

# D R A F T

## SUMMARY

Provides that members of Public Defense Services Commission are entitled to per diem compensation for service on commission.

Removes designation of fees and expenses of appointed counsel in criminal case that require preauthorization as “nonroutine” expenses. Provides that such fees and expenses are those that require preauthorization under policy of commission.

## A BILL FOR AN ACT

Relating to public defense; amending ORS 40.225, 135.055, 151.213 and 151.216.

**Be It Enacted by the People of the State of Oregon:**

**SECTION 1.** ORS 151.213 is amended to read:

151.213. (1) The Public Defense Services Commission is established in the judicial branch of state government. Except for the appointment or removal of commission members, the commission and employees of the commission are not subject to the exercise of administrative authority and supervision by the Chief Justice of the Supreme Court as the administrative head of the Judicial Department.

(2) The commission consists of nine members appointed by order of the Chief Justice. In addition to the nine appointed members, the Chief Justice serves as a nonvoting, ex officio member. The Chief Justice shall appoint at least three persons who are not bar members, at least one person who was formerly engaged in the provision of public defense services and at least one person who has been formerly represented by a public defense provider in this state. All members must have a demonstrated record of commitment to public defense. Except for the Chief Justice or a senior judge under ORS

1 1.300, a member may not serve concurrently as a judge, a prosecuting attorney  
2 ney or an employee of a law enforcement agency. A person who is primarily  
3 engaged in providing public defense services may not serve as a member of  
4 the commission.

5 (3) The term of a member is four years beginning on the effective date  
6 of the order of the Chief Justice appointing the member. A member is eligible  
7 for reappointment if qualified for membership at the time of reappointment.  
8 A member may be removed from the commission by order of the Chief Justice.  
9 If a vacancy occurs for any cause before the expiration of the term of  
10 a member, the Chief Justice shall make an appointment to become immediately  
11 effective for the unexpired term.

12 (4) A chairperson and a vice chairperson shall be appointed by order of  
13 the Chief Justice every two years with such functions as the commission may  
14 determine. A member is eligible for reappointment as chairperson or vice  
15 chairperson.

16 (5) A majority of the voting members constitutes a quorum for the transaction  
17 of business.

18 (6) A member of the commission is [*not*] entitled to compensation for  
19 services as a member, [*but is entitled*] **and** to expenses, as provided in ORS  
20 292.495 [(2)].

21 **SECTION 2.** ORS 40.225 is amended to read:

22 40.225. (1) As used in this section, unless the context requires otherwise:

23 (a) “Client” means:

24 (A) A person, public officer, corporation, association or other organization  
25 or entity, either public or private, who is rendered professional legal  
26 services by a lawyer, or who consults a lawyer with a view to obtaining  
27 professional legal services from the lawyer.

28 (B) A person, public officer, corporation, association or other organization  
29 or entity, either public or private, who consults a lawyer referral service  
30 with a view to obtaining professional legal services from a lawyer.

31 (b) “Confidential communication” means a communication not intended

1 to be disclosed to third persons other than those to whom disclosure is in  
2 furtherance of the rendition of professional legal services to the client or  
3 those reasonably necessary for the transmission of the communication.

4 (c) “Lawyer” means a person authorized, or reasonably believed by the  
5 client to be authorized, to practice law in any state or nation.

6 (d) “Lawyer referral service” means an entity that, as a regular part of  
7 its business, refers potential clients to lawyers, including but not limited to  
8 a public nonprofit entity sponsored or operated by the Oregon State Bar.

9 (e) “Representative of the client” means:

10 (A) A principal, an officer or a director of the client; or

11 (B) A person who has authority to obtain professional legal services, or  
12 to act on legal advice rendered, on behalf of the client, or a person who, for  
13 the purpose of effectuating legal representation for the client, makes or re-  
14 ceives a confidential communication while acting in the person’s scope of  
15 employment for the client.

16 (f) “Representative of the lawyer” means one employed to assist the law-  
17 yer in the rendition of professional legal services, but does not include a  
18 physician making a physical or mental examination under ORCP 44.

19 (2) A client has a privilege to refuse to disclose and to prevent any other  
20 person from disclosing confidential communications made for the purpose of  
21 facilitating the rendition of professional legal services to the client:

22 (a) Between the client or the client’s representative and the client’s law-  
23 yer or a representative of the lawyer;

24 (b) Between the client’s lawyer and the lawyer’s representative or the  
25 client’s lawyer referral service;

26 (c) By the client or the client’s lawyer to a lawyer representing another  
27 in a matter of common interest;

28 (d) Between representatives of the client or between the client and a  
29 representative of the client;

30 (e) Between lawyers representing the client; or

31 (f) Between the client or a representative of the client and a lawyer re-

1 ferral service.

2 (3) The privilege created by this section may be claimed by the client, a  
3 guardian or conservator of the client, the personal representative of a de-  
4 ceased client, or the successor, trustee, or similar representative of a corpo-  
5 ration, association, or other organization, whether or not in existence. The  
6 person who was the lawyer or lawyer referral service or the lawyer's repre-  
7 sentative at the time of the communication is presumed to have authority  
8 to claim the privilege but only on behalf of the client.

9 (4) There is no privilege under this section:

10 (a) If the services of the lawyer or lawyer referral service were sought  
11 or obtained to enable or aid anyone to commit or plan to commit what the  
12 client knew or reasonably should have known to be a crime or fraud;

13 (b) As to a communication relevant to an issue between parties who claim  
14 through the same deceased client, regardless of whether the claims are by  
15 testate or intestate succession or by inter vivos transaction;

16 (c) As to a communication relevant to an issue of breach of duty by the  
17 lawyer or lawyer referral service to the client or by the client to the lawyer  
18 or lawyer referral service;

19 (d) As to a communication relevant to an issue concerning an attested  
20 document to which the lawyer or lawyer referral service is an attesting  
21 witness; or

22 (e) As to a communication relevant to a matter of common interest be-  
23 tween two or more clients if the communication was made by any of them  
24 to a lawyer retained or consulted in common, when offered in an action be-  
25 tween any of the clients.

26 (5) Notwithstanding ORS 40.280, a privilege is maintained under this  
27 section for a communication made to the office of public defense services  
28 established under ORS 151.216 for the purpose of seeking preauthorization  
29 for or payment of [*nonroutine*] fees or expenses under ORS 135.055.

30 (6) Notwithstanding subsection (4)(c) of this section and ORS 40.280, a  
31 privilege is maintained under this section for a communication that is made

1 to the office of public defense services established under ORS 151.216 for the  
2 purpose of making, or providing information regarding, a complaint against  
3 a lawyer providing public defense services.

4 (7) Notwithstanding ORS 40.280, a privilege is maintained under this  
5 section for a communication ordered to be disclosed under ORS 192.311 to  
6 192.478.

7 **SECTION 3.** ORS 135.055 is amended to read:

8 135.055. (1) Counsel appointed pursuant to ORS 135.045 or 135.050 shall  
9 be paid fair compensation for representation in the case:

10 (a) By the county, subject to the approval of the governing body of the  
11 county, in a proceeding in a county or justice court.

12 (b) By the public defense services executive director from funds available  
13 for the purpose, in a proceeding in a circuit court.

14 (2) Except for counsel appointed pursuant to contracts or counsel em-  
15 ployed by the public defense services executive director, compensation paya-  
16 ble to appointed counsel under subsection (1) of this section:

17 (a) In a proceeding in a county or justice court may not be less than \$30  
18 per hour.

19 (b) In a proceeding in a circuit court is subject to the applicable com-  
20 pensation established under ORS 151.216.

21 (3)(a) A person determined to be eligible for appointed counsel is entitled  
22 to necessary and reasonable fees and expenses for investigation, preparation  
23 and presentation of the case for trial, negotiation and sentencing. The person  
24 or the counsel for the person shall upon written request secure preauthori-  
25 zation to incur fees and expenses that [*are not routine to representation but*]  
26 are necessary and reasonable in the investigation, preparation and presen-  
27 tation of the case **and that require preauthorization under a policy of**  
28 **the Public Defense Services Commission**, including but not limited to  
29 [*nonroutine*] travel, photocopying or other reproduction of [*nonroutine*] doc-  
30 uments, necessary costs associated with obtaining the attendance of wit-  
31 nesses for the defense, investigator fees and expenses, expert witness fees and

1 expenses and fees for interpreters and assistive communication devices nec-  
2 essary for the purpose of communication between counsel and a client or  
3 witness in the case. Preauthorization to incur a fee or expense does not  
4 guarantee that a fee or expense incurred pursuant to the preauthorization  
5 will be determined to be necessary or reasonable when the fee or expense is  
6 submitted for payment.

7 (b) In a county or justice court, the request must be in the form of a  
8 motion to the court. The motion must be accompanied by a supporting affi-  
9 davit that sets out in detail the purpose of the requested expenditure, the  
10 name of the service provider or other recipient of the funds, the dollar  
11 amount of the requested expenditure that may not be exceeded without ad-  
12 ditional authorization and the date or dates during which the service will  
13 be rendered or events will occur for which the expenditure is requested.

14 (c) In a circuit court, the request must be in the form and contain the  
15 information that is required by the policies, procedures, standards and  
16 guidelines of the Public Defense Services Commission. If the public defense  
17 services executive director denies a request for preauthorization to incur  
18 [*nonroutine*] fees and expenses **subject to a preauthorization**  
19 **requirement**, the person making the request may appeal the decision to the  
20 presiding judge of the circuit court. The presiding judge has final authority  
21 to preauthorize incurring [*nonroutine*] fees and expenses under this para-  
22 graph.

23 (d) Entitlement under subsection (7) of this section to payment for fees  
24 and expenses in circuit court is subject to the policies, procedures, standards  
25 and guidelines adopted under ORS 151.216. Entitlement to payment of [*non-*  
26 *routine*] fees and expenses **subject to a preauthorization requirement** is  
27 dependent upon obtaining preauthorization from the court, if the case is in  
28 county or justice court, or from the public defense services executive direc-  
29 tor, if the case is in circuit court, except as otherwise provided in paragraph  
30 (c) of this subsection and in the policies, procedures, standards and guide-  
31 lines adopted under ORS 151.216. Fees and expenses shall be paid:

1 (A) By the county, in respect to a proceeding in a county or justice court.

2 (B) By the public defense services executive director from funds available  
3 for the purpose, in respect to a proceeding in a circuit court.

4 (C) By the city, in respect to a proceeding in municipal court.

5 (4) Upon completion of all services by the counsel of a person determined  
6 to be eligible for appointed counsel, the counsel shall submit a statement of  
7 all necessary and reasonable fees and expenses of investigation, preparation  
8 and presentation and, if counsel was appointed by the court, a statement of  
9 all necessary and reasonable fees and expenses for legal representation,  
10 supported by appropriate receipts or vouchers and certified by the counsel  
11 to be true and accurate.

12 (5) In a county or justice court, the total fees and expenses payable under  
13 this section must be submitted to the court by counsel or other providers and  
14 are subject to the review of the court. The court shall certify that such  
15 amount is fair reimbursement for fees and expenses for representation in the  
16 case as provided in subsection (6) of this section. Upon certification and any  
17 verification as provided under subsection (6) of this section, the amount of  
18 the fees and expenses approved by the court and not already paid shall be  
19 paid by the county.

20 (6) In a county or justice court, the court shall certify to the adminis-  
21 trative authority responsible for paying fees and expenses under this section  
22 that the amount for payment is reasonable and that the amount is properly  
23 payable out of public funds.

24 (7) In a circuit court, the total fees and expenses payable under this sec-  
25 tion must be submitted to and are subject to review by the public defense  
26 services executive director. The public defense services executive director  
27 shall determine whether the amount is necessary, reasonable and properly  
28 payable from public funds for fees and expenses for representation in the  
29 case as provided by the policies, procedures, standards and guidelines of the  
30 Public Defense Services Commission. The public defense services executive  
31 director shall pay the amount of the fees and expenses determined necessary,

1 reasonable and properly payable out of public funds. The court shall provide  
2 any information identified and requested by the public defense services  
3 executive director as needed for audit, statistical or any other purpose per-  
4 tinent to ensure the proper disbursement of state funds or pertinent to the  
5 provision of appointed counsel compensated at state expense.

6 (8) If the public defense services executive director denies, in whole or in  
7 part, fees and expenses submitted for review and payment, the person who  
8 submitted the payment request may appeal the decision to the presiding  
9 judge of the circuit court. The presiding judge or the designee of the pre-  
10 siding judge shall review the public defense services executive director's de-  
11 cision for abuse of discretion. The decision of the presiding judge or the  
12 designee of the presiding judge is final.

13 (9) The following may not be disclosed to the district attorney prior to  
14 the conclusion of a case:

15 (a) Requests and administrative or court orders for preauthorization to  
16 incur [*nonroutine*] fees and expenses **subject to a preauthorization re-**  
17 **quirement** in the investigation, preparation and presentation of the case;  
18 and

19 (b) Billings for such fees and expenses submitted by counsel or other  
20 providers.

21 (10) Notwithstanding subsection (9) of this section, the total amount of  
22 moneys determined to be necessary and reasonable for [*nonroutine*] fees and  
23 expenses **subject to a preauthorization requirement** may be disclosed to  
24 the district attorney at the conclusion of the trial in the circuit court.

25 (11) As used in this section unless the context requires otherwise, "coun-  
26 sel" includes a legal advisor appointed under ORS 135.045.

27 **SECTION 4.** ORS 151.216 is amended to read:

28 151.216. (1) The Public Defense Services Commission shall:

29 (a) Establish and maintain a public defense system that ensures the pro-  
30 vision of public defense services consistent with the Oregon Constitution, the  
31 United States Constitution and Oregon and national standards of justice.



1 (b) Establish an office of public defense services and appoint a public  
2 defense services executive director who serves at the pleasure of the com-  
3 mission.

4 (c) Adopt policies for contracting for public defense providers not em-  
5 ployed by the office of public defense services that:

6 (A) Ensure compensation, resources and caseloads are in accordance with  
7 national and regional best practices;

8 (B) Promote policies for public defense provider compensation and re-  
9 sources that are comparable to prosecution compensation and resources;

10 (C) Ensure funding and resources to support required data collection and  
11 training requirements; and

12 (D) Recognize the need to consider overhead costs that account for the  
13 cost of living and business cost differences in each county or jurisdiction,  
14 including but not limited to rent, professional membership dues, malpractice  
15 insurance and other insurance and other reasonable and usual operating  
16 costs.

17 (d) Establish operational and contracting systems that allow for over-  
18 sight, ensure transparency and stakeholder engagement and promote equity,  
19 inclusion and culturally specific representation.

20 (e) Review the caseload policies described in paragraph (c)(A) of this  
21 subsection annually, and revise the policies as necessary and at least every  
22 four years.

23 (f) Adopt a statewide workload plan, based on the caseload policies de-  
24 scribed in paragraph (c)(A) of this subsection, that takes into account the  
25 needs of each county or jurisdiction, practice structure and type of practice  
26 overseen by the office of public defense services.

27 (g) Submit the budget of the commission and the office of public defense  
28 services to the Legislative Assembly after the budget is submitted to the  
29 commission by the director and approved by the commission. The Chief Jus-  
30 tice of the Supreme Court and the chairperson of the commission shall  
31 present the budget to the Legislative Assembly.

1 (h) Review and approve any public defense services contract negotiated  
2 by the director before the contract can become effective.

3 (i) Adopt a compensation plan, classification system and personnel plan  
4 for the office of public defense services that are commensurate with other  
5 state agencies.

6 (j) Adopt policies, procedures, standards and guidelines regarding:

7 (A) The determination of financial eligibility of persons entitled to be  
8 represented by appointed counsel at state expense;

9 (B) The appointment of counsel, including the appointment of counsel at  
10 state expense regardless of financial eligibility in juvenile delinquency mat-  
11 ters;

12 (C) The fair compensation of counsel appointed to represent a person fi-  
13 nancially eligible for appointed counsel at state expense;

14 (D) Appointed counsel compensation disputes;

15 (E) Any other costs associated with the representation of a person by  
16 appointed counsel in the state courts that are required to be paid by the  
17 state under ORS 34.355, 135.055, 138.500, 138.590, 161.346, 161.348, 161.365,  
18 419A.211, 419B.201, 419B.208, 419B.518, 419B.908, 419C.206, 419C.209, 419C.408,  
19 419C.535, 426.100, 426.135, 426.250, 426.307, 427.265, 427.295, 436.265 or 436.315  
20 or any other provision of law that expressly provides for payment of such  
21 compensation, costs or expenses by the commission;

22 (F) Professional qualifications for counsel appointed to represent public  
23 defense clients;

24 (G) Performance for legal representation;

25 (H) The contracting of public defense services;

26 (I) Contracting with expert witnesses to allow contracting with out-of-  
27 state expert witnesses only if in-state expert witnesses are not available or  
28 are more expensive than out-of-state expert witnesses; [*and*]

29 **(J) The types of fees and expenses subject to a preauthorization**  
30 **requirement; and**

31 [*(J)*] **(K)** Any other matters necessary to carry out the duties of the

1 commission.

2 (k) Establish a peer review system for the approval of [*nonroutine*] fees  
3 and expenses **subject to a preauthorization requirement** incurred in cases  
4 involving aggravated murder and the crimes listed in ORS 137.700 and  
5 137.707. The review shall be conducted by a panel of attorneys who practice  
6 in the area of criminal defense.

7 (L) Establish a complaint process that allows district attorneys, criminal  
8 defense counsel and the public to file complaints concerning the payment  
9 from public funds of [*nonroutine*] fees and expenses **subject to a preau-**  
10 **thorization requirement** incurred in cases.

11 (m) Reimburse the State Court Administrator from funds deposited in the  
12 Public Defense Services Account established by ORS 151.225 for the costs of  
13 personnel and other costs associated with location of eligibility verification  
14 and screening personnel pursuant to ORS 151.489 by the State Court Ad-  
15 ministrator.

16 (2) Policies, procedures, standards and guidelines adopted by the commis-  
17 sion supersede any conflicting rules, policies or procedures of the Public  
18 Defender Committee, State Court Administrator, circuit courts, the Court of  
19 Appeals, the Supreme Court and the Psychiatric Security Review Board re-  
20 lated to the exercise of the commission's administrative responsibilities un-  
21 der this section and transferred duties, functions and powers as they occur.

22 (3) The commission may accept gifts, grants or contributions from any  
23 source, whether public or private. However, the commission may not accept  
24 a gift, grant or contribution if acceptance would create a conflict of interest.  
25 Moneys accepted under this subsection shall be deposited in the Public De-  
26 fense Services Account established by ORS 151.225 and expended for the  
27 purposes for which given or granted.

28 (4) The commission may not:

29 (a) Make any decision regarding the handling of any individual case;

30 (b) Have access to any case file; or

31 (c) Interfere with the director or any member of the staff of the director

1 in carrying out professional duties involving the legal representation of  
2 public defense clients.

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