys are effective when representing a child or parent, others seem to confuse these roles, and would do better if they represented only children or only parents.

If the department intends to seek a change in the permanency plan at the permanency hearing, the assigned AAG provides such notice approximately 30 days before the scheduled hearing. This allows the other parties time to consult with their clients and, if needed, request time for a contested permanency hearing. Prior to the AAG getting involved, discovery is inconsistent and depends on the particular caseworker. If the department does not intend to seek a change in plan, the court generally does not change the plan and, instead, schedules the next permanency hearing in approximately 90 days. In some cases, the court will continue jurisdiction until a parent obtains a custody order in a domestic relations proceeding.

If the case proceeds toward termination of parental rights (TPR), DHS includes a first appearance date on the TPR petition. At the first appearance, the court appoints counsel, schedules dates for a pretrial conference, a best-interest settlement conference (“BI/SC”) (basically, a second status hearing), calendar call (the Friday before the trial date), and trial.<sup>21</sup> If a parent fails to appear at the first appearance, the court schedules a termination-without-parent (“TWOP”) hearing about a month later, at which point, if the parent still does not appear, DHS can proceed with a “prima facie” termination case. Relinquishment of parental rights is not an option in most cases. In lieu of relinquishment, a parent stipulates to termination in a non-contested court proceeding. Stipulation to a termination of parental rights is considered by DHS to be “voluntary” and, as a result, parents are more likely to be offered mediation services with the selected adoptive resource.

About 25 to 30 percent of cases in Washington County involve a Court Appointed Special Advocate (CASA). The CASAs are regarded as well-trained, engaged in case planning and strong advocates for children. There were mixed reviews, however, regarding the effectiveness of lawyers appointed to represent children. While some attorneys are said to communicate appropriately and effectively with children, there is also a sentiment that more training is needed in how to talk to kids about legal issues in age appropriate terms. As noted above, there is also criticism of using legal assistants, rather than attorneys, for home visits with child clients, especially with teens or where a child’s capacity to make informed decisions is in question.

There is a concern, according to interviews, that attorneys in juvenile cases lack cultural competence, especially regarding Latinos. According to one person, attorneys need to

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<sup>21</sup> The court addresses any evidentiary issues on the morning of trial.

better understand acculturation and how it affects the lives of their clients. They also need to know that even though parents may speak some limited English, an interpreter may be necessary for effective communication. Attorneys would also benefit, according to information received by the peer review team, from a better understanding of the Mexican child welfare system. Concerns were expressed that there is reluctance to place children with relatives in Mexico, which can leave children in substitute care longer than necessary. This reluctance was attributed to a lack of understanding about resources in Mexico and how to access them.

### **III. PUBLIC DEFENSE CONTRACTORS**

Detailed findings and recommendations specific to particular providers will be made in the sections pertaining to those providers. Overall, though, the peer review team found general satisfaction with the public defense providers in the county.<sup>22</sup> Some attorneys, especially those practicing as part of ODAC, are highly regarded, with appreciation for their years of service to public defense, and for their skill and professionalism in criminal cases. MPD was commended for recent improvements in its training of new attorneys and overall professionalism, though one interviewee noted that their certified law students need additional oversight. ODAC and MPD handle the vast majority of criminal cases, with the other four contractors handling some misdemeanor and minor felony criminal cases and a substantial number of juvenile cases.

There were a number of concerns about defense providers heard consistently during the peer review interviews. There was an impression among many system stakeholders that high caseloads (one judge called them “obscenely high”) are interfering with adequate client contact and case preparation. There is also concern about the turnover of attorneys, which delays case resolution (even serious in-custody cases) as they are reassigned to new lawyers. It also means that there is a regular influx of new or less experienced defense attorneys who require intensive training and supervision to achieve proficiency in their work. Further, there were concerns that some new lawyers weren’t getting adequate training and supervision.

Public defense contractors have been active participants in local justice system workgroups that pertain to both ongoing planning and consultation efforts, such as regular bench-bar meetings, or project-based efforts, such as exploration of a new pretrial services office or the court’s current reengineering effort. Typically, these efforts involve participation by a representative from MPD and/or ODAC, although other providers are involved in other justice system workgroups. Some concern was expressed, though, that information provided or received by contractor attorneys at these meetings was not always widely shared with the rest of the public defense provider community. More generally, some people, especially those working on juvenile law cases where five of the six contractors handle cases, expressed a desire for a better mechanism to easily and reliably disseminate information to all attorneys providing public defense services in the county. Currently, defense providers gather

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<sup>22</sup> However, the Washington County results on the annual OPDS statewide public defense performance survey are less favorable than overall statewide results. On the question concerning rating of performance in criminal cases, for instance, 90% of respondents statewide said it was either excellent or good, whereas only 50% said so for Washington County. Most respondents for Washington County rated the performance good (37.5%) or fair (37.5%).

once a month at MPD to discuss issues of common concern, but the topics are generally focused on criminal cases.

#### **IV. REVIEW FINDINGS**

##### **1. THE METROPOLITAN PUBLIC DEFENDER (MPD)**

**OVERVIEW:** Founded in 1970, MPD is the oldest and largest of the not-for-profit public defender offices in Oregon. It began accepting cases in Multnomah County in 1971 and in Washington County in 1973. Although there is an office director, currently Greg Scholl, in the Washington County office, much of the MPD administrative staff, including the Executive Director, Human Resources Director, Director of Attorney Training, and IT support staff, are located in the Portland office. MPD is governed by a seven-member board of directors, four of whom are appointed by outside authorities, including the Washington County Board of Commissioners. The board meets approximately quarterly.

There are 21 attorneys in the Washington County office, supported by five investigators, 11 legal assistants, and several other clerical positions. The staff is divided among two groups of attorneys working in the criminal courts, one focused on felonies and the other on misdemeanors, a group of four lawyers working in the juvenile court, and a specialty court group that works in the ECR and arraignment courts, mental health court, LEC probation cases and a number of other matters. Each group is led by a Chief Attorney. The office director, in addition to administrative responsibilities, handles drug court and also serves as part of the MPD death penalty representation team.

Cases are assigned at MPD by their longtime docketing specialist who has information about current caseload numbers for each attorney, attorney leave schedules and major trial obligations when she distributes cases. She also works with the court to avoid appointment of cases to MPD where there will be a conflict and to quickly seek MPD withdrawal on appointed cases where conflicts become apparent during the case opening process. Once the case file reaches the assigned attorney, that person is responsible for further and ongoing analysis of possible conflicts, in consultation with his or her supervisor.

MPD frequently emphasizes its commitment to training. New lawyers participate in a multi-day in-house trial skills program. The firm provides financial support for attorneys to attend programs presented by the Oregon Criminal Defense Lawyers Association, the Oregon State Bar and other organizations. The firm employs a fulltime director of training, although this person's office is in Portland and generally visits Hillsboro only once a week for regular Tuesday one hour "brown bag" training meetings. The office also convenes an annual one-day diversity training for all staff. Most of the training that occurs, though, is "on the job" experience, with guidance and feedback from supervisors and other colleagues, and it is the quality of this mentoring that can be most critical to an attorney's development. The firm expects that supervisors will conduct annual formal evaluations of all employees, although it appears that this expectation is largely unfulfilled.

MPD attorneys and other staff have been represented by the American Federation of State, County and Municipal Employees (AFSCME) for many years. A central and controversial provision of the collective bargaining agreement between MPD and AFSCME has allowed attorneys to transfer from the Washington County office to the Portland office when openings become available only after 18 months of employment in Hillsboro. That provision had been dropped from the agreement, and lawyers began transferring to Portland even earlier. This contributed to an increase in turnover, and was noted by many as being a significant problem. Since the time of the peer review, the contract was renegotiated, and lawyers must now once again wait for at least 18 months before transferring out of Washington County. While there are still instances of turnover, it has diminished since the time of the peer review, and there is a sense of commitment to the Washington County office among many of the lawyers there.

MPD attorneys are involved in many Washington County justice system stakeholder meetings, including the Public Safety Coordinating Council, criminal and juvenile bench-bar committees, the Washington County Reentry Council, and the Drug Court Policy Committee. Firm attorneys have also participated on the OCDLA Board of Directors, the Oregon State Bar Criminal Law Section Executive Committee, and have served as faculty on numerous CLE programs pertaining to criminal and juvenile law.

**FINDINGS.** Overall, MPD and Greg Scholl, the director of MPD's Washington County office, received praise for recent improvements in professionalism and training, and for performance in some areas of representation, as well as for the abilities of specific attorneys. Of particular note, Jennifer Harrington in Mental Health Court, and Mary Bruington in juvenile court, were mentioned repeatedly as attorneys who provide valuable input in collaborative settings, zealous advocacy in the courtroom, and who demonstrate the highest level of professionalism. MPD's work in special courts, and especially in connection with drug court, mental health court and its handling of probation matters, was highly praised by judges, probation officers and others. The firm is said to work well in policy committees, in team staffings prior to court, and some commented on attorneys in the firm who are positive participants in efforts to fund raise for county programs that benefit their clients. With drug court and mental health court in particular, MPD is reported to embrace the mission and philosophy of the courts, work collaboratively with system partners, while maintaining a client-centered focus and advocacy.

The previously high rate of attorney turnover at MPD, mentioned above, was cited by many people as a factor that seriously affected the overall quality of the firm's representation. The regular departure of experienced attorneys and arrival of those with little or no experience is an obvious concern, as is the wholesale transfer of entire caseloads to new attorneys, which can cause significant delay in case resolution. While MPD has improved in this area during the last year, it is still a concern that should be consistently monitored and managed.

The MPD director seems to have responded well to the peer review team recommendation for better supervision of new lawyers. Several people interviewed noted the increased training provided to, and improved professionalism demonstrated by, MPD's newer lawyers. While there were very specific concerns about interactions between MPD lawyers and the bench at the time of the peer review, but those

interviewed were consistent in their praise for MPD's current attorney group and management team during the last year since the peer review.

## **2. OREGON DEFENSE ATTORNEY CONSORTIUM (ODAC)**

**OVERVIEW.** ODAC was formed in 2006 by Robert Harris, who heads the Harris Law Firm. The consortium consists of ten members who maintain their own private practices and the Harris Law Firm (this firm was an individual contract provider prior to 2006), from which four associates handle consortium cases. Mr. Harris administers the consortium but does not handle consortium cases. An office assistant in the Harris Law Firm performs some ODAC administrative work under the contract. ODAC is organized as a Sec. 501(c)(3) non-profit corporation and is governed by a five-person board of directors, which at the time of the peer review consisted of Mr. Harris, two consortium member attorneys, one non-member attorney and another vacant non-member position.

ODAC handles only criminal cases, including the largest share of adult Measure 11 cases in the county (for 2014, ODAC is contracted to handle 120 adult Measure 11 cases; MPD is the only other contractor handling Measure 11 cases, contracting for 108 cases, including juvenile Measure 11 cases; ODAC, however, does not contract for any murder cases, whereas MPD is contracted for 8 in 2014). By contract, ODAC shares responsibility to cover the ECR court with MPD. The consortium receives appointments to cases each morning. After staff does a preliminary conflict check and determines if a client is being or has been represented by a consortium member, Mr. Harris and his staff make case assignments to consortium members. In the process, they review member totals for previous number and type of cases assigned, and the court and vacation schedules for members, seeking to make assignments that work best for member schedules and workload.

ODAC does not have any formalized processes for attorney training, oversight, evaluation or discipline. Instead, the group relies upon its selection of excellent, experienced criminal defense attorneys. Some of the Harris Law Firm attorneys handling ODAC cases have been newer and less experienced, but they do receive training and supervision through the law firm. The model ODAC member agreement also provides for the termination of membership, which would be by action of its board, if the member "is deemed to have failed in providing services according to the requirements" of the agreement, which incorporates by reference the ODAC contract with PDSC and its performance expectations. ODAC does not sponsor its own CLE programs, but was involved in the creation of the noontime training meetings held every other month at the MPD, and remains involved in the planning and coordination of those meetings. ODAC also has its own email list for announcements and other communications among its members, and Mr. Harris initiated a similar list for all criminal defense attorneys in Washington County.

ODAC attorneys are involved in a number of Washington County justice system stakeholder meetings, including the Public Safety Coordinating Council and the Washington County Bar Association. Firm attorneys have also participated on the OCDLA Board of Directors and have served as faculty on CLE programs pertaining to criminal law. Mr. Harris worked with the Presiding Judge to restart a bench-bar

committee, drafting the group's by-laws and eventually serving as its presiding officer. It now meets quarterly and includes the Presiding Judge, the Chief Judge of the Civil, Criminal and Family Courts, and representatives from the civil and criminal bar.

**FINDINGS.** ODAC consortium members are clearly viewed as premier public defense providers in Washington County, and they were praised for their experience and skill in both settling cases and in trial practice in both criminal and juvenile cases, which some members handle on a non-contract hourly basis. Mr. Harris was also praised for his effective administration of the consortium and for his involvement in justice system management issues. Interview comments also commended Mr. Harris and members of ODAC for their commitment to the community in Washington County, as evidenced by involvement in non-legal community affairs and through their long-term relationship with the legal community there. Finally, Mr. Harris and ODAC members receive praise for their involvement in court operation workgroups and committees. Their participation is clearly valued by system stakeholders and fulfils a best practice for Oregon public defense providers. This participation can benefit all public defense providers, their clients and the justice system generally as court policies and procedures evolve with the information and expertise of respected public defense leaders.

### **3. RIDEHALGH & ASSOCIATES, LLC (R&A)**

**OVERVIEW.** The Ridehalgh law firm has contracted to provide public defense services since 2000. The firm is a limited liability company and does not have a board of directors. Ronald Ridehalgh manages the firm, which consists of himself, four other attorneys and three support staff. The firm contracts with PDSC to handle a caseload of dependency, misdemeanor, probation violation, and contempt cases, in addition to providing coverage for the DUUI diversion program and the domestic violence deferred sentencing program. The firm does not handle juvenile delinquency cases.

As the "advice attorney" for both the DUUI diversion and domestic violence deferred sentencing program, Ron Ridehalgh meets with persons determined by the DA's office to be eligible for participation, and provides both general information about the advantages and disadvantages of the programs and case-specific guidance about whether participation is advisable or not. In juvenile dependency cases, R&A attorneys are present in court for the initial court appearance of a new client and are appointed at that time. In criminal cases, where the initial arraignment is covered by MPD attorneys, a firm paralegal picks up notices of new appointments at least once each day at the LEC and then usually also visits those new clients who are in custody. Case assignments to firm attorneys are made according to a detailed flow chart that seeks, among other things, to make efficient use of attorney time by assigning particular court dockets (what the firm calls "zones") to specific attorneys, and then assigning other cases according to attorney workload and availability. Workload and case distribution information for each firm member is available in a database which is monitored by Mr. Ridehalgh but also accessible to all firm members.

Much of the firm's work processes, such as the flow chart for case assignment, are set out in a detailed employee manual. R&A relies upon the manual and mentoring by its more experienced attorneys for new attorney training, along with firm-paid attendance at outside CLE programs. There is also a weekly attorney meeting where cases are

discussed. The firm has both an intranet and a separate networked database where practice forms, manuals and other aids are available. The firm does not have a formal evaluation process. Mr. Ridehalgh is the direct supervisor of each attorney, and part of the firm's file closing protocol calls for him to personally review each file. The firm has a complaint procedure that involves a form to receive input about an attorney's performance and investigation by Mr. Ridehalgh.

R&A attorneys are involved in a number of Washington County justice system stakeholder committees, including an advisory group for the domestic violence deferred sentencing program, the local Domestic Violence Intervention Council, and the Juvenile Court Improvement Project. Mr. Ridehalgh is also a member of the county's Supplemental Local Rules committee.

**FINDINGS.** Attorneys with the Ridehalgh firm are said to be knowledgeable, prepared and committed to doing good work. Mr. Ridehalgh was specifically praised for his work with both the domestic violence deferred sentencing docket and the DUII diversion docket, and for his management of the firm. The firm's work in juvenile dependency cases was described overall as very good, and the firm was noted as one that provides excellent training and oversight. As with many of the contractor firms in Washington County, there was mention about what seemed to be high attorney turnover at the firm. This firm manages to mitigate some of the potential harm of turnover, largely because Mr. Ridehalgh is clearly committed to public defense work and has invested significant time and energy to create office systems that provide structure, training, and oversight to newer lawyers.

#### **4. KARPSTEIN & VERHULST, PC (K&V)**

**OVERVIEW.** The Karpstein & Verhulst law firm has contracted to provide public defense services since 1994. The firm does not have a board of directors. Greg Karpstein manages the firm, which consists of himself and four other attorneys and three support staff. In addition, the firm has two part-time positions called "home visitors," who maintain in-person contact with dependency clients on behalf of the assigned attorney. Mr. Karpstein has expressed his intent to transition firm leadership over the next five to seven years to two of his firm's attorneys, Nathan Law and Jacob Griffith, who joined the firm in 2012,.

The firm contracts with PDSC to handle a caseload of largely juvenile delinquency and dependency cases, in which it represents mostly children. In addition, it contracts to handle some criminal Class C felony, misdemeanor and probation violation cases. In addition to its public defense work, the firm handles a variety of privately retained cases, advertising services in business and incorporation matters, domestic relations, estate planning, real estate, and landlord/tenant cases.

In juvenile delinquency and dependency cases, K&V attorneys are present in court for the initial court appearance of a new client and are appointed at that time. In criminal cases, where the initial arraignment is covered by MPD attorneys, a firm secretary picks up notice of new appointments each day at the LEC. Case assignments to firm attorneys are made on the basis of availability, case type and level of attorney qualification, and the workload of attorneys. The firm is able to avoid some conflicts of

interest by reviewing delinquency and dependency dockets prior to the initial hearings. Otherwise, a conflict check is conducted during the file opening process.

K&V does not have any formal processes for attorney training, oversight or discipline. Instead, the firm relies upon outside CLE seminars and mentoring by senior firm attorneys to train new attorneys, in addition to the weekly staff meetings, other special firm gatherings and an open-door policy that is in place for all firm attorneys and staff. There is a general orientation for new attorneys that involve introductions to key places and players in the criminal and juvenile justice system, as well as a period of shadowing more experienced attorneys. The firm has an employee handbook that includes an evaluation form, although it is unclear if it conducts regular evaluations. Regarding attorney oversight, the firm says, in responses to the questionnaire submitted in conjunction with the peer review, that there is no formal process to gather input on attorney performance but because it is a small entity “the supervising attorney knows immediately from either judges or court staff if there is a problem.” As related below, however, this may not be a sufficient approach to quality assurance.

K&V attorneys are involved in a number of Washington County justice system stakeholder committees, in addition to participation in the Washington County Bar Association. Nate Law is the current private bar representative for the Washington County model court team, which involves regular monthly meetings, as well as attending the statewide JCIP conference. Mr. Karpstein has received professionalism awards from the Juvenile Law Section of the Oregon State Bar in 2010 and from the Washington County Bar Association in 2013.

**FINDINGS.** Overall, interviewees said that firm attorneys were generally prepared and provide good representation in public defense cases, and Mr. Karpstein has clearly earned the respect of system stakeholders. There is concern regarding the transition of the firm. Other attorneys in the firm are described as being very capable, but still in need of training in some areas, particularly around representation in juvenile delinquency cases, and especially serious case types. The firm has improved its client contact in both juvenile dependency and delinquency cases, but they can still improve in this area. Prior to the peer review team’s site visit, the team reviewed a lengthy letter from the Executive Director and the Program Director of the CASA program for Multnomah and Washington counties that detailed numerous specific concerns about the performance of K&V attorneys, in addition to a concern about insufficient contact with child clients. The firm is reported to have responded appropriately, terminating one attorney who was not providing quality representation, hiring capable attorneys, and making some improvement regarding the frequency of visits to clients. This remains an area where the firm should continue to make improvements. Reports indicate that the firm’s reliance on staff contact with clients make the lawyers less effective during court hearings, and there is very little advocacy on clients’ behalf outside of court hearings. There was also concern about lawyers having staff attend CRB reviews because the staff who attend don’t speak on the client’s behalf (several people suggested that the staff appear to be there to take notes), even when the client is clearly in need of advocacy. Finally, while firm lawyers are visiting with in-custody delinquency clients more frequently, and always prior to the first preliminary hearing, the firm continue monitor and improve upon the frequency of visits to clients who remain housed at the DEL facility. With the transition of the firm’s management responsibilities to the newer

management team, extra caution will have to be taken to ensure that attorneys receive necessary training and oversight, and that the firm's recent steps to improve representation are not lost in the transition process, but rather continually enhanced and monitored. Because the lawyers at the firm are said to be very capable and professional in their relationships with stakeholders in the county, as well as with their clients, they are in a good position to build upon their successes during the period of transition.

## **5. HILLSBORO LAW GROUP, PC (HLG)**

**OVERVIEW.** The HLG is the current iteration of a law firm that has contracted to provide public defense services in Washington County since 1994. HLG is the assumed business name of Burton McCaffery Oregon Lawyers PC, an S Corporation with three shareholders who constitute the directors of the firm. Grant Burton is the firm's managing attorney and administrator of its public defense contract. In addition to himself and the two other shareholders, the firm employs two senior associate attorneys, one who leads a criminal team and the other the juvenile team, and three associate attorneys who work in part on one of those two teams. There are five support staff employees.

The firm contracts with PDSC to handle a caseload of juvenile dependency and delinquency, Class C felony and misdemeanor, probation violation, and contempt cases. The public defense contract, however, accounts for less than half of the annual revenue of the firm, which advertises services in bankruptcy, corporate, family law, immigration, personal injury, real estate, social security and estate planning matters. Some firm members do very little or no public defense representation. At the time of the peer review, Mr. Burton was administering the firm's public defense work, and though he was providing coverage for other attorneys in his firm and had handled court-appointed work in the past, he was not handling any public defense cases. Mr. Burton explained that the firm began expanding its retained work in 2006 in order to meet overhead expenses and accelerated that expansion in 2008 when its share of public defense work was significantly reduced.

HLG attorneys are present in court for the initial court appearance of a new client in juvenile dependency and delinquency cases. In criminal cases, where the initial arraignment is covered by MPD attorneys, a firm legal assistant receives notices of new appointments and then emails the assigned attorney about in-custody clients. Case assignments are rotated among firm attorneys according to the percentage of FTE they devote to the public defense contract and the particular team, juvenile or criminal, to which the attorneys are assigned. The intent is to achieve a fair distribution of the public defense work, whether the assigned cases are above or below the expected quota.

As with other firms, HLG relies largely upon mentoring and outside CLEs for training new attorneys. In addition, there are monthly attorney and support staff lunches with the supervising shareholders. The firm uses group emails to update its teams with announcements and other messages relevant to their practice. Mr. Burton conducts formal attorney performance reviews twice a year that consist of a meeting with him and a written evaluation. He obtains input for the review from senior firm employees, clients and judges.

Much of the firm's workflow is managed through a highly customized implementation of the Time Matters software, which manages and tracks work performed on cases, the associated documents, and case outcomes. The firm also uses Time Matters to organize various documents and resources concerning office procedures and practice forms and aids. Time Matters also automates the creations of basic letters and other case related documents. In conjunction with Time Matters, the firm had been a user of Demandforce, a service that automatically sends clients email and/or text message reminders about court and office appointments, and sends them a satisfaction survey at the conclusion of the case. Mr. Burton reported that this did reduce the number of failures to appear for his firm's clients. Unfortunately, the firm's ability to use Demandforce was lost due to an incompatibility issue created during a recent Time Matters upgrade. Mr. Burton is interested in finding a solution, and has agreed to speak at the 2015 OCDLA Management Conference regarding the benefit of automated client communications.

HLG attorneys are not active participants in Washington County justice system policy and planning efforts, but they are members of the Washington County Bar Association and attend a juvenile bench bar meeting and the monthly criminal defense bar meetings held at MPD.

**FINDINGS.** The firm was reported as providing somewhat inconsistent representation at the time of the peer review, with some very good attorneys and others in need of improvement. Additionally, the firm was asked to evaluate the extent to which it was committed to providing quality public defense services. The firm has taken steps to improve its services since that time. One particularly problematic attorney was let go, and the vacancy was filled with an experienced attorney from out-of-state. Mr. Burton reports that the firm now provides Oregon and Washington County-specific training to new attorneys. Additionally, Mr. Burton started personally representing public defense clients, primarily in a small number of Measure 11, felony PV, and juvenile delinquency cases, and he reports that the firm is winning more than 50 percent of the cases it takes to trial. Mr. Burton has asked senior attorney Peter Tovey to be co-administrator of their public defense contract going forward, as Mr. Tovey does a higher percentage of public defense work. Mr. Burton is also making good use of technology to measure results and keep clients engaged. The firm should continue its efforts to ensure quality representation provided to public defense clients.

## **6. BRINDLE MCCASLIN & LEE, PC (BML)**

**OVERVIEW.** The Brindle McCaslin & Lee law firm has contracted to provide public defense services in Washington County since 1995. The firm does not have a board of directors. Louise Palmer is the contract administrator for the firm. In addition to its public defense work, the firm maintains a privately retained practice for which it advertises services in a broad range of civil and criminal matters including immigration, insurance, land use, personal injury, estate planning and real estate. Of the ten attorneys at the firm, three shareholders and three associates devote some portion of their practice to public defense cases.

The firm had contracted to provide representation in Washington County in some criminal Class C felony, misdemeanor and probation violation cases, in addition to a larger caseload of juvenile dependency and delinquency cases, but shortly before the peer review's site visit the firm agreed with OPDS that it would no longer take any criminal cases. This change was a result of serious concerns on the part of the court and others about the quality of the firm's representation in criminal cases.

Attorneys from BML are present at first appearances in juvenile dependency and delinquency cases when it is expected that they will receive an appointment by the court. According to the firm, cases are assigned to attorneys with the goal of matching both attorney interest and level of proficiency with case complexity and to achieve caseload balance among the attorneys. Since the firm's associates have relatively little experience with juvenile law, a more experienced attorney is reported to be available to assist with more complex cases.

The BML firm does not have a formal training program for new attorneys or sponsor its own CLE events. Its supervision appears to be largely an "open-door" policy where attorneys can seek guidance from other firm attorneys. The firm does have a bi-annual review for each attorney that includes completion of a self-evaluation and a "feedback session" with a firm partner.

**FINDINGS.** Interviewees consistently commented on the very high rate of turnover in this firm, the complete absence of training and supervision for new lawyers, and the continued practice of giving these new attorneys very high caseloads. Specific comments regarding the firm's representation in Washington County were uniformly negative. Even when the firm is able to recruit competent lawyers, those lawyers are overloaded with cases, receive no training, and leave in relatively short order. While Mr. McCaslin is described as being a capable lawyer, he handles public defense cases only when needed to provide coverage when attorneys leave the firm and everyone seems to be aware that he would prefer not to handle juvenile public defense cases. Louise Palmer, the contract administrator, spends her time on remaining Multnomah County cases. The firm did not provide any response to the peer review team recommendations and does not seem to have an awareness of what would be required to improve the situation.

## **V. SERVICE DELIVERY REVIEW—RECOMMENDED AREAS OF INQUIRY**

### **Quality of Representation.**

- **Contact with Juvenile Clients in Detention.** Public defense providers should ensure that they are visiting with their in-custody clients in delinquency cases within the requirements of the contract with PDSC (within 24 hours of appointment to the client) and as needed to fulfill their obligations under the Oregon State Bar *Standards of Representation for Criminal and Juvenile Delinquency Cases*, Standard 2.2, and Oregon Rule of Professional Conduct 1.4.
- **Professionalism.** ODAC was identified in the peer review and again in the service delivery review as being a provider who consistently demonstrates the highest level of professionalism. Almost all other providers, most notably MPD, made significant gains in this area between the time of the peer review and the service delivery review. All providers should be encouraged to document and

adhere to the highest standards of professionalism, and the Commission may wish to inquire about each provider's commitment to this important element of representation.

- **Client-Centered Advocacy.** ODAC and MPD were consistently identified as firms that provide zealous, client-centered advocacy. As mentioned throughout this report and in the system issues section below, other firms could benefit from increased information-sharing to ensure that all entities have an opportunity to learn about recent system developments that impact clients, and to share ideas with each other about how to provide client-centered advocacy in light of those developments.
- **Advocacy for Juvenile Delinquency Clients.** Firms should ensure that their attorneys are filing motions for alternative disposition and motions to find unable to aid and assist, and exploring ways to challenge the denial of conditional postponements. Additionally, because this is an area of rapid development, attorneys handling juvenile delinquency cases should be seeking particularized training from organizations such as the National Juvenile Defense Center.

### **System Issues.**

There are a number of other issues that are either common to all or most public defense providers in Washington County or pertain to them. Those issues are as follows:

- **Advocacy at Arraignment, specifically pretrial release.** The court's prohibition on attorneys advocating for release at the time of arraignment remains a significant concern in this county. The Commission may wish to discuss with providers whether they have considered any kind of group effort to address this issue. Clearly, it has a disproportionate impact on public defense clients (note that privately retained clients have more attorney contact prior to arraignment giving the attorney a better opportunity to work with the pretrial release officer). Studies consistently demonstrate that pretrial advocacy and the

opportunity to gain release at the first court appearance is critical to achieving procedural justice.<sup>23</sup>

- **Specialty dockets: ECR (ODAC & MPD), DUII and DV Diversion (Ridehalgh).** The Commission may wish to inquire further to determine whether clients in these programs are receiving thorough advice regarding options and collateral consequences prior to entering a plea, and whether the structure of these programs is consistent with the PDSC's *Guidelines For Participation of Public Defense Attorneys in Early Disposition Programs*.<sup>24</sup>
- **Information Sharing.** As the two largest public defense providers in Washington County, it is appropriate that MPD and ODAC be represented on major justice system workgroups pertaining to system wide policy and procedure. At the time of the peer review, there were complaints that MPD did not sufficiently share information about the proceedings of these workgroups with other public defense providers. The Commission may wish to inquire about the extent to which information is being shared with other providers.

A different but related concern is that stakeholders in the juvenile justice system, such as Juvenile Court Counsellors, CASAs, CRB, and DHS caseworkers, do not have a convenient mechanism to share information or developments concerning their agencies with the public defense community. Likewise, there appears to be some uncertainty in these agencies about whom to contact with specific concerns about the representation provided by public defense attorneys. The Commission may wish to inquire about steps providers have taken to communicate with juvenile court stakeholders and with other public defense providers to ensure there is a way for information to be easily shared when necessary, and whether stakeholders feel they have a way to provide feedback to each provider about the quality of representation in juvenile court. The Commission may also wish to consider whether the creation of a juvenile consortium, rather than the current consistent use of private bar lawyers for conflict cases, would provide a more efficient mechanism for distribution of information to juvenile providers.

- **Shackles in Juvenile Court.** Public defense providers handling juvenile delinquency cases should ensure that in-custody youth are transported to court and appear in court in shackles only when this extreme measure is required by a combination of heightened security concerns and no less onerous alternative. In light of evidence demonstrating the psychological harm that shackling can cause to youth, a growing number of jurisdictions, including in Oregon, have prohibited the indiscriminate use of shackles in juvenile court. Lawyers should contact Youth, Rights & Justice or OPDS for briefing and court orders from litigation in other counties if needed to challenge the practice in Washington County.

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<sup>23</sup> See the latest report by the Constitution Project at: [http://www.constitutionproject.org/wp-content/uploads/2015/03/RTC-DINAL\\_3.18.15.pdf](http://www.constitutionproject.org/wp-content/uploads/2015/03/RTC-DINAL_3.18.15.pdf)

<sup>24</sup> The guidelines are available on the OPDS website here: <http://www.oregon.gov/OPDS/pages/pdscreports.aspx>.

## Administrative Oversight.

- **Documentation & Efficiency.** Some contractors have well-documented systems to ensure adequate attorney training and oversight and sufficient client contact. The Commission may wish to speak with providers about any efforts underway to create, or for some providers preserve and enhance, existing practices.
- **Performance Reviews.** Some providers are reportedly very consistent in providing attorneys with performance reviews, and in checking with the court and other system stakeholders to ensure that public defense clients are receiving quality representation. The Commission may wish to ask stakeholders about contractor efforts to get feedback regarding lawyer performance.

## VI. TESTIMONY AT THE SEPTEMBER 17, 2015 PDSC MEETING

Chair Ellis introduced the Commission's hearing on the Service Delivery Review by explaining that the Commission's primary interest is to learn whether it is contracting with the right number and type of public defense providers in the county and whether those providers are performing well.

District Attorney Robert Hermann was invited to speak first. He expressed appreciation for the opportunity to have shared his observations of how things were working in the county with PDSC staff prior to preparation of the draft report. He said that his office and the public defense community work together very well in a number of areas, including the administrative efforts needed to simply make the system work efficiently, the county's drug court, and the Early Case Resolution (ECR) program. He estimated that 20% to 30% of all criminal cases filed in the county are resolved in the ECR program. He emphasized that it is not a "rocket docket," and that attorneys can postpone resolution if additional time is required to investigate the case and consult with a client about the benefits of resolving a case through ECR. He had particular praise for the work of MPD, and its director, Gregg Scholl, in the drug court, which focuses on high risk offenders who may face substantial prison sentences.

Mr. Hermann said the public defense community was also working well with a new protocol for pre-trial conferences. The new protocol seeks to make the conferences more meaningful events where cases can be resolved in advance of the scheduled trial date and without resorting to trial. He expressed one concern about MPD withdrawing in murder cases when nearing trial because new witnesses, mainly other defendants awaiting trial in jail with whom MPD's clients have talked about their cases, were identified by the state. Because these new witnesses were former clients of MPD, the firm has needed to withdraw from representation, causing delay in resolving the murder cases. Mr. Hermann also noted a previously high rate of turnover at MPD, resulting in reshuffling of caseloads at the firm, which caused significant delay in resolving cases. He noted however, that this dynamic has improved dramatically in the last year.

Asked about the concern with the shackling of juveniles for transport to and from, and during, court hearings, Mr. Hermann said he had not thought too much about the issue until reading a draft of the service delivery report, but he had to agree it's a

concerning practice. He promised to raise the concern with others in his office and with the Sheriff.

Mr. Hermann said that he sees the need for more attention, planning, and resources in the area of mental health as key to diverting people from the criminal justice system or avoiding their contact with it entirely. He hopes that the defense community will be able to devote attention and resources to this area.

Commissioner Lazenby noted that Washington County is said to be the most diverse county in the State of Oregon, and he said the conversation ongoing now about over-representation of minorities in the juvenile justice system will soon take place in the context of the entire justice system. He asked whether the DA's office itself reflected the diversity of the community it serves. Mr. Hermann didn't have data available to answer the question, but identified a number of attorneys and staff who were from minority communities. He also estimated that about 40% of the attorneys were women.

Penny Belt, with the Washington County Juvenile Department, told the Commission that both referrals to the department and delinquency petition filings had decreased in recent years. In 2012, she said, there were almost 3,200 referrals, whereas in 2014 there were fewer than 2,500 referrals. Of those referrals in 2014, which she said were the result of about 1,500 youth, only 212 of them were actually adjudicated, with the remainder handled through diversions or formal accountability agreements or in some other non-court manner. She said the average length of stay in detention is about seven days, but that number also reflects the inclusion of Measure 11 youth, who are now detained in the juvenile detention facility rather than the county jail and have much longer lengths of stay in detention.

Ms. Belt said that under a previous presiding juvenile court judge, her department developed specific criteria for when youth may be shackled. She also clarified that her department, not the Sheriff, is primarily responsible for the transportation of youth to and from court. She said in recent years her department has not been following those criteria, but until one defense attorney spoke to her about it the defense bar had not been raising any objections to the practice.

Ms. Belt concluded by saying that she wished that both defense attorneys and deputy district attorneys would do a better job of keeping the juvenile department "in the loop" on cases, and indicated that defense attorneys could also do a better job of communicating with the families of their clients, she said.

In response to questions from Commissioner Lazenby, Ms. Belt said it is very clear that there is minority over-representation in the county's juvenile justice system. She said that in addition to the Latino and African American populations, her department is having more frequent contact with the Somali community and, to some extent, with Russian families.

Karen James spoke to the Commission about her group, founded by parents of adults in the criminal justice system with mental illnesses, which seeks to improve conditions and services for persons in the criminal justice system with mental illness. They have focused their efforts on the Department of Corrections but have also meet with the Washington County Sheriff's Office to talk about concerns. More recently, the group

has sent a letter to Presiding Judge Charles Bailey. Locally, the group is concerned that persons in jail with mental illness are not receiving appropriate attention and resources, and that insufficient planning is occurring to transition them back into the community. Ms. James is especially concerned that some public defense attorneys are neglecting their clients with mental illness. She thinks better training and awareness of how to represent clients with mental illness will lead to better advocacy and outcomes.

Judge Charles Bailey, Presiding Judge in Washington County since January 2015, presented his views to the Commission. He said a number of things have changed significantly, and for the better, since the 2014 OPDS Washington County Peer Review report. He specifically commended the defense bar for the reduction in affidavits for change of judge, which were a major cause of tension and difficulty. He also praised the reduced turnover at MPD, which was a source of delay and difficulty in case management. Finally, he noted that the re-engineering process facilitated by the National Center on State Courts resulted in judges becoming more engaged in managing pre-trial conferences and helped reduce Washington County's unusually high trial rate.

He said that overall he is very pleased with the public defense providers in the county, and with how PDSC has addressed concerns when they arise. He expressed concern, though, about compensation for the non-public defender contractors, which he said should be on an equal par with the public defender offices. The Chair clarified that this is being addressed thanks to a legislative funding package specifically for that purpose. Judge Bailey also communicated a concern from Judge Raines that the Commission continue to assure the presence of a viable non-contract private bar in juvenile cases, where they are needed for conflict cases. [A letter from Judge Raines is appended to the end of this report.] He also said that he shared the concern of Ms. James, that better attention and resources are needed to appropriately handle persons with mental health issues who come into contact with the criminal justice system.

Judge Bailey also expressed satisfaction with the courtroom work at the Law Enforcement Center, where MPD handles most of the arraignments in criminal cases and also handles, along with the consortium, the ECR program. He also expressed appreciation that he can call PDSC staff when necessary to address concerns that might arise with public defense providers in the county.

Judge Richardo Menchaca is the presiding juvenile court judge, who works in the small juvenile services building along with Referee Michele Rini. He said that he is trying to take inspiration from Judge Bailey and do a better job of managing the juvenile docket, which is very busy and needs to be run efficiently. He appreciates the great job of all of the juvenile defense providers, and echoed other comments about the need for a non-contract private bar presence within juvenile court. He also appreciates being able to contact PDSC staff when needed.

Regarding shackles, Judge Menchaca said he did not realize it was an issue until reading a draft of the service delivery report. He believes that shackles are used when appropriate security concerns have been identified and trusts the juvenile court staff to make decisions about when they are necessary. He said the juvenile court is a small, crowded building where it's necessary to keep a close watch on security

issues.

Chair Ellis pointed out that his assumptions about the appropriate use of shackles may be unwarranted if they are being used indiscriminately. Commissioner Welch, who was the presiding juvenile court judge in Multnomah County, shared her philosophy about shackles in the courtroom, which is that they will not be used unless she approves it based upon appropriate concerns. Judge Menchaca said that during his entire tenure on the bench he has yet to have a defense attorney or deputy district attorney express concerns about shackles. He reiterated that security is a paramount concern, especially since a number of juvenile court cases concern gang-involved youth.

Asked about over-representation of minorities in juvenile court, Judge Menchaca said that as an Hispanic judge, who experienced racial bias growing up, he will not allow racial intolerance in his courtroom. But he acknowledged that over-representation occurs in both the criminal and juvenile justice systems. He expressed pride in the juvenile “gang court,” which seeks to avoid commitment of high-risk youth to the Oregon Youth Authority’s correctional facilities. Commissioner Lazenby said that the issue of over-representation is likely to demand increased attention of every justice system partner and will require a concerted effort in order to see improvement.

Sandy Berger, the field manager for the Citizens Review Board in Washington County, told the Commission that she sees a real benefit in those cases where attorneys are present at CRB reviews. She has the benefit of having previously worked as the CRB field manager in Klamath County, where the public defense providers employ case managers to work closely with parents and children, and those case managers appeared for the attorneys at CRB hearings and were able to provide valuable information. She thought that system worked very well. But in Washington County, when attorneys cannot appear at CRB hearings they send legal assistants, who mainly take notes and only occasionally relay information from attorneys about their clients. She thinks outcomes would improve if attorneys were consistently present at the hearings, especially since parents may be under significant stress and not able to express themselves well on their own.

Lynn Travis is the program director and program attorney for the CASA program in Washington County, which advocates for the best interests of children in juvenile dependency cases. She told the Commission that there is a need to shift the locus of advocacy with the advent of managed health care. Under the Oregon Health Plan, all Coordinated Care Organizations (CCOs) are now required to provide wraparound services for most children in foster care. Whereas in the past, she said, most advocacy focused on services provided by the Department of Human Services, now critical decisions will be made at CCO staffings. Thus, advocacy concerning visitations, transitions home, and transitions out of more restrictive levels of care will need to occur at these CCO staffings in order to achieve better outcomes for children.

Gregg Scholl, the director of MPD’s Washington County office, told the Commission that the county is a very good place to be a criminal defense attorney in part because it can also be a difficult place to practice criminal defense. He said that the high rate of turnover that his office had experienced has improved significantly, in part because of a new policy negotiated with the union representing MPD employees concerning when transfers can occur between MPD’s Hillsboro and Portland offices. But he also

said that he thinks the Hillsboro office is seen now as a very good place to work, in part because of a new training regimen for new lawyers. The office has also developed a strong commitment to zealous advocacy, which fulfills the classic public defender ethic of challenging authority. But he insists that this be done professionally and with purpose. Mr. Borg also addressed the turnover issue and the attendant reshuffling of caseloads that District Attorney Hermann said had been a problem but was much improved. He said that the problem wasn't primarily that lawyers were moving from Hillsboro to Portland, and simply abandoning their Hillsboro clients. He said that there had been a great many new hires into the Hillsboro office and that some of those attorneys simply didn't perform well and left the firm entirely.

Mr. Scholl emphasized that he has an excellent working relationship with District Attorney Hermann, and that the office has good relationships with the Sheriff, with the jail command staff, with community corrections, and even with the county's administrator. In addition, the office has a seat on the local Public Safety Coordinating Council, on the OCDLA Board of Directors, on the Supplemental Local Rules Committee, and the Oregon State Bar's Criminal Law Executive Committee. He also expressed appreciation for OPDS's trust in the office to undertake representation in cases in other counties, in addition to the work they do around the state in aggravated murder cases.

Mr. Scholl also praised the county's drug court. He said that graduates of the program have paid around \$120,000 in restitution, and the 90% of them are now employed, many full-time. He also praised the attorneys in the juvenile section of his office, calling one of them the person most knowledgeable about the juvenile code in the state, and saying another is considered a model juvenile court defense attorney.

He also addressed the concerns about affidavits, saying that his office has never had a policy that lawyers should file them when assigned to certain judges. He emphasized the fact that lawyers are trained to determine for themselves whether a judge can be fair, even ones that have been historically difficult in criminal defense cases. He said this training has contributed to the decrease in the use of affidavits, but that judges' individual efforts lawyers are also making lawyers more comfortable having their clients appear before them. Lane Borg, the executive director of MPD, also addressed the affidavit issue, and said he thinks the controversy died down in part because, after a judge filed a bar complaint against an MPD attorney concerning the practice, the Oregon State Bar wrote a comprehensive opinion finding no misconduct on the part of the MPD attorney.

Both Mr. Borg and Mr. Scholl addressed a question from Chair Ellis about how MPD operates now with two offices. They both expressed satisfaction with having most administrative functions located in Portland, especially since key administrators, including Mr. Borg, the training director, and others, are usually present in the Hillsboro office at least once a week. Lane Borg also noted that the size of the Hillsboro office has grown steadily and dramatically, so that it is foreseeable that each office will eventually have about the same number of employees.

Mr. Borg also addressed Mr. Hermann's complaint that MPD has needed to withdraw from a number of murder and aggravated murder cases because of conflicts of interest. He said that it was his belief that these conflicts were created by the DA's office through intentionally targeting current or former MPD clients to become

informants, thereby requiring that MPD withdraw from the cases. In one instance, MPD insisted that the state had no real intention of calling the informant as a witness, which the state denied. Yet when the case did come to trial, with different attorneys, in fact the state did not call the witness. He said that MPD is now more vigilant when it appears that the state might be creating a conflict simply to have the firm removed from a case. Mr. Borg also made clear that he was not accusing Mr. Hermann of misconduct, saying that he is an honorable and good man. But Mr. Borg said the same cannot be said for some of the deputy district attorneys in Washington County.

In response to a question from Commissioner Lazenby about the diversity of the attorneys in the Washington County office, Gregg Scholl that three or four of the 20 attorneys employed by the firm are minorities. He said there is more diversity among the support staff. Ellen Johnson, who is appointed by the Washington County Commissioners to the MPD Board of Directors and serves as the chair of the board, said that overall five percent of the entire firm's attorneys are African American and about one to two percent are Hispanic, which she said mirrors the population of the Oregon State Bar. She said that the MPD board is in the process of examining both the firm and the broader justice system through an equity lens.

Rob Harris, the executive director of the Oregon Defense Attorney Consortium (ODAC), began his appearance before the Commission with praise for the work of Gregg Scholl and MPD for leadership in the county's criminal justice system. In response to a question from Chair Ellis, he described a number of ODAC members who formerly were MPD attorneys. He said he looks for good experienced attorneys to bring into ODAC, who need to also be good at managing their own businesses and workloads, especially since ODAC is appointed to some of the most serious cases, other than murder, that can be brought. He said that ODAC is losing two very experienced attorneys, one to retirement and to other to focus more on federal appointed work. But he has recruited some good attorneys in recent years, whom he described to the Commission. He also manages his own 11-attorney law firm, which is a part of ODAC. New lawyers in that firm do some public defense representation, with the opportunity to also work in other areas of the law involving litigation.

The chair asked how the consortium handles concerns about attorney performance. Mr. Harris described one recent instance where he was able to find a more appropriate caseload for one attorney, and said that the membership of another attorney was terminated. Most of Mr. Harris's time, in connection with consortium matters, is devoted to administration and providing some limited coverage, although he expects in the next year to handle a number of major felony cases in order to remain fully acquainted with the issues facing other ODAC members in their criminal defense representation.

In response to a question from Commissioner Potter, Mr. Harris said that he does not have any immediate plans for retirement, but he is preparing for long-range transitions both by bringing younger attorneys into ODAC who may have an interest in taking over his administrative responsibilities, and by bringing a minority shareholder into his firm who can eventually become its managing owner.

Ron Ridehalgh, who heads a one of the law firms that contracts with PDSC, appeared briefly. The chair noted that the draft service delivery had good comments about the work of his firm. Mr. Ridehalgh said he appreciated those comments.

Grant Burton, managing attorney at the Hillsboro Law Group, complimented MPD as the “vanguard” of public defense in the county, but he said that his firm also provides a place for talented attorneys who may wish to practice both criminal defense and work in other practice areas. He explained that because his firm has a broad multi-area practice, it is not dependent upon public defense to remain viable, which provides flexibility in contracting with PDSC. He said that the firm will continue to contract for public defense work only if the terms are fair and work for the firm. He cited, as an example, that the firm needs to be paid enough to afford to adequately pay a felony-qualified attorney. Mr. Burton also noted, following up on earlier comments, that he believes race to be a clear factor in criminal justice outcomes in the county, and suggested that more data is needed in order to determine causation.

Nate Law appeared before the Commission for the Karpstein and Verhulst firm, which contracts to handle, along with MPD, the bulk of juvenile dependency cases, along with some lesser criminal cases. He said that Greg Karpstein is transitioning management of the firm to himself and Jake Griffith, another younger attorney, and said they both are excited about providing new leadership for the firm. He also addressed the shackling issue, saying he was alarmed to hear Judge Menchaca say that defense attorneys were not raising concerns with him, and noted that though he has been worked behind the scenes with the juvenile department on this issue, he sees now that much more work remains.

The chair then noted that though **Louise Palmer**, with the Brindle, McCaslin and Lee firm, had been invited to speak to the Commission, she did not attend the meeting.

## **VII. A SERVICE DELIVERY PLAN FOR WASHINGTON COUNTY**

At its October 23, 2015, meeting, the Commission reviewed a draft of this report, including the testimony from its September 17, 2015, meeting. The Commission determined that the current service delivery plan should be continued, except that contracts for public defense services in the county for 2016-2017 will no longer include the Brindle, McCaslin and Lee firm. A substantial portion of the cases that firm would have received will be handled by juvenile law practitioners in the Oregon Defense Attorney Consortium.

The Commission observed that relationships among public defense providers in the county are good, and that the overall climate for public defense in the county has improved recently. It also noted that the Washington County office of the Metropolitan Public Defender appears to receive appropriate administrative support and attention from the firm's top managers, although the Commission directed OPDS to continue to monitor how the firm performs with offices in two counties.

The Commission further determined that OPDS should continue to monitor the performance of all public defense providers in Washington County in connection with the issues identified above as “areas of inquiry” for Commission consideration in the county. The Commission specifically directs OPDS staff to continue its efforts to address the unwarranted use of shackling in juvenile court proceedings. In this regard, following the Commission's meeting in Washington County in September 2015, OPDS Deputy General Counsel Amy Miller provided Judge Menchaca, the presiding juvenile court judge, with additional information about shackling, including a statement from the National Council of

Juvenile and Family Court Judges urging a presumptive rule or policy against shackling children except when individual circumstances warrant the practice.<sup>1</sup> Ms. Miller also followed up on the issue with the county's Juvenile Department and with the public defense providers in the county.

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<sup>1</sup> [http://www.ncjfcj.org/sites/default/files/ShacklingOfChildrenInJuvenileCt\\_Resolution\\_July2015.pdf](http://www.ncjfcj.org/sites/default/files/ShacklingOfChildrenInJuvenileCt_Resolution_July2015.pdf).

# Attachment 5



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# Public Defense Services Commission

Office of Public Defense Services

Executive Director's Biennial Report to the  
Oregon Legislative Assembly  
July 1, 2013 – June 30, 2015

Nancy Cozine  
Executive Director  
(October 2015)

## Contents

<b>I. INTRODUCTION .....</b>	<b>3</b>
(A) AGENCY MISSION .....	3
(B) THE RIGHT TO COUNSEL .....	3
(C) ROLE IN JUVENILE AND CRIMINAL JUSTICE SYSTEMS.....	4
(D) OREGON’S PUBLIC DEFENSE DELIVERY MODEL .....	4
<b>II. AGENCY ORGANIZATION AND OPERATION.....</b>	<b>5</b>
<b>III. PDSC’S ACCOMPLISHMENTS IN 2013-2015 .....</b>	<b>7</b>
(A) CONTRACT SERVICES.....	7
(B) FINANCIAL SERVICES .....	7
(C) QUALITY ASSURANCE .....	7
1. <i>Statewide Surveys</i> .....	8
2. <i>Complaint Program</i> .....	8
3. <i>Contract Revisions</i> .....	8
4. <i>Peer Reviews</i> .....	9
5. <i>Service Delivery Reviews</i> .....	10
6. <i>Parent Child Representation Program</i> .....	10
(D) DIVERSITY TRAINING .....	11
(E) APPELLATE DIVISION.....	11
1. <i>Criminal Appellate Section</i> .....	12
2. <i>Juvenile Appellate Section</i> .....	13
<b>IV. PDSC’S CHALLENGES IN 2013 – 2015 .....</b>	<b>14</b>
(A) ENSURING QUALITY REPRESENTATION .....	14
(B) RECRUITMENT AND RETENTION .....	14
(C) COMPENSATION .....	14
(D) FUNDING FOR 2015-2017 .....	15
<b>V. CONCLUSION.....</b>	<b>16</b>
<b>APPENDIX A .....</b>	<b>17</b>

# *The Right to Counsel*

The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

*Gideon v. Wainwright*, 372 US 335, 344 (1963)

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

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

## **I. Introduction**

The Public Defense Services Commission (PDSC) is an independent commission within the judicial branch of state government. In July of 2003 it assumed full responsibility for administering Oregon’s public defense system, which delivers trial level and appellate legal services in criminal, juvenile, civil commitment, post-conviction relief, and habeas corpus cases across the state.

### **(a) Agency Mission**

In carrying out its responsibilities, the PDSC’s mission is to establish and maintain a public defense system that ensures the provision of public defense services in the most cost-efficient manner consistent with the Oregon Constitution, the United States Constitution and Oregon and national standards of justice.<sup>1</sup>

### **(b) The Right to Counsel**

The legal services provided by PDSC represent an essential component of Oregon’s public safety system. Under the United States Constitution, the Oregon Constitution and Oregon statutes, financially eligible individuals charged with a crime, parents and children in abuse and neglect cases, and individuals facing involuntary commitment due to mental health concerns are entitled to representation by court-appointed counsel at trial and on appeal. During the 2013-2015

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<sup>1</sup> ORS 151.216(1)(a).

biennium, circuit and appellate courts appointed attorneys to represent clients in approximately 341,000 cases.

### **(c) Role in Juvenile and Criminal Justice Systems**

Court appointed attorneys defend the rights of all Oregonians by asserting the constitutional and statutory protections afforded to the criminally accused, family members who are involved in juvenile dependency or delinquency proceedings, and the rights of allegedly mentally ill persons, to ensure that they are not inappropriately deprived of their liberty or fundamental rights. Indeed, the state cannot legally prosecute crime, remove children from their parents, or involuntarily commit those in need of treatment without providing mandated representation to financially eligible individuals subject to these proceedings.

Defenders also contribute directly to public safety by (1) advocating for effective criminal sanctions that help clients avoid future involvement in the criminal justice system; (2) finding resources for families involved in dependency cases that help them avoid or limit disruption of the family unit, lead to reunification or, when reunification is not possible, help children find permanent safe and supportive homes; and (3) assisting allegedly mentally ill persons find safe and effective alternatives to involuntary hospitalization.

On both the state and local level, defenders play a valuable role in shaping our criminal and juvenile justice systems. Defenders participate in public safety planning groups and provide critical insights to policy makers regarding effective approaches to controlling crime, protecting children, providing for the mentally ill, and facilitating the efficient operation of the courts and the public safety system as a whole. Additionally, appellate level defenders raise important issues, resulting in court opinions that clarify the law and enhance its consistent application across the state.

### **(d) Oregon's Public Defense Delivery Model**

The PDSC provides representation in most criminal and juvenile dependency appeals directly through state employee lawyers and staff in the Appellate Division (AD) at the Office of Public Defense Services.

PDSC provides representation for all trial level cases and appellate cases not handled by the Appellate Division through contractual and hourly agreements administered by the Office of Public Defense Services.

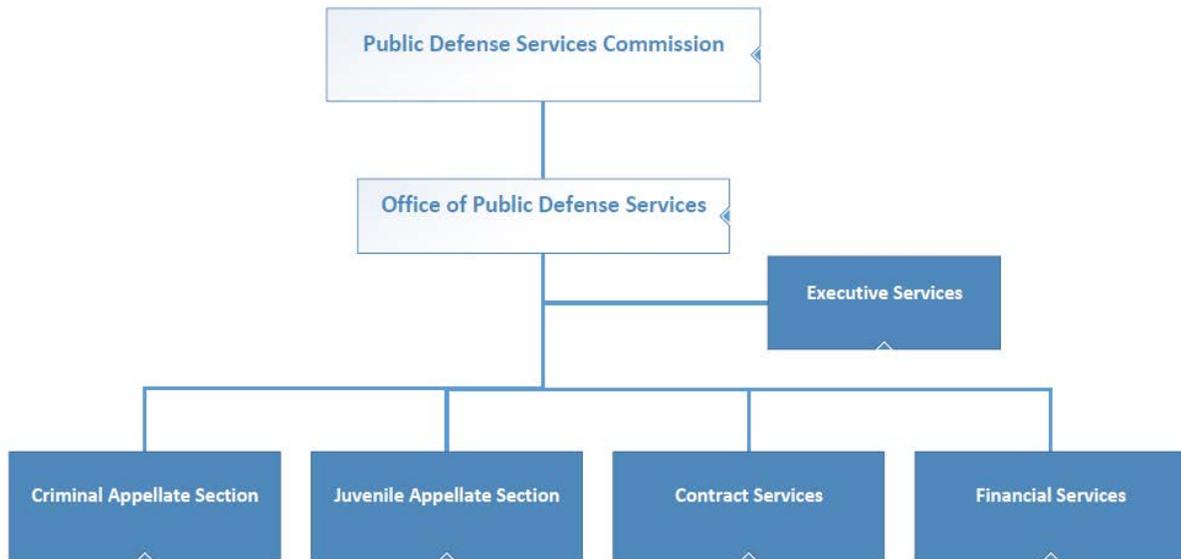
## **II. Agency Organization and Operation**

The Public Defense Services Commission is a seven-member commission that serves as the governing body for Oregon's public defense system. It provides policy direction and oversight for administration of the system. The commissioners are civic-minded, uncompensated volunteers who are appointed by the Chief Justice, who serves as an *ex officio*, non-voting member. By statute, two members must be non-attorneys, one must be a former prosecutor, and another must be an attorney engaged in criminal defense practice who does not serve as a court-appointed attorney compensated by the state. The current members of the PDSC are listed in Appendix A.

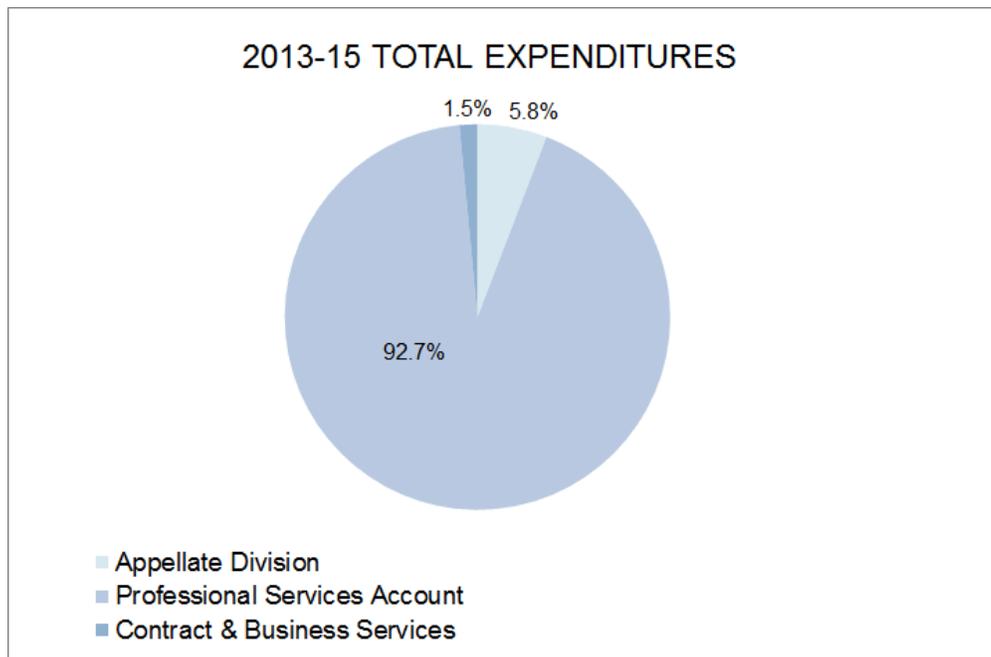
The Commission established the Office of Public Defense Services, as required by ORS 151.216(1)(b), as the administrative agency responsible for carrying out the Commission's directives and other statutorily defined duties. The Commission appoints the agency's executive director. Nancy Cozine has served as the executive director since September 7, 2011.

As shown on the Organizational Chart (next page) for 2013-2015, the Office of Public Defense Services has several work units: the Appellate Division, Contract Services, Financial Services, and Executive Services. The Appellate Division (AD) has two sections, both of which provide direct legal representation in state appellate courts. The Criminal Appellate Section provides appellate representation in criminal cases, and the Juvenile Appellate Section represents parents in juvenile dependency and termination of parental rights cases. Contract Services ensures representation in all trial level cases through contractual agreements negotiated with providers across the state, and a limited number of attorneys paid on an hourly basis. Financial Services is responsible for all budget-related functions, including processing and payment of agency expenses and contract obligations. Executive Services supports the entire agency in the areas of human resources, information technologies, and operations. Executive Services also includes the office of General Counsel, which is responsible for providing legal counsel for the entire agency and its Commission, including agency representation in contested matters (such as appeals of agency denials of expense requests),

trial-level quality assurance oversight, technical assistance for contract and hourly providers, and administration of the agency’s complaint program.



The chart below sets forth the 2013-2015 funding allocations for the two appropriations that fund the office (Appellate Division; Contract and Business Services) and for the Public Defense Services Account, which funds private contractors, hourly rate attorneys, and other private service providers such as investigators and expert witnesses.



### **III. PDSC's Accomplishments in 2013-2015**

#### **(a) Contract Services**

In order to secure consistent representation for individuals at the trial court level, Contract Services was able to negotiate contracts with more than 100 private providers in every region of the state. Through these agreements, the agency provided representation in approximately 338,000 cases. Analysts performed monthly reconciliation of contractor data reports, comparing the information received to information available through court records, and worked with courts and contractors to ensure the smooth operation of the public defense system at the trial court level.

In addition to negotiating and administering contracts for the provision of legal services, the staff in Contract Services reviewed non-routine expense requests for investigators, expert witnesses, discovery materials provided by other parties, and other expenses necessary for the preparation and presentation of an adequate defense. The agency uses a peer-review process in public defender offices to obtain input from experienced attorneys about which expenses are truly "reasonable and necessary," as required by ORS 135.055. There were more than 35,000 such requests during the biennium.

#### **(b) Financial Services**

The Financial Services group processed over 40,000 payments during the 2013-15 biennium. Responses to OPDS's Customer Service Survey in 2014 indicated high satisfaction with the agency's helpfulness, accuracy, timeliness, knowledge and expertise. The Financial Services manager is responsible for the agency budget, and worked with staff to prepare the 2015-17 biennium budget proposal for approval by the Commission.

#### **(c) Quality Assurance**

The Office of General Counsel is responsible for monitoring and ensuring the quality of representation statewide. The mechanisms

used are varied, including peer reviews, statewide surveys, a complaint program, and training sessions for public defense attorneys.

### **1. Statewide Surveys**

In January 2015, OPDS conducted its eighth annual statewide public defense performance survey. The agency asks judges, prosecutors, Citizen Review Board coordinators, and juvenile department directors to evaluate and comment upon the performance of public defense providers in each judicial district. The survey this year showed general satisfaction with public defense services, although there was concern that caseloads remain too high in many jurisdictions. Respondents made 150 narrative comments, either complimenting public defense providers or expressing concerns. OPDS staff was able to follow-up with respondents and providers to address many of the concerns. The PDSC has asked that the next survey include more opportunities for respondents to leave detailed and focused comments.

### **2. Complaint Program**

OPDS receives complaints from public defense clients and their families, prosecutors, courts, and occasionally from legislative staff responding to constituent concerns. Pursuant to the PDSC complaint policy and procedure, OPDS will investigate complaints that raise a facially reasonable concern regarding either the performance of public defense providers or the expenditure of public defense funds. OPDS is able to quickly resolve many concerns by facilitating communication between attorneys and clients. In other instances, OPDS will work with contract administrators to ensure that adequate training, supervision, and oversight protocols are in place that can address concerns about attorney performance. On rare occasions, OPDS will suspend an attorney's eligibility to serve on public defense cases.

### **3. Contract Revisions**

In preparation for release of the Request for Proposals for contracts to provide public defense services in 2016-2017,

General Counsel directed a comprehensive review of the general terms applicable to most public defense services contracts. The resulting revisions, made after consultation with public defense providers, clarify PDSC requirements, in keeping with state and national performance standards, for representation of public defense clients and for the administration of public defense providers. The revised general terms also enhance the ability of OPDS to gather data from providers to analyze provider performance.

#### **4. Peer Reviews**

Peer reviews are an essential component of OPDS's quality assurance program. These reviews, staffed by teams of volunteer lawyers from around the state and coordinated by General Counsel, include an intensive three-day on-site investigation into the quality of services provided by individual public defense contractors. Peer review reports seek to identify especially effective practices that can be recommended to other providers, and to make recommendations for improvement when teams find concerns about performance. Peer review reports may also make recommendations to OPDS and PDSC regarding contract management in particular jurisdictions.

Depending upon the findings and recommendations of peer review reports, various follow-up actions may be required of the provider under review and OPDS. Under current practice, in most instances the PDSC will conduct a service delivery review about a year after a peer review report is finalized. The service delivery review, as described in more detail in the next section, will look at developments since the peer review report, as well as examine other needs and issues in a jurisdiction.

During the 2013–2015 biennium, three peer review processes were completed or started. The Marion County peer review, started in May 2013, continued through the remainder of the year and generated positive changes in the county. In September 2014, General Counsel completed a peer review in Washington County. Initial planning began for a review of Clackamas County providers.

## **5. Service Delivery Reviews**

In pursuit of its mission to assure high quality, cost-effective public defense services during the biennium, PDSC completed a service delivery review in Clatsop County, and conducted service delivery review in Marion County. The service delivery review process includes holding public meetings in various locations in the state, gathering information from judges, prosecutors, other officials and citizens, evaluating the need for changes in the structure and delivery of local public defense services and directing the Commission's management team to implement needed changes.

There are three phases in the process. The Executive Director and other agency representatives perform an initial investigation. The Commission then meets in the region to hear directly from the stakeholders in the local justice system. The Commission then develops a service delivery plan, which is incorporated into a final report. This report serves as a blueprint for agency staff contracting with providers in the region. All of these reports appear on the agency's website.

In previous biennia, PDSC completed investigations in, and evaluations of, most of Oregon's local public defense systems.<sup>2</sup> It developed service delivery plans to improve the structure and operation of local systems, and to raise the quality of legal services in those jurisdictions. Service delivery reviews have also examined substantive areas of practice, devoting reports to representation in death penalty cases, juvenile representation, post-conviction cases, and management of drug courts.

## **6. Parent Child Representation Program**

The Parent Child Representation Program (PCRP), aimed at improving the quality of legal representation for parents and children in juvenile dependency and termination proceedings,

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<sup>2</sup> As they are completed these plans are posted on the PDSC website: [www.oregon.gov/OPDS/PDSCReports.page](http://www.oregon.gov/OPDS/PDSCReports.page).

launched in Linn and Yamhill counties in August 2014. The PCRCP is modeled on a similar program in Washington State which, through repeated independent evaluation, has shown to be effective at reducing the use of foster care and expediting permanency for children. Key components of the program include caseload limits, additional training and oversight requirements, and a multidisciplinary approach to representation.

Although the PCRCP is in its infancy, initial results are positive. Attorneys are spending significantly more time with clients, independent investigation is regularly occurring, attorneys are present at all court proceedings including initial shelter hearings, and local system improvement is underway.

#### **(d) Diversity Training**

OPDS continued its practice in 2015 of presenting a biennial diversity training program for its entire staff. The program this year was in two parts. The first focused on better understanding the current debates about immigration enforcement and reform, and how that affects the communities in which our staff live and work. The program featured an experienced immigration law practitioner and a young immigration activist. The second part of the program examined in depth a recent major case from the Oregon Supreme Court.

#### **(e) Appellate Division**

The Appellate Division (AD) has two sections: criminal appellate (CAS) and juvenile appellate (JAS). The division provides legal representation in the state appellate courts on direct appeal in criminal cases, parole appeals, juvenile dependency appeals, and appeals from the termination of parental rights. Peter Gartlan was the Chief Defender and manager of the Appellate Division until his retirement on March 31, 2015. Ernest Lannet assumed the role of Chief Defender of the Criminal Appellate Section upon Mr. Gartlan's departure. Shannon Storey is the Chief Defender in the Juvenile Appellate Section.

Appellate Division managers continue to meet regularly with the Chief Judge of the Court of Appeals and the Solicitor General of the

Department of Justice to advance and promote practices that improve the appellate process without prejudicing the rights of clients.

In addition, representatives from the Appellate Division, the Attorney General's office, and appellate court operations meet quarterly to address operational issues that affect system efficiencies, for example, issues concerning the quality and timeliness of transcript production, access to trial court files through the Odyssey system, eFiling, and appellate case docketing.

The division provides ongoing support to the trial level juvenile and criminal defense bar. AD lawyers sit on the executive committees of the Oregon State Bar's criminal law, juvenile law, constitutional law, and appellate law sections, as well as the executive and educational committees for the Oregon Criminal Defense Lawyers Association (OCDLA). AD lawyers regularly present at continuing legal education (CLE) seminars sponsored, for example, by the Oregon State Bar and the Oregon Criminal Defense Lawyers Association. The division's attorneys field email and telephone inquiries from the juvenile and criminal defense trial bar on a daily basis and provide briefing and memoranda to trial practitioners.

### **1. Criminal Appellate Section**

During the 2013-15 biennium the criminal section changed its target for PDSC's appellate Key Performance Measure, which is the median time to filing of the opening brief in criminal cases. The target had been 210 days, and after almost meeting it for several years in a row, the agency requested permission to reduce the target to 180 days. This new target represents significant progress. In 2006 the median number of days to file the opening brief was 328. The average for this biennium was about 225 days, but during the second quarter of 2015 it was down to 210 days. The agency expects that newer attorneys who are gaining experience are also becoming more efficient, and that the agency will be able to achieve the goal of 180 days to filing of the opening brief.

The criminal section had many successful appeals. Notable successes in the Oregon Supreme Court include decisions

removing procedural obstacles from obtaining review of defects in jury instructions, endorsing a defendant's right to have a jury instructed on lesser-included offenses, and abandoning a *per se* rule that discovery of an arrest warrant deprives a defendant of the right to suppress evidence found because of an unlawful detention. The Oregon Supreme Court also asked the division to provide briefs as *amicus curiae* in three other cases—one of which supplied the analysis adopted by the court in its decision.

## **2. Juvenile Appellate Section**

The division's juvenile unit, created by the 2007 Legislative Assembly, has realized the legislature's intent of effecting systemic improvement in the practice of juvenile law at both the appellate and trial court level. The Juvenile Appellate Section (JAS) represents parents in the majority of appeals in juvenile dependency and termination of parental rights cases, appearing regularly before the appellate courts in cases that produce written opinions that guide trial level practice. The unit has also provided assistance to the Oregon Law Commission and the Juvenile Court Improvement Project. JAS lawyers participated in the drafting of the Oregon State Bar's performance standards for juvenile dependency practitioners, served on the executive committees of the Juvenile Law and Appellate Practice Sections of the Oregon State Bar, routinely presented at CLE seminars concerning juvenile dependency law, and have been appointed to edit the latest draft of the Oregon State Bar Juvenile Law Bar Book. In addition, JAS lawyers devote significant time each day to assisting defense practitioners litigating trial-level juvenile dependency cases, resulting in numerous wins for families, thereby obviating the need for appeal.

Juvenile Appellate Section litigation has resulted in a body of case law effectuating the legislature's preference for family unity and autonomy in the first instance and family reunification in those cases where state interference was historically deemed necessary. Most notably the Court of Appeals has clarified that the proponent of ongoing dependency jurisdiction bears the burden of proving that dependency jurisdiction continues to be warranted, that the rules of evidence apply to all jurisdictional determinations, that

the Inter State Compact on Placement of Children (ICPC) does not apply to a child's biological parent, that a parent is not required to provide primary care to his or her child to avoid dependency jurisdiction and may instead delegate caretaking to others, and that the focus of the juvenile court's inquiry at all stages is not the parent's deficits in the abstract but rather whether—and to what degree—the parent's deficits harm or threaten to harm to the specific child at issue.

## **IV. PDSC's Challenges in 2013 - 2015**

### **(a) Ensuring Quality Representation**

The PDSC's launch of the Parent and Child Representation Program was a significant undertaking and a wonderful addition to the agency's existing quality assurance efforts. The enhanced training, monitoring, and compensation, in addition to reduced caseloads, have resulted in better representation for children and families in the pilot counties. Additionally, the data-driven monitoring of attorney performance is an enhancement to the agency's quality assurance efforts. As the agency develops its capacity for data storage, data analysis, and attorney evaluation through the pilot program, the lessons learned will be useful for development of such measures in other case types.

### **(b) Recruitment and Retention**

Public defense providers at the trial court level continue to experience difficulties attracting and retaining qualified lawyers. Over the course of the biennium, several lawyers presented information to the PDSC and the Legislature regarding public defender compensation. Practitioners explained that it is difficult to attract and keep younger lawyers, most of whom have very high law school debt, due to the low rates paid for public defense cases, and that contract rates are not keeping pace with the rising costs of running a business.

### **(c) Compensation**

The PDSC has advocated for increased compensation for Oregon's public defense lawyers each biennium in an effort to reduce caseloads and improve the quality of representation. Studies indicate that reduced

caseloads improve representation and case outcomes in criminal<sup>3</sup> and juvenile dependency<sup>4</sup> cases, but are possible only when case rates are increased to amounts that allow attorneys to handle fewer cases. Without continued improvements in case rates, the agency will struggle to ensure reasonable attorney caseloads.

#### **(d) Funding for 2015-2017**

The PDSC submitted seven substantive policy option packages (POPs) in the 2013-15 agency request budget. These packages were developed following regional meetings that included every single public defense provider across the state. These regional meetings, held between December 7, 2013, and February 4, 2014, included the following groups:

- December 7, 2013: Eastern (Baker, Grant, Harney, Malheur, Morrow, Umatilla, Union, Wallowa)
- January 10, 2014: Central (Crook, Deschutes, Gilliam, Hood River, Jefferson, Sherman, Wasco, Wheeler)
- January 14, 2014: North Coast (Clatsop, Columbia, Lincoln, Tillamook)
- January 28, 2014: Southern Oregon (Coos, Curry, Douglas, Jackson, Josephine, Klamath, Lake)
- January 30, 2014: Tri-County (Clackamas, Multnomah, Washington)
- February 4, 2014: Willamette Valley (Benton, Lane, Linn, Marion, Polk, Yamhill)

Two additional meetings were held with providers handling specialized contracts:

- March 5, 2014: Post-Conviction Relief and Habeas Corpus (trial and appeals)
- March 21, 2014: Capital Providers

While there were many challenges that were consistent in every region, there were also issues that were unique to specific areas. The

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<sup>3</sup> Luchansky, PhD. "*The Public Defense Pilot Projects, Washington State Office of Public Defense*" (March 2009). Available electronically at: <http://digitalarchives.wa.gov/WA.Media/do/0C9435A31893A6A3C504FA4AA28678A5.pdf>

<sup>4</sup> Mark E. Courtney, PhD., Jennifer L. Hook, PhD., and Matt Orme, "*Evaluation of the Impact of Enhanced Parental Legal Representation on the Timing of Permanency Outcomes for Children in Foster Care*," Partners For Our Children at the University of Washington, Discussion Paper Volume I, Issue I (February 2011). This report is available electronically at: <http://partnersforourchildren.org/pocweb/userfiles/PRP%20Discussion%20Paper.pdf>

Commission reviewed regional meeting reports, received testimony from providers, and developed seven policy option package requests directed at improving public defense services across the state.

The agency received partial funding of policy option packages 100 and 104 for the 2015-17 biennium. These funds allow the agency to ensure that consistent rates are given to similarly situated non-profit public defense providers and consortium and law firm providers, and allow the agency to add a permanent position for administration of the Parent Child Representation Program and quality assurance oversight in juvenile dependency cases statewide.

## **V. Conclusion**

Oregon's public defense system has long been considered a national leader in the provision of effective, cost-efficient representation to qualified individuals. The Legislature's support of the agency's efforts to develop data-driven performance reviews, in combined with other quality assurance efforts, and continued improvements in case rates, will allow Oregon to remain a model state. Throughout the course of the 2015-17 biennium, in addition to providing quality representation across the state, the agency will update its strategic plan and build targeted, outcome-driven policy option package requests for the 2017 legislative session.

# Appendix A

## Oregon Public Defense Services Commission Members

Chief Justice Thomas A. Balmer  
Ex-Officio Permanent Member

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

Shaun McCrea, Vice-Chair  
Partner, McCrea PC

Per Ramfjord  
Partner, Stoel Rives LLC

Henry H. Lazenby, Jr.  
Lazenby & Associates

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

Janet C. Stevens  
Co-Editor, Bend Bulletin

Hon. Elizabeth Welch  
Senior Judge