



# Oregon

## Office of Public Defense Services

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The Honorable Floyd Prozanski, Chair  
Senate Interim Committee on the Judiciary

The Honorable Jennifer Williamson, Chair  
House Interim Committee on the Judiciary

**RE: Office of Public Defense Services Update**

Chair Prozanski, Chair Williamson, and members of the Senate and House Judiciary Committees:

Thank you for the opportunity to provide an update on the agency's actions since the 2019 legislative session ended, and to discuss the efforts the agency has taken to improve public defense statewide.

### Introduction

My name is Eric Deitrick, and I appear today as General Counsel for the Office of Public Defense Services ("OPDS"). As background, OPDS funds all of public defense in Oregon's circuit and appellate courts. At the trial level, public defense is provided almost exclusively by independent contractors.<sup>1</sup> Those contracts are flat-fee contracts, which award the contractor a fixed flat-fee for each case the attorney provides counsel.

In the fall of 2017, public defense attorneys, administrators, OPDS, and the Public Defense Services Commission ("PDSC") understood public defense to be in crisis. In October 2017, I (along with agency staff) met with David Carroll and Rep. Jennifer Williamson in Newport, Oregon at the annual public defense management conference. Mr. Carroll expressed interest in providing a comprehensive assessment of public defense services in Oregon. During the 2018 legislative short session, the legislature appropriated funds for Mr. Carroll and the Sixth Amendment Center ("6AC") to provide such an assessment.

The assessment began soon thereafter. OPDS put together a stakeholder advisory group that would select judicial districts for the 6AC to engage in site visits and provide a forum for the 6AC to report

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<sup>1</sup> 1% to 2% of trial cases are provided by attorneys on conflict lists who take cases when a contractor is unavailable.

back on its findings.<sup>2</sup> The first meeting was held in May 2018, and the site visits began in July 2018. The 6AC issued its final report in January 2019.

Two key findings stand out:

1. The State of Oregon has created a complex bureaucracy that collects significant amounts of indigent defense data, **yet does not provide sufficient oversight or financial accountability**. In some instances, the bureaucracy is itself a hindrance to the effective assistance of counsel.
2. The complex bureaucracy obscures an attorney compensation plan that is at its root a **fixed fee contract system that pits attorney's financial self-interest against the due process rights of their clients** and is prohibited by national public defense standards.

In response, OPDS immediately began working on reform legislation to address the concerns raised by the 6AC report. OPDS worked with the House and Senate Judiciary Co-Chairs and their staff, along with public defense providers and contractors, interested stakeholders, and other advocates on what became House Bill 3145 (2019).

In February 2019, the PDSC also discussed the findings of the 6AC report. The PDSC directed the agency to stop contracting on a flat fee basis and to develop a new contracting model.

In March 2019, HB 3145 had a hearing in the House Committee on the Judiciary and was voted out, with a referral to the Joint Committee on Ways and Means. Before the end of session, HB 3145 was amended to provide for a task force on public defense, with the substantive provisions of the measure removed. That amended version passed the House of Representatives by one vote, and it was unanimously rejected by the Senate on a floor vote.

#### Inquiry Regarding Caseload and Distribution of Funds

Since the agency's inception, it has relied upon two-year contracts with public defense providers. A request for proposals is issued during the spring of odd numbered years. The proposal includes a summary of how the contractor intends to distribute its funds. Contracts are then awarded in the fall of odd numbered years, to begin on January 1 of even numbered years. At the end of the contract, there is reconciliation between OPDS and the contractor to determine if the projected number of case credits had been satisfied. At that time, OPDS may owe the contractor additional funds, or the contractor could be in debt to the agency.

However, OPDS has never followed up at the end of the biennium to inquire about whether contractors appropriated money in accordance with their RFP. Nor has the agency uniformly asked contractors to explain how they distributed their funds.

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<sup>2</sup> Members of the 6AC Advisory Group included Judge Eric Bergstrom; Tim Colahan, the Oregon District Attorneys' Association; Justice Rebecca Duncan, Captain Lee Eby, Clackamas County Sheriff's Office; Helen Hirschbiel/Amber Hollister from the Oregon State Bar; Misha Isaak, Office of the Governor; Aaron Knott, Office of the Attorney General; Shaun McCrea, OCDLA; Rep. Mike McLane; Sen. Floyd Prozanski; Per Ramfjord, PDSC Chair; Mike Schmidt, Criminal Justice Commission; and Rep. Jennifer Williamson.

When the 2019 session ended, OPDS turned to contracting for the next biennium's public defense services. As discussed, the agency was directed by the PDSC to cease flat fee contracting. With no reform legislation, OPDS would have to develop a new service delivery model while relying upon funding predicated upon the case-credit model. Fortunately, OPDS did receive an increase in its budget appropriation from the legislature, which has helped with the transition.

OPDS elected to not immediately seek two-year contracts. Rather, the agency would offer public defense contractors six month extensions of their existing contracts<sup>3</sup>. This would allow the agency time to develop and implement a constitutional and more comprehensive contracting model. However, to be eligible for an extension, OPDS required contractors to provide the agency with detailed information about how its state funds were distributed in the year 2018, including financial records, 1099s, etc. The agency also requested information about how many cases were handled by each attorney subject to the contract.

OPDS then received and reviewed the information, and the agency reached several conclusions. Overall, it is fair to say that most public defense providers are underpaid and overworked. Indeed, caseloads are crushing for many public defense providers, and high caseloads are driving people from the profession. And it is fair to say that most public defense providers are not compensated commensurately with their prosecutorial counterparts.

However, there is a wide inequity regarding compensation for public defense providers, and there are some public defense providers doing quite well in the current model. Indeed, some of the highest paid attorneys reliant upon governmental funds are not at the Department of Justice, nor are they Justices of the Oregon Supreme Court. They are public defense contractors.

One provider received \$325,000 in total state funds in 2018. Others received more than \$250,000 and up. While this is not a salary, it still provides for an inequitable distribution once overhead is deducted from these funds. And while these high earning public defense attorneys are an exception to the norm, they demonstrate the challenges of managing a state public defense system with scant bandwidth for oversight. The agency presumes that many of these attorneys maintain private law practices in addition to their public defense work. Others serve as municipal prosecutors and judges. Currently, OPDS has no capacity to assess how much of their time is provided to public defense clients versus other legal clients and/or professional obligations.

It is important to note that inequitable distribution of funds was greatest for the for-profit public defense providers (law firms and groups of private law firms, called consortia). The non-profit public defender offices, which cover roughly one-third of the total state caseload, have progressive salary scales, but that is where the financial inequity ends. For for-profit entities, your compensation may depend upon whether (1) the attorney is the contract administrator, (2) there is a contract administrative fee taken off of the top of each case credit, (3) the attorney did not receive the entire case credit rate, and (4) whether the attorney is an employee or independent contractor of a consortia member.

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<sup>3</sup> OPDS elected to not offer extensions to two groups – Madras Indigent Defense Consortium in Jefferson County and Independent Defenders, Inc. in Clackamas County – prior to making the request for caseload and financial information.

## Six Month Contract Extensions

OPDS then offered six month extensions to nearly all existing trial level contractors, excepting three.<sup>4</sup> Those contracts are all signed and are effective January 1, 2020 until June 30, 2020.<sup>5</sup> These contracts transition away from case credits and toward a new FTE model. In terms of deliverables, OPDS established a general target case quota, which was based on each provider's recent caseload and capacity. The contract requires OPDS and the contractor to work together in good faith, and to reassess the contract if the target caseload deviates by 15% or more. Most important to public defense contractors, it will eliminate the requirement to return state funds if the target quota is not met with precision. This will allow public defense providers to get a more accurate understanding of their workload capacity without fear of non-payment. It will also free up money that contractors would normally hold in reserve for the end of biennia reconciliation.

Based upon the legislatively approved budget OPDS was able to increase the size of these contracts. Each entity received an increase of 5% to address cost of living and inflation. Additionally, entities that are participating in timekeeping for the American Bar Association caseload study received an additional 2% in contract value. These increases were meaningful, as non-profit public defenders have not received a meaningful contract increase since 2013 and the for-profit public defense providers have not had a meaningful increase since 2015.

Finally, the agency increased funding for certain entities based upon their agreement to add capacity – new attorneys – to their groups. OPDS was funding approximately 574 FTE attorneys in the current biennium<sup>6</sup>. With the additional funding from the legislature, OPDS was able to add 30 attorneys for the six month contract extensions, which should help alleviate the urgency of the caseload concerns in certain jurisdictions.

## Next Steps

The two key agency priorities heading into 2020 are (1) the implementation of a new contracting model for public defense providers and (2) finalizing a plan to release the \$20 million dollars placed in a SPA as a result of House Bill 5050 (2019).

OPDS will be moving to a new contract model effective July 1, 2020. The new model will rely upon FTE funding and hourly rate compensation. Instead of a flat fee for providing counsel in a “case,” OPDS will contract with entities to cover a certain number of “caseloads.” These caseloads will have hard caps and limit the number of cases public defense providers can handle per year. Ideally, the caseload cap will be data-informed and reflect the true capacity of individual attorneys. OPDS is

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<sup>4</sup> OPDS did not offer a six month extension to Justice Alliance Center in Yamhill County after having reviewed its caseload and financial information. OPDS had already elected to not offer an extension to MIDC or IDI.

<sup>5</sup> There are a few exceptions. Parent Child Representation Program contracts were extended for two years. Capital Defense contracts were modified. And some of the agency's specialty contracts – the Immigrant Rights Project and the Forensic Justice Project – were issued as two year contracts.

<sup>6</sup> OPDS is providing funding for that number of attorneys. However, the number of attorneys doing that work is certainly larger, as many attorneys in for-profit entities do not dedicate their entire practice to public defense.

working with the American Bar Association to determine such a cap. However, the results of the ABA caseload study will not be completed until late 2020 at the earliest.

Until then, the agency will aspire to meet the caseload standards used by the state of Washington – 400 misdemeanors and 150 felony cases per year. However, it is unclear if the agency will have sufficient funding to meet those caseload standards. Depending upon available funds, OPDS may be limited to reaching 110% or 120% of these standards. But the agency is committed to maximizing available funds to come as close these standards as possible. Attorneys not on FTE contracts will receive an hourly rate. And while the currently hourly rate of \$55/hour is quite low, the agency is confident it can increase that amount significantly as a part of the transition to the new model<sup>7</sup>.

The agency will be working with attorneys at DOJ to develop new contract language that addresses the agency's values of transparency, oversight, and an equitable distribution of funds. The RFP will be issued in late January 2020. Responses will be due in mid-March. Those proposals will be reviewed by OPDS, which will then make contract recommendations to the PDSC at its meeting on May 21, 2020. The new contracts will go live July 1, 2020.

At the same time OPDS is developing and implementing a new contracting model, the agency is working with legislative leadership on a plan to release the \$20 million SPA. This funding is critical to the transition to the new contracting model, as it will help reduce attorney caseloads and increase compensation. This will help not only the attorneys doing public defense work, but also the courts in which they practice, and the clients that they serve. Ultimately, that is the goal.

Achieving that goal will also require additional OPDS oversight to ensure financial accountability and quality assurance. The 6AC highlighted this as one of the major deficiencies regarding public defense in Oregon. Indeed, the caseload and financial inquiry the agency recently engaged in highlights this need more than ever. Legislative leadership has directed the agency to develop a plan for improved oversight and financial accountability and to include that in the plan for the SPA.

This is an exciting time for public defense reform in Oregon, and I appreciate the opportunity to provide you with an update.

Respectfully submitted,

Eric J. Deitrick  
General Counsel  
Office of Public Defense Services

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<sup>7</sup> Hourly compensation currently constitutes 1-2% of all trial level services. Although the agency has relied upon the case credit model for the other 98% of cases, the agency has examined how the current distribution of funds translates into hourly compensation, assuming standard billing practices. For most contractors, OPDS estimates the agency is actually compensating attorneys at a rate of roughly \$80 to \$100/hour.