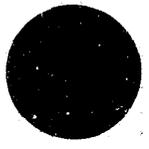


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TECHNICAL ASSISTANCE REPORT

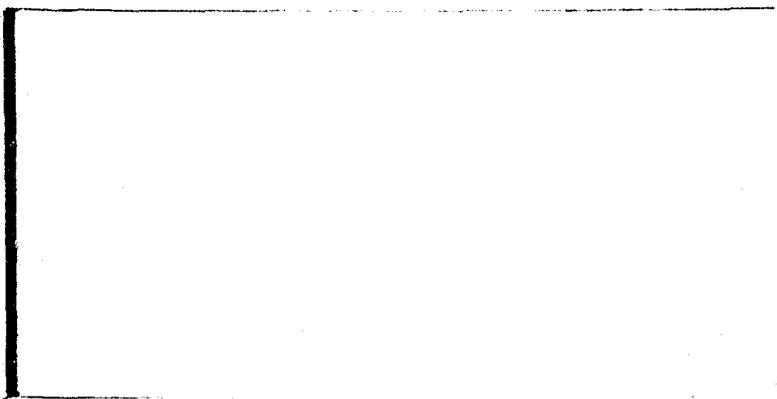


**Bureau of  
Justice  
Assistance**

ADJUDICATION TECHNICAL ASSISTANCE PROJECT

121384

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**ADJUDICATION TECHNICAL ASSISTANCE PROJECT**  
Technical Assistance Assignment No. 123

**The Potential Impact of Prosecutorial  
and Court Practices and Procedures on  
Indigent Defense Costs in Oregon:**

**A Preliminary Assessment**

**April 1989**

**Consultants:**

**Hon. Bruce D. Beaudin  
Peter Gilchrist  
Kim Taylor**

**Prepared Under BJA Cooperative Agreement No. 87-DD-CX-K061**

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Consultant(s) Assigned: Hon. Bruce D. Beaudin, Associate Judge  
Superior Court of the District of Columbia  
Peter Gilchrist, District Attorney  
Charlotte, North Carolina  
Kim Taylor, Director  
District of Columbia Public Defender Service  
Central Focus of Study: Prosecutor Operations

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## FOREWORD

Dismayed by the difficulties of providing for regular assessment of problems with the administration of criminal justice, Oregon Supreme Court Chief Justice Edwin Peterson established the Justice Improvement Committee in late 1986, a working group of representatives from the Oregon Criminal Defense Lawyers Association and the Oregon District Attorneys Association whose task is to meet regularly to assess such problems. In November 1987, F. Douglass Harclerod, then Committee Vice-Chairman and District Attorney for Lane County, requested the Bureau of Justice Assistance-sponsored Adjudication Technical Assistance Project (ATAP) at the EMT Group, Inc., to provide guidance to the Committee in developing its agenda for addressing criminal justice needs, particularly those arising out of the increasing drug caseload in the state.

The ATAP assigned Hon. Bruce D. Beaudin of the District of Columbia Superior Court and former director of the District of Columbia Pretrial Services Agency to attend a Committee meeting in April 1988 to explore with Committee members potential areas of concern. During the course of this meeting, Committee discussions focussed upon the subject of indigent defense costs and the potential impact of district attorneys' charging practices on such costs. Subsequently, the Committee received the endorsement of the Oregon District Attorneys Association, the Oregon Criminal Defense Association, and the Chief Justice to pursue a study of this matter.

At the Committee's request, the ATAP agreed to assemble a consultant team to provide an initial assessment of the issue with the understanding that the Committee would follow-up on areas which could not be addressed within the limited resources available through the ATAP. In addition to Judge Beaudin, the study team was composed of Hon. Peter Gilchrist, presently serving his fourth term as elected District Attorney for Mecklenburg County (Charlotte), North Carolina and an instructor for the National District Attorneys Association, and Ms. Kim Taylor, Director of the District of Columbia Public Defender Service who also serves as faculty for the National Legal Aid and Defender Association. The team conducted a four day site visit January 22 - 25 at which time they met with prosecutors and defense attorneys from eight counties<sup>1</sup> selected by the Committee to be representative of Oregon's judicial processes. The agenda for the site visit was arranged by Mr. Harclerod and Mr. Ross Shepard, Lane County Public Defender and Committee member, who served jointly as local coordinators for the study. In addition, because the team was based in Eugene, they also met with Judge Maurice Merten and Judge Gregory Foote of the Lane County Circuit Court. A list of those interviewed is provided in Appendix B.

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1. Listed in Appendix B, the counties included Benton, Clackamas, Deschutes, Douglas, Josephine, Lane, Marion, and Multnomah.

## I. INTRODUCTION

### A. Focus of the Study

For some time there has been concern in Oregon at the state and local levels about the increasing costs of administering justice, particularly in light of ever mounting increases in crime. Recently, the spotlight has again focussed on the issue of providing indigent defense representation. In September 1988, a detailed report prepared by the Spangenberg Group<sup>2</sup> concerning the manner and cost of indigent defense representation in the state was submitted to the State Court Administrator who, by law, must petition the legislature for funds to provide state and local indigent defense services.

The present study by the Committee is designed to provide a framework for looking at the relationship between charging and other pre-trial practices of the various district attorney offices and courts in Oregon and indigent defense costs without, of course, in anyway intruding on the local control inherent in each county's approach to criminal prosecution. In keeping with this approach, the Committee identified the following issues for study:

- (1) What are the charging practices of district attorneys and how do they affect the costs of the criminal justice system?
- (2) How do the negotiation practices of the district attorneys affect the costs of the criminal justice system?
- (3) How do indigent defense costs affect charging and negotiating practices of district attorneys?
- (4) Are indigent defense contracts entered into after considering the charging practices of the district attorneys?
- (5) How do negotiation policies of indigent defense contractors affect the cost of the criminal justice system?
- (6) How do court procedures (e.g., appointment of counsel) affect indigent defense and prosecution costs?

Although ATAP's limited resources did not permit each of these issues to be fully explored, the study team reviewed relevant procedure and practice in the eight selected counties with prosecutors and defense attorneys<sup>3</sup> and has prepared this report documenting their preliminary assessment. Upon review of this assessment, the Committee should

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2. The Spangenberg Group. Oregon Indigent Defense Systems Study. Draft Findings and Recommendations. September 2, 1988.

3. See Appendix B for a list of the individuals interviewed.

determine whether or not further investigation with the remaining counties in the State might be fruitful in presenting a statewide perspective. The team has also suggested additional information which, if collected regularly by prosecutor and defender offices, might provide a more systematic basis for further addressing these issues.

In preparation for the site visit, the team reviewed the following materials which Mr. Harclerod provided:

- (1) a copy of the Oregon Revised Statutes regarding plea discussions and agreements to which prosecuting attorneys, defense attorneys and trial judges must adhere; and
- (2) statewide statistical information relating to District and Circuit Court caseload compiled by the State Court Administrator for 1987 and the first two quarters of 1988.

#### B. Study Team's Approach

There are 36 counties in Oregon, some rural and some urban. Practices in all 36 jurisdictions vary. As Peter Sandrock, President of the Oregon District Attorneys Association noted in his letter of May 23, 1988 to Chief Justice Peterson proposing this study, "... criminal prosecution must remain a matter of local control ... district attorneys have a responsibility to address unique local crime problems." The challenge, however, which this diversity posed to the study team required them to examine widely diverse practices to see whether some commonality could be identified sufficient to be beneficial to the assessment underway.

Because most of the team's interviews were scheduled in Eugene, with representatives from the majority of the other counties coming to meet with them, they were able to view the prosecutor's office and the court at work in Lane County. While they are aware that things done in Lane County may not be replicated elsewhere, their observations in Lane County served as a basis for comparison with what they learned about practice in other counties through their interviews.

The report which follows documents the team's findings and recommendations.

## II. ANALYSIS

The team found that both the prosecution and defense attorneys overall are not only committed to the principal of quality legal representation, but are actually providing such representation within severe financial restraints. In keeping with its charge, however, the team did identify certain prosecutorial charging and negotiation practices and current court procedures which were consistently noted as affecting the task of representation and which, if addressed, might help to further reduce indigent defense costs and allow the criminal justice system to function in a more efficient manner. These are discussed below.

### A. Charging Practices

#### 1. Screening

Screening occurs in each of the districts that the team studied and normally consists of a review by an experienced attorney of the police reports. District attorneys normally do not interview either the investigating officer or any witnesses. Limiting review to police reports is done for a variety of reasons. In the rural counties, offenses may be committed miles away from the district attorney and the officers are not available for case review before the first court appearance. Even in the urban counties, the staff available and the work to be done to file a case prior to the first court appearance appear to allow only a screening of reports before filing. Exception are in Lane County and Multnomah County, where cases that are brought to the District Attorneys' Office for direct presentment to the Grand Jury and on occasion screened by means of telephone conversations or personal interviews with investigative officers.

Interviews with victims, witnesses, and officers normally occur only immediately prior to the grand jury presentment. The interviews for Grand Jury presentation therefore are actually brief and frequently cover little more than what is needed for the Grand Jury hearing. Since only five judicial days are allowed after arrest for return of a true bill by the grand jury (or else a probable cause hearing is mandated), time available for witness interviews and case evaluations is by necessity limited. Where the pre-grand jury interviews indicate that there is either insufficient evidence to proceed or that additional information is necessary to evaluate the case, the district attorneys usually withdraw the case from the grand jury.

Consideration should be given by the district attorneys to more extensive case evaluation to permit weak cases to be screened-out or pled to lesser charges and simultaneously to identify early, cases where there is a need to further develop evidence and secure witnesses that will be needed for trial. Better statistical information would

permit an evaluation of whether there is justification to expand the screening process to allow the district attorney to adequately interview the investigators, victims, and witnesses before filing or at least before the Grand Jury presentation.

To permit the district attorneys to do early and extensive screening either pre-filing or pre-indictment, more resources may well be required and this issue merits further analysis.

2. Initial Charging Practices<sup>4</sup>

Despite limited staff and other resources, district attorneys in the eight counties studied are able to issue charging documents in an extremely high percentage of cases. However, the study team found that in the vast majority of those cases additional screening by district attorneys could be conducted. As already noted, in many counties, district attorneys candidly discussed their practice of making charging decisions without the benefit of discussion with complaining witnesses or the arresting officer to determine the relative strengths and weaknesses of a given case. Defendants are simply charged with offenses based on a review of incident reports delivered to the prosecutor's office. As a direct consequence of this practice, only an extremely small percentage of cases are being dismissed at this early stage. Once the case is charged, defense attorneys are appointed and cases are prepared that eventually may be found to have little or no merit. In such cases, resources are, therefore, committed to cover defense costs that might have been avoided had the case not entered the system at this initial stage. While no information was readily available to the study team regarding the number of cases that might be disposed of early and with minimal if any expenditure of indigent defense resources, this issue merits further study.

3. Statutory Provisions for Reduction of Charges in Certain Offenses

The Spangenberg study indicates that, between 1982 and 1986 the volume of indigent cases increased by 214% to nearly 140,000 cases. In 1987, the legislature, in an attempt, in part, to lower the number of cases requiring counsel, provided that certain misdemeanors could be reduced to violations. There appears to be some movement by prosecutors toward reducing certain charges but no authoritative data was obtained in this regard.

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4. It was reported by some defense attorneys that in a few counties prosecutors appear reluctant to reduce a charge of aggravated murder, even in weak cases. This issue should be explored further.

4. Use of Diversion Programs

The study team learned that, apart from the diversion program which is authorized by statute for first offender drunk drivers, diversion programs for both first offenders and misdemeanants are rarely, if ever, used. An array of formal diversion programs needs to be established and then funded with necessary staff and resources. Such programs, by design, can divert significant numbers of less serious cases out of the court system, thereby reducing the high volume of cases that can cause costly delays in the district courts. Moreover, these programs have a substantial impact on reducing defense costs, since diversion decisions can be made early in the process before significant attorney hours have been invested in pretrial preparation.

B. Negotiation Practices

1. General Comments

Through its interviews, the team confirmed that district attorneys and defense counsel regularly engage in the practice of negotiating guilty pleas, a cost-efficient method of resolving cases. While the team found that, primarily in misdemeanors, plea offers are relayed to defense counsel close to the time that a case enters the system, these offers are generally regarded by both sides as "preliminary" offers and normally based only on the police reports received by the district attorney's office. While an exceptional job is being done in making early written offers, the district attorneys need more and better information upon which to make the offers. Meaningful plea offers are often not made until relatively late in the process, once the district attorney has had an opportunity to evaluate the case carefully. If these "meaningful" offers could be communicated shortly after a case enters the system, fewer indigent defense dollars would have to be expended.

In the larger counties, the team found that district attorneys, faced with a high volume of cases, are actively seeking innovative methods to resolve cases in a cooperative and cost-efficient manner. One example of this cooperation is the "Arraign-O-Rama" -- or "Let's Make A Deal" courtroom in Lane County<sup>5</sup>. Briefly, -- and with apologies to the officials of Lane County for our characterization -- the process we witnessed exemplifies a herculean effort by judges, prosecutors, and defense attorneys to process as many cases as possible at minimal cost. Prosecutors offer arrestees a chance to

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5. While it is not our intention to single out any process as "good" or "bad" since such qualitative judgments should more properly be exercised by the local milieu, the "Arraign-O-Rama" Court is indicative of what happens around the state as local officials attempt to make maximum use of existing resources which are most likely inadequate to meet today's needs.

dispose of minor offenses at their first appearances by entering pleas of guilty. Under this program, meaningful plea offers are made at arraignment to defendants who do not assert their right to counsel. Once the defendant requests an attorney, the plea offer is raised. For these guilty plea purposes, charges are reduced to the minimum acceptable providing the defendant agrees to waive counsel and plead guilty. However, as noted, should the defendant request counsel or refuse the plea, the anti will be "upped" and succeeding offers will be less generous.<sup>6</sup> Certainly, there is plenty of subtle pressure for the defendant to plead guilty and avoid the risk of more serious charges. At any rate, one of the results of this practice is that many cases are disposed of very early in the process without any indigent defense costs being incurred.

Clearly, the design of this program is to encourage defendants to admit their guilt at an early stage and to reduce the costs of indigent defense by precluding the appointment of counsel. Such a program is also evidence of the substantial cooperative effort of the system to cooperate in its disparate parts so as to permit the processing of criminal cases that could not possibly be otherwise handled with the resources allocated absent such extensive cooperation. Such attempts are, indeed, laudable; however, a program such as "Arraign-O-Rama also poses potential constitutional implications by inappropriately impacting on a defendant's Sixth Amendment right to counsel. Moreover, in the event that a defendant asserts his or her right to counsel, he or she is then faced with a poorer plea offer. The net result may be that the defendant will then opt to take the case to trial. Clearly, in that situation, there is also a potential for increased cost in a category of cases that could and should be resolved short of trial.

## 2. Early Written Plea Offers

All the District Attorneys' offices appeared to be doing an excellent job of sending early written plea offers to defense counsel on felony cases. Two offices also prepared early plea offers on some misdemeanors. The practice of early written plea offers is an excellent one and many resultant benefits can be seen. However, district attorneys, deputies, and indigent defenders all related numerous instances where inappropriate plea offers were made by the State. While the offers appeared reasonable based upon the police reports alone, follow-up investigation and interviews often revealed case deficiencies which made the plea offers unreasonable. Early and thorough case evaluation by the State will further permit appropriate plea offers to be made for defense consideration.

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6. It is significant that this first offer is based solely on prosecutorial review of an arrest report and prior criminal record and may be one that is even less serious than might otherwise be indicated or even more serious than might be required.

3. Plea Cut-Off Dates

As noted above, prosecutors generally put into writing their formal plea offers based on police arrest reports. While individual prosecutors may call arresting officers on occasion to get more facts, the norm seems to be to make the offer based on a review of the arrest report. Under Uniform Trial Court Rule 7.010 (the 35 day rule)<sup>7</sup> the defendant has 35 days to consider and accept or reject the offer. After the 35 days the case is deemed ready for trial, the offer is withdrawn if not accepted, and all plea agreements and negotiations are supposed to be concluded.

The team found, however, that in spite of Rule 7.010 and the 35-day call plea negotiations continue beyond the 35 days until cases are actually called for trial in many counties. While the intent of Rule 7.010 is to force both sides to complete discovery, evaluate their evidence and file all necessary motions early, early resolution seems to be the exception, rather than the practice. In some counties, the 35-day call never occurs and in others it is merely a step in the process where neither side expects to accomplish any of the required tasks. If a hearing were to be set before the judge who will ultimately try or dispose of the case, it might be easier to measure performance by counting the number of cases actually resolved or pled on or shortly after the 35-day call.

We are told that when Rule 7.010 was initially implemented a good deal was accomplished. Defense investigations were completed, and many cases were disposed of within that time. It seems that today, however, the rule is more honored in its breach and, while it is "acknowledged", so is the reality that on trial dates plea offers are reinstated and a growing number of cases await final disposition by plea until the day of trial. Judges and counsel are forced to reopen the bargaining in order to maintain a decently current docket.

4. Use of Civil Alternatives for Case Resolution

A number of defense attorneys interviewed indicated that, in many counties, the district attorneys oppose the use of civil alternatives for resolving cases. Such alternatives could permit the district attorney to dismiss a case once the defendant had complied with whatever civil sanctions were imposed. For example, some attorneys interviewed reported that complainants sometimes indicate their willingness to accept restitution instead of proceeding with the prosecution; however, this method of case disposition, although cost-efficient, is routinely opposed by district attorneys. The reasons

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7. See Section C(1) below.

for prosecutorial reluctance to use civil alternatives for case dismissal should be explored.

5. Sentence Certainty As Part of the Plea Offer/Agreement

It was also reported that some defendants are reluctant to enter into plea agreements when the sentence under the agreement is uncertain. Although there exists statutory authority to "bind" a judge in plea agreement, attorneys interviewed indicated that it is becoming increasingly difficult to find a judge who is willing to enter into such an arrangement. Certainty of the sentence can be an effective tool for encouraging resolution of cases through guilty pleas, and without such certainty, the potential for resolution of cases short of trial is decreased.

C. **Court Procedures**

1. The "35-day" Rule

As part of the study, the team conducted preliminary interviews concerning court procedures that might tend to increase indigent defense costs. The primary procedure identified in these interviews was the "35 day" rule. This rule, which, as previously described, is designed to set a deadline by which all plea negotiations are to be concluded, is, as already noted, apparently honored primarily in the breach. Most attorneys indicated that the rule is not viable because the time limits are unreasonable. Although in an attempt to follow the rule, courts generally set hearings on the 35th day to ascertain the status of the case, the parties often require extensions of time before being able to make a determination regarding a viable plea agreement. The team learned that there are numerous cases being scheduled for court appearances for the 35-day call and for pretrial conferences where there is little expectation by the state or the defense that anything will occur.

A possible solution would be for teams of local court officials, perhaps supplemented with outside resources, to devise plans whereby the number of required hearings was reduced but specific expectations were established as to what would be accomplished at each hearing. The net result of the current situation is that there is not only no cost reduction achieved but, in reality, there remains the potential for actually increasing costs because of the necessity for setting additional court hearings.

2. Judicial Involvement in Pretrial Conferences

In some counties, judges set pretrial conferences approximately two weeks before a scheduled trial date. At these hearings, parties indicate if a case will proceed to trial or if it will be resolved short of trial. In the counties where judges take an active role at these hearings, the team found that cases may more often be resolved short of trial.

3. Impact of Judicial Involvement in Other Aspects of the Pre-Trial Process

Many lawyers feel that if judges enter the criminal case process at some date prior to the trial date -- either at the end of the 35-day period or some other set time -- cases would move more quickly just because a judge would look to them for accountability. Judges, too, believe that if they are more active earlier, more cases can be disposed of earlier. By statute (135.432) judges are permitted and encouraged to participate in plea negotiations.<sup>8</sup>

In Lane and Multnomah Counties, the District Attorney's office screens misdemeanors and presents a written plea offer to the defendant at a very early stage. The public defender in Lane County has an attorney on standby at in-custody arraignments to consult with defendants without formal assignment of the case to the office. If the proposed offer by the state appears reasonable to the standby public defender, these cases are often resolved immediately. This practice seems to be a good one and very cost effective, both to the district attorney and public defender as well as to the court. Further evaluation of this procedure would appear to be in order as it offers promise to all concerned. In Lane County, the presiding judge awards a one-third or a one-half credit to the Public Defender for pleas taken on this basis and thus underwrites the costs for providing the standby public defender.

4. Scheduling of Motion Hearings

During the course of its interviews, the team learned that, in many counties, judges are reluctant to set hearings to resolve motions before the day of trial. In many cases, defense attorneys indicated that even when they report to the court that a motion will be dispositive of the case, the judge will set the hearing on the trial date. This practice certainly potentially prolongs the time that a case remains in the system and might easily be changed in order to reduce costs.

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8. See Appendix C.

D. State Criteria for Allocating Indigent Defense Resources

1. Affect of Indigent Defense Billing Policies on Prosecutor Charging Practices

Since responsibility for paying for indigent representation has been lodged with the State, it falls to the State Court Administrator to prepare the state budget for public defender services. It is our understanding that this budget is based on a case number justification presented by various defender offices. Our rather hurriedly conducted visit led us to question this case method of budgeting; but in any event, it is clear that the number of cases handled -- by plea, trial, or other disposition -- directly affects indigent defense costs. Certainly the time spent on one type of disposition (plea) is vastly different from time spent on another (trial). The desirability of a case-based budget justification is therefore questionable.

The team inquired as to whether the state consolidated appropriate offenses in a single bill of indictment with multiple charges or whether multiple bills of indictment were brought. The issue is important because normally indigent defenders bill based on numbers of cases. All of the district attorneys interviewed were aware that if they did not join related offenses in a single bill of indictment multiple case numbers would be created thereby permitting indigent defense counsel to do the same amount of work, yet "count it" or bill it as multiple cases. The consensus of the team was that, other than trying to join appropriate charges, most of the district attorneys' offices did not consider that the indigent defense billing practices affected their charging or negotiation practices. It was also the consensus of the team, that, generally, the district attorneys attempt to consolidate wherever the law permits joinder. Occasionally, motions are filed by the defense for severance of offenses but this did not seem to be a significant problem. Apparently, proposed legislation will further expand permissible joinder so even this issue may become moot. Thus, consolidation or lack thereof does not appear to contribute significantly to the cost of criminal defense.

2. Affect of District Attorney Charging Practices on Indigent Defense Contracts

The team obtained no information as to whether or not the State Court Administrator considered the local district attorneys' charging practices in the indigent defense contracting process and neither the district attorneys nor the indigent defense representatives interviewed indicated that they were aware of any of the contracts reflecting local district attorneys charging practices. This issue, however, merits further investigation.

An examination of the interaction between prosecutor charging practices and indigent defense costs must also acknowledge the quality and cost of defense representation. There is no need to repeat here what has been set out at length in the Spangenberg study. Suffice it to say that a reexamination of the amounts to be paid to contract attorneys and the value of implementing statewide public defender offices requires an assessment of a number of issues beyond the scope of the present effort.

### III. RECOMMENDATIONS

The recommendations which follow address particular areas of improvement identified by the technical assistance team during the course of its study. While a number of these recommendations may require the commitment of additional staff and support resources to implement, their impact on improved justice system operations and more efficient use of existing judicial system resources should make them highly cost beneficial.

**A. Early and More Thorough Prosecutorial Screening Should be Undertaken Whenever Possible and District Attorneys Should Institute the Practice of Interviewing Officers in Person Before Issuing Charging Documents.**

As noted, a prosecutor's review of police arrest reports generally forms the basis for such decisions as initial charge, initial plea offer, diversion, etc. A face to face (or telephone) consultation with the arresting officer and/or the complaining witness obviously takes more time, yet, just as obviously, leads to better and more accurate information. With that kind of information in hand, a prosecutor would be in a better position to:

- assess diversion potential
- explore civil alternatives to prosecution, e.g., restitution, etc.;
- reduce (or increase) charges;
- employ the use of a violation in lieu of criminal prosecution;
- dismiss nonprosecutable cases; etc.

Adequate resources should be provided to permit prosecutors to perform more complete screening at an earlier stage in the process of a given case. Such screening should result in earlier dismissals. District attorneys should not wait until the eve of trial to evaluate the relative worth of a case because of the inefficiency of this practice.

Early screening is particularly important in capital cases which, because of their complexity, usually require the appointment of co-counsel. If capital cases which are weak can be recognized early, then defense costs can be allayed.

Again, the Spangenberg study at p. 31 alludes to the factors listed above as being worth the costs attendant to early screening.

**B. As a Method of Screening Cases, the District Attorneys Might Consider Conducting Preliminary Hearings in Appropriate Cases**

The use of preliminary hearings should be considered as one method of screening for appropriate cases. To prepare for a preliminary hearing, district attorneys and defense attorneys necessarily take a careful look at a case and make determinations regarding its

strengths and weaknesses of the case at a relatively early stage in the process. Weak cases can be dismissed by the Court or the District Attorney before significant attorney hours have been invested.

**C. Diversion Programs Should Be Utilized for First Offenders and Misdemeanants.**

Since the automatic diversion provisions of the drunk driving statute have successfully diverted large numbers of cases out of the system, the study team would recommend that the Legislature consider developing additional automatic diversion provisions for first offenders and specific misdemeanor offenses. Adequate staff and resources should also be provided to implement these programs once they are established.

**D. The Use of Early (at first appearance) Written Plea Offers Should be Considered, as Well as an Extended Time Within Which to Exercise the Option To Plead Guilty.**

The team recommends that district attorneys should make more meaningful plea offers earlier in the stage of a case. Preferably, such an offer could be made at arraignment with a reasonable period of time for the defendant to consider the plea and accept it.

In the larger counties where the district courts are dealing with high volumes of cases, innovative plea arrangements may be appropriate. The team would recommend that under the "Arraign O Rama" program, district attorneys should continue to make meaningful plea offers at the time of arraignment; however, the terms of the offers should not worsen if the defendant asserts his right to counsel. Another option which could avoid the constitutional problems of this program, would be to make plea offers that reduce the misdemeanor to a violation. Through that method, a defendant would not need the assistance of counsel since he would not be required to make a decision that could result in a criminal conviction on his record.

Both Lane and Multnomah Counties have experienced much success with the practice of offering early pleas. Obviously, the more cases that are disposed of earlier the less the cost to all. Subject to improving the quality of information available when the offer is made and extending the period of consideration for a short time (24 hours to a week) the practice of providing early written plea offers should result in the disposition of many cases at the earliest possible time.

Our reason for suggesting some extension beyond the date of initial appearance for consideration of the plea offer is to permit informed decision making. While the statute seems to imply that pleas of guilty may be withdrawn rather easily, we were concerned that existing practice permitted some uninformed decisions to be made. It would seem appropriate to permit at least a short time to pass so that a defendant could consult briefly with counsel.

**E. If a Complaining Witness Would be Satisfied With a Civil Alternative for Resolving the Case, Such as Regular Restitution Payments From the Defendant, the District Attorneys' Offices Should Not Adopt a Policy Opposing Such Resolution.**

Disposition of a criminal matter by way of a civil alternative should not be ruled out uniformly for all cases. Clearly, the appropriateness of a civil sanction to resolve a criminal matter would depend upon the nature of the case and the use of such a sanction would, of course, rest solely in the discretion of the district attorney.

**F. Statutory Provisions Enabling Judges to Be Bound in Their Sentencing Determinations Under a Guilty Plea Agreement Should be Utilized.**

Such practices would encourage a greater number of defendants to enter into guilty plea agreements, which will reduce indigent defense costs.

**G. As Long as the Status Quo Exists, to the Extent Possible, Prosecutors Should Continue to Charge Multiple Offenses in One Bill of Indictment Rather Than in Several.**

Prosecutors and defenders agreed that the prosecutors generally consolidate multiple offenses in one bill of indictment (case). When necessary, severance motions are filed. As long as defense budgets are based on cases handled, the fewer the cases the lower the budget. While we believe this system of budgeting costs should be evaluated as the Spangenberg study recommended, under the present system, multiple charges indicted in one bill of indictment is the most cost effective insofar as allocating defense costs.

**H. Uniform Trial Court Rule 7.010 Should Be Revitalized by Permitting (requiring) a Judicial Event Such as a Status Call to Take Place.**

Although interviews indicate that the original intent of Rule 7.010 was good, as time has gone by and caseloads have grown, the 35-day period appears to have become an artificial and meaningless event. The intervention of a judge who can pressure both prosecution and defense to assess their respective cases and to dispose of a case by plea, if appropriate, can inject new life into the rule. Where possible, the judge ultimately responsible for the trial should be the one to conduct such a hearing. If necessary, cases could be referred to a non-trial judge for appropriate negotiation.

**I. A Further Study Should be Conducted to Determine Whether the 35-day Limit Provides a Viable Time Within Which Parties Can Make Realistic Determinations Regarding the Status of a Case.**

Suggestions were made during the course of this study that the rule be extended to 60 days since practice had demonstrated that the 60-day limit was a workable period of time to make such decisions for incarcerated defendants.

**J. Judges Should Consider Instituting Pretrial Conferences at a Time Certain Before the Date of Trial in Order to Determine if a Case will Proceed to Trial or be Resolved by Way of a Plea Agreement.**

The team further recommends that judges become active participants in these hearings.

**K. Dispositive Pretrial Motions Should Be Litigated at a Hearing Before the Scheduled Trial Date.**

This practice will help to reduce the number of cases that linger in the system as well as avoid the need for both prosecutors and defense attorneys to prepare for the trial of cases which will ultimately be disposed of by pre-trial motion.

**L. Prosecutors Should Agree to Establish a Statewide Management Information System With a Minimum List of Data Requirements to Permit Accurate Assessment of Various Screening and Plea Negotiation Practices.**

For many valid reasons, all data contained in prosecutors' offices should not be made public. Without a detailed picture of when, where and how cases are closed, however, it is difficult to determine what works and what doesn't. We believe that it would be of benefit to all prosecutors and to others involved with the criminal justice process in Oregon if the following information were kept (preferably as part of an automated system):

- (1) Disposition Information
  - (a) rejected - prior to arrest/after arrest
  - (b) dismissed - with prejudice/without prejudice
  - (c) plea
    - as charged/reduced/or to fewer charges
    - felony/misdemeanor/violation
  - (d) Trial
    - felony/misdemeanor
    - guilty as charged/guilty of reduced or less than all charges/not guilty
  - (e) Diversion (drug/first offender/etc.)
  - (f) Probation without verdict/conditional discharge
- (2) Activity Dates (date case opened/date case closed)
- (3) Type of Attorney Representation (Public Defender/consortium/Assigned Counsel)

Implementation of this recommendation may require provision of equipment and staff resources in some of the state's prosecutorial offices to maintain an information system such as that proposed in this report. However, the benefits which such a system can provide in terms of caseload analysis and planning far outweigh the costs involved.

**M. Indigent Defense Service Offices Should Also Regularly Gather Information to Permit Assessment of the Potential Relationship Between the Costs of Services Provided and Prosecutorial and Court Procedures.**

Indigent Defense Service Offices should gather information similar to that recommended for the prosecutor offices as well as information regarding the phases of the criminal case process which receive the greatest concentration of resources. Implementation of this recommendation, which may require provision of some additional resources, will provide indigent defense offices with information to permit analysis of their caseload and resource utilization essential for more efficient future planning.

#### IV. SUMMARY

The recommendations submitted in this report are, in large part, a response to very rapid caseload and population growth which have called into question the efficacy of certain procedures which had heretofore contributed significantly to expeditious case process in Oregon. In light of the current fiscal and other pressures which confront the justice system generally and the provision of indigent defense services particularly, this is an opportune time to take a fresh look at what is working and what may need revamping.

A number of the recommendations submitted are designed to provide more meaningful case information at an earlier stage in the process so that those cases which do not merit full scale judicial system processing are identified as early as possible. Other recommendations focus on improving the plea negotiation process and alternative disposition resolution mechanisms with the overall goal of conserving judicial, prosecutorial and defense resources. Many of these recommendations will require funds to establish necessary programs and procedures and to provide adequate staff support for implementation. These costs, however, are far outweighed by the benefits which can accrue to the Oregon criminal justice process and to the savings in criminal justice system resources that should result. None the least of these benefits will be a reduction in the expenditure of resources for cases which can be disposed of early and routinely so that more resources can be available for those cases which merit substantial prosecutorial and defense effort.

## APPENDICES

- A. (1) Letter from Peter Sandrock, Jr., President of the Oregon District Attorneys Association to Chief Justice Edwin J. Peterson Describing the Proposed Study, May 23, 1988.
- (2) Letter from Chief Justice Peterson to Peter Sandrock, Jr., Supporting the Proposed Study, May 27, 1988.
  
- B. List of Persons Interviewed and Counties Represented During the Site Study



OREGON DISTRICT ATTORNEYS ASSOCIATION  
JUSTICE BUILDING  
SALEM, OREGON 97310  
TELEPHONE: (503) 378-6347

RECEIVED  
MAY 26 1988

LANE COUNTY  
DISTRICT ATTORNEY

May 23, 1988

EXECUTIVE COMMITTEE:

- PETER F SANDROCK  
President
- F DOUGLASS HARCLEROD  
Vice-President
- DALE W PENN  
Secretary/Treasurer
- ULYS J STAPLETON  
Director
- EDWIN I CALEE  
Director
- RUSSELL B WEST  
Director
- DAVE FROMMAYER  
Attorney General
- ROBERT C CANNON  
County Counsel
- MICHAEL D SCHAUNK  
Immediate Past President

The Honorable Edwin J. Peterson  
Chief Justice  
The Supreme Court  
Salem, OR 97310

Re: Study of District Attorneys' Charging Practices

Dear Chief Justice Peterson:

The Executive Committee of the Oregon District Attorneys Association believes that it would be helpful for the EMT Group to conduct a study of the charging practices of district attorneys.

The Executive Committee also believes that criminal prosecution must remain a matter of local control. As independently elected officials, district attorneys have a responsibility to address unique local crime problems. Consequently their practices and procedures will vary according to the needs and desires of their communities.

Keeping in mind the fundamental importance of local control, the Executive Committee feels the following issues should be studied:

1. What are the charging practices of district attorneys and how do they affect the costs of the criminal justice system?
2. How do the negotiation practices of the district attorneys affect the costs of the criminal justice system?
3. How do indigent defense costs affect charging and negotiating practices of district attorneys?
4. Are indigent defense contracts entered into after considering the charging practices of the district attorneys?
5. How do negotiation policies of indigent defense

contractors affect the cost of the criminal justice system?

6. How do court procedures (e.g., appointment of counsel) affect indigent defense and prosecution costs?

If the ODAA/OCDLA Committee approves, I will ask Doug Harclerod, as Committee chair, to make arrangements with the EMT Group for the technical assistance to conduct the study.

Very truly yours,

Peter F. Sandrock, Jr.  
President

cc: Michael T. Dugan  
F. Douglass Harclerod /  
Michelle A. Longo  
John Potter  
Ross M. Shepard

THE SUPREME COURT

Edwin J. Peterson  
Chief Justice



CLAH/OCE-4

Salem, Oregon 97310  
Telephone 378-6026

May 27, 1988

RECEIVED

JUN 1 1988

LANE COUNTY  
DISTRICT ATTORNEY

Peter F. Sandroch, Jr.  
President  
Oregon District Attorneys Association  
Benton County Courthouse  
120 NW Fourth  
Corvallis OR 97330

RE: Study of District Attorneys Charging Practices; Your  
Letter of May 23, 1988

Dear Peter:

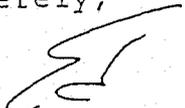
I was pleased to receive your letter of May 23, 1988.

Considering the sensitivity of this subject to many district attorneys (see the second paragraph of your letter), this is a courageous (but appropriate) step for your association to take.

I will assist you in every way possible, for the study will impact other parts of the criminal justice system. If there is one thing I have learned about government, it is that no department of government operates in a vacuum. The six areas of inquiry listed in your letter reflect careful consideration of the role of district attorneys in the criminal justice system. Others (such as the Judicial Department, Corrections, Probation, and the Criminal Defense Bar) owe you complete cooperation in this endeavor.

Good luck to all of us.

Sincerely,

  
Edwin J. Peterson  
Chief Justice

EJP:jmg/3988M

cc: Michael T. Dugan  
F. Douglass Harclerod  
Michelle A. Longo  
John Potter

Ross M. Shepard  
William Linden  
Kingsley Click

## APPENDIX B

### List of Persons Interviewed January 11-25, 1989 and Counties Represented

#### I. Circuit Court Judges

Maurice Merten (Lane)  
Gregory Foote (Lane)

#### II. Prosecutors

F. Douglass Harclerod (Lane)  
Peter Sandrock (Benton)  
Jim Hunt (Lane)  
Bob Gorham (Lane)  
Dale Penn (Marion)  
Tom Bostwick (Marion)  
Bob Thompson (Josephine)  
Jack Banta (Douglas)  
Mike Dugan (Deschutes)  
Mike Schrunk (Multnomah)  
Jim O'Leary (Clackamas)  
John Bradley (Multnomah)  
Laurie Abraham (Multnomah)  
Wayne Pearson (Multnomah)  
Gayle Brooks (Multnomah)

#### III. Defenders and Private Attorneys

Dick Smurthwaite (Lane)  
Kathy Wood (Benton)  
Ross Shephard (Lane)  
Jim Shephard (Lane)  
Jim Hennings (Multnomah, Clackamas, Washington)  
Steve Rich (Josephine)  
Bruce Tower (Douglas)  
Tom Crabtree (Deschutes, Jefferson and Crook)  
H. John Potter (OCDLA)

#### IV. Counties

Benton  
Clackamas  
Deschutes  
Douglas  
Josephine  
Lane  
Marion  
Multnomah