



OREGON JUDICIAL DEPARTMENT
Office of the State Court Administrator

October 11, 2023
(SENT BY EMAIL)

The Honorable Janeen Sollman, Co-Chair
The Honorable Paul Evans, Co-Chair
Joint Interim Committee on Ways and Means
Subcommittee on Public Safety
900 Court Street NE
H-178 State Capitol
Salem, OR 97301-4048

Re: Responses to Committee Questions on September 28, 2023

Dear Co-Chair Sollman and Co-Chair Evans,

As you likely recall, there were several questions asked during the September 28, 2023, Public Defense Services Commission work session (regarding the Unrepresented Defendant/Person's Crisis) that focused on Oregon Judicial Department (OJD) processes and procedures. This memo outlines those questions and provides answers to each question. Also attached is a copy of the letter from the Chief Justice to the Public Defense Services Commission that was referenced during the work session.

1. Where are the greatest number of individuals in custody that exceed 10 days?

You can find the number of unrepresented individuals on OJD's unrepresented dashboard: [Unrepresented Persons Dashboard](#). The information on this dashboard is updated daily. The circumstances contributing to the number of unrepresented persons are dynamic and frequently change as judges actively work with other judges, lawyers in their community, and with Office of Public Defense Services (OPDS) to identify and appoint counsel. The data you see today will be different than it was on September 28, 2023, when Representative Lewis asked the question.

This dashboard has been publicly available since August 2022. OJD worked collaboratively with OPDS to establish a transparent and data-driven approach to understanding the unrepresented persons crisis across the state. On October 5, 2023, OJD added a geo-mapping or "heat map" tool showing the location of individuals who have been in custody for more than 10 days without a lawyer.

If you have any challenges accessing the link or have questions, please feel free to reach out. We would be happy to assist.

2. In light of the federal order issued by U.S. District Court’s Judge McShane, may a circuit court judge provide a “judicial override” and continue to detain an individual?

On August 17, 2023, in *Betschart v. Garrett*, Case No. 3:23-cv.01097-CL, U.S. District Court Judge McShane granted in part and denied in part the petitioners’ motion for a temporary restraining order. At this point, the case is ongoing and questions about the court’s authority will need to be addressed in the context of that litigation.

For purposes of background, among other things, the August 17 order directs the Washington County Sheriff to release unrepresented indigent defendants in Washington County Detention Centers who have not “secured counsel” within 10 days of their initial appearance. The order also directs the circuit court to ensure that defendants who are released pursuant to the U.S. District Court order are given a release agreement that includes the conditions of release provided in ORS 135.250, in addition to “any other conditions that the circuit court may impose” related to assuring appearance or community safety. The order further provides that a defendant’s failure to execute the release agreement or abide by conditions of release may result in continued detention or revocation of release.

3. Are individuals who have knowingly and voluntarily waived their right to counsel included on the OJD unrepresented person data dashboard?

Individuals who have been determined by a judge to have knowingly and voluntarily waived their right to counsel are not generally included as an unrepresented person on OJD’s data dashboard. There are instances where individuals are included as unrepresented persons for a variety of reasons related to partial waivers of counsel, but it is not typical. OJD continues to work collaboratively with OPDS and courts to refine the data on the OJD dashboard and to improve reporting and training on data collection.

4. Is there a way to give OPDS access to lethality assessments so that OPDS knows who is most dangerous and most in need of a lawyer?

Before addressing lethality assessments, we want to clarify that reports written by OJD release assistance officers related to release decisions are available to OPDS, appointed counsel, and the district attorney.

Lethality assessments are administered by law enforcement officers in domestic violence cases. They are typically performed with the victim-survivor at the scene of an alleged domestic violence incident or by a victim’s advocate. Those assessments are investigatory in nature and

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aim to help identify, measure, and assess risk and/or lethality factors for repeat and escalated abuse within domestic violence cases.

OJD's understanding is that there is not currently consistency with law enforcement agencies administering lethality assessments. Where they are administered, the assessments are sometimes shared with the district attorney and/or victim services. They are not typically provided to the court.

At the initial appearance or at a subsequent release hearing, the district attorney may present information and make arguments about the defendant's dangerousness and risk to the community to assist the court in determining appropriate conditions of release, which may include enhanced monitoring conditions, no contact orders, or release to a third party. In cases involving violent felonies, the district attorney may request a preventative detention hearing to be held within five days of the initial appearance. Those requests give the court more information about a person's potential dangerousness and trigger communication regarding the need for counsel to OPDS when local counsel is not available.

Individuals charged with murder, aggravated murder, and treason are not releasable when the proof is evident, or the presumption strong, that the person is guilty. If that standard is not met, those cases may be eligible for the district attorney to seek preventative detention.

I hope this information is helpful and, as always, if you or other committee members have any questions, please do not hesitate to reach out.

Sincerely,

A handwritten signature in black ink, appearing to read "Nancy J. Cozine". The signature is fluid and cursive, with a large initial "N" and "C".

Nancy J. Cozine
State Court Administrator

NC:jm/23eNC022jm
Attachment
ec: John Borden, Legislative Fiscal Office

Meagan A. Flynn
Chief Justice



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OREGON SUPREME COURT

August 23, 2023

Public Defense Services Commission
1175 Court Street NE
Salem, OR 97301

Re: PDSC Contract Proposals to Address the Unrepresented Crisis

Dear Commission Members:

As Judge McShane articulates in granting his recent temporary restraining order, the "failure to appoint counsel, while incarcerating pretrial detainees indefinitely, violates the Sixth Amendment's right to counsel and fundamentally impacts the liberty interest a pretrial detainee has under the Due Process Clause of the Fourteenth Amendment." The best solution to that constitutional crisis is obvious: for every person who is entitled to an appointed attorney, we would have an attorney who is qualified and willing to be appointed. Yet, despite the extensive time and energy that so many of you – and so many within all of the branches of state government – have devoted to that goal over the past year, we have failed to meet our constitutional obligation to those entitled to appointed counsel. I wish that Judge McShane's order had captured that widespread commitment to solving our crisis of unrepresented persons, but what matters is that the crisis continues. And I know that none of us have given up on solving the crisis ourselves.

To that end, I want to share some suggestions that have emerged from the work of the crisis teams that our courts have convened with local stakeholders and representatives of the Office of Public Defense Services. As contemplated by SB 337, the local courts have been hosting crisis team meetings and creating plans to address the significant and urgent need to provide representation for those with a constitutional right to appointed counsel. Although the plans are not yet finalized, many of the crisis teams have identified provisions of the current OPDS contracts that appear to create barriers to appointing qualified and willing attorneys for the individuals who are entitled to an attorney.

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Attached to this letter is a document listing some of the suggestions that have emerged from those meetings. Some could be achieved immediately if PDSC were to waive certain contract provisions in at least some judicial districts. Others could make a difference in the near future. Please keep in mind that these suggestions are intended to address our immediate crisis and, thus, may not reflect long-term best practices for providing public defense services. But, given the immediate crisis, I encourage you to authorize and direct OPDS to make the suggested changes to ensure that those entitled to appointed counsel are provided with counsel at the earliest possible opportunity.

I look forward to seeing all of you at the meeting on Thursday and hope we can come to some decisions that will ensure that Oregon meets its obligation to provide counsel in all case types where there is a constitutional or statutory right to counsel.

Sincerely,

A handwritten signature in blue ink that reads "Meagan A. Flynn". The signature is written in a cursive, flowing style.

Meagan A. Flynn
Chief Justice

MAF:kl/23eMAF004kl
Attachment

PDSC Contract Proposals to Address the Unrepresented Individuals Crisis

1. Make Use of All Available Contractor Capacity

The following proposals reflect that a 300 MAC case count is only an estimate or average of a full-time caseload for providers; individual attorneys may be equipped to handle more or fewer in a given year depending on factors like attorney experience and outside commitments, staff support, and cases that resolve more or less easily than average for the case type. Indeed, in prior contract cycles, OPDS assumed that a significantly higher MAC number represented a permissible full-time caseload.

- a) Allow attorneys with capacity to handle caseloads in excess of 25 cases per month to contract in advance to do so, such as contracts for 1.25 MAC or contracts to take a set number of additional cases at an hourly rate.^{1,2}
- b) Establish exceptions that would allow attorneys to accept more than the monthly limit when:
 - The attorney represents clients with multiple cases.
 - The attorney has previously represented that client.
 - The attorney is taking a conflict case from another county.
 - The attorney has the ethical capacity to take additional cases.³
- c) OPDS should identify a process to ensure that the attorneys who accept appointment to such cases will be paid for that case, without need for further administrative review or action.
- d) Approve waivers of the monthly intake limits, at least through the end of 2023. Currently, OPDS is asking providers to limit their intake of cases monthly to 25 weighted

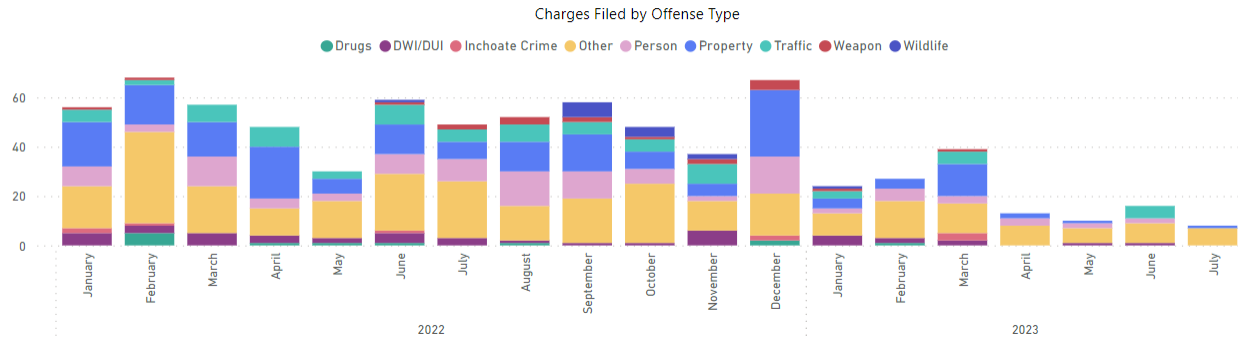
¹ Recitals 5. The monthly MAC for each attorney shall be pro-rated at one-twelfth of the attorney's existing contracted MAC, *Public Defense Legal Services Contract Terms for Criminal Case Types, Emergency Extension and Modification to Contract* (July 1, 2023, to September 30, 2023).

² Exhibit B Section C. The annual caseload limit for a 1.0 FTE attorney is 300 weighted cases per year, which corresponds to 25 weighted cases per month. *Draft Public Defense Services Commission Contract for Public Defense Services (2023)*.

³Exhibit B Sections A and B. The caseload standards for attorney FTE may be adjusted by the mutual assent of the PDSC and Contractor if a portion of Contractor's responsibilities include administration, training, supervision, or specialty courts. Section B contains maximum number of cases an attorney may be assigned per calendar year. *Draft Public Defense Services Commission Contract for Public Defense Services (2023)*.

cases per month.⁴ Many providers are asking OPDS to allow attorneys to take cases based on the number of cases that are charged per month and the attorney’s existing caseload. Because filings and case resolution vary dramatically month-to-month, the rigid limits do not fit the filing and attorney availability trends. A change of this nature would be especially helpful and responsive to the dynamics seen in frontier and rural counties, as demonstrated below.

Grant County Filings, 2022-2023



2. Eliminate Barriers to Tapping Excess Capacity

- a) Expedite approval for caseloads greater than contract limits. Currently, providers must seek an exception from the Public Defense Services Commission to exceed the 115% caseload variance granted in the contract.⁵ To immediately address the unrepresented crisis, attorneys with capacity to represent additional clients, consistent with the ethical obligations that the Oregon Rules of Professional Conduct impose, should be permitted to accept cases from the unrepresented list, especially for in-custody defendants. And OPDS should identify a process to ensure that the attorneys who accept appointment to such cases will be paid for that case, without need for further administrative review or action.
- b) Expedite approval for criminal defense attorneys who are not currently under contract, to accept court appointments and be paid hourly for those cases.

⁴ Recitals 5. The monthly MAC for each attorney shall be pro-rated at one-twelfth of the attorney’s existing contracted MAC, *Public Defense Legal Services Contract Terms for Criminal Case Types, Emergency Extension and Modification to Contract* (July 1, 2023, to September 30, 2023).

⁵ Recitals 5. Excluding murder and Jessica’s Law cases, no attorney shall accept assignments to more than 15% of the pro-rated MAC without preapproval by the PDSC, and that limitation shall be adjusted proportionally to the attorney’s MAC, *Public Defense Legal Services Contract Terms for Criminal Case Types, Emergency Extension and Modification to Contract* (July 1, 2023, to September 30, 2023).

- c) Expedite process to amend contracts and adjust compensation or allow hourly representation when attorneys are qualified and have capacity to provide representation in case types that are more serious than what is included in the contractual agreement for unrepresented individuals. Existing process requires attorneys to take more serious cases at the contracted rate for less serious case types if MAC is available, removing the financial incentive to accept the appointment.
- d) Allow attorneys who are contracted for 1 MAC to take privately retained work within reasonable limits.⁶ Currently, attorneys who have the capacity to handle at least a full 300-case caseload elect to contract for less than 1 MAC solely because of a provision within the OPDS contract that prevents attorneys who have contracted for 1 MAC from taking privately retained work. This results in an unnecessary reduction in caseload capacity overall throughout the state because providers will only agree to a partial MAC in order to preserve their opportunity to take privately retained cases.

3. Preserve and Prioritize MAC

- a) Ensure that available MAC capacity is not reduced by voluntary case transfers to another attorney within the same firm. Under the current contract, case weight is earned for partial representation, and when the case is transferred from one attorney to another, both the initial attorney and the new attorney may receive case weight for the same case, leading to double counting MAC capacity within the same firm.⁷
- b) Require contractors to allocate capacity according to the priority set by the local court. In

⁶ Section 7.2.2 (b), Case Assignment and Workload, no contract attorney funded to provide legal services to a Maximum Attorney Caseload may take on any other paid work. *Public Defense Legal Services Contract Terms for Criminal Case Types* (July 1, 2022, to June 30, 2023). Exhibit B. A. Overview. Contractor shall ensure that 1.0 FTE attorneys funded pursuant to this contract do not engage in other paid legal work, unless the PDSC agrees in writing. *Draft Public Defense Services Commission Contract for Public Defense Services* (2023).

⁷ Section 10.1.6, Partial Representation, Cases where only a partial representation occurs because the court allows the attorney to withdraw due to an ethical conflict, is relieved by retained counsel, the case is transferred or reassigned by the court, contract administrator, or OPDS. Section 10.5, Partial Representation, when an attorney's appointment ends for any of the reasons stated in section 10.1.6, the full case weight of the case will be transferred to the new attorney. The attorney's case weight will be determined based on the length of time they were on the case with partial weight being applied to the original case type weight. *Public Defense Legal Services Contract Terms for Criminal Case Types* (July 1, 2022, to June 30, 2023).

an effort to stretch insufficient capacity, some presiding judges have issued orders specifying the priority for representation between the various individuals for whom they are appointing counsel. When providers assign cases, however, they sometimes are not prioritizing those eligible individuals who have been waiting the longest or who are in custody. OPDS should require contractors to follow the priorities specified by the presiding judge (*i.e.*, an attorney with capacity to take one new C-felony in a week should, absent conflict, take the first-priority C-felony on any list that the local court might create).

- c) Require attorneys to withdraw from representation and close cases that have been in warrant status more than 60 days. Many contract providers have stated in crisis team meetings that cases in long-term warrant status are still consuming attorney time and preventing the attorneys from accepting new appointments. In a fully resourced environment, these attorneys would continue to assist all clients with resolving pending charges, but the reality requires difficult decisions about how best to use the limited resource of attorney capacity. The current contracts specify that attorneys may withdraw from a case in warrant status more than 180 days, and the 2023 contracts provide that attorneys must withdraw after 180 days.^{8,9} But OJD data shows that 70% of individuals who are in warrant status will return in the first 60 days. Another 19% return within 61-180 days. Currently, 8% of warrants issued in 2021 are still outstanding. This is more than 7,000 warrants in misdemeanor and felony cases. Directing contracting attorneys to focus their capacity on individuals who are presently ready to engage in the court process and in need of counsel to do so would be a better allocation of resources.
- d) Maintain the current contracting provisions that require attorneys to represent clients for no additional MAC credit if the reappointment happens within 365 days of the date the attorney was removed.¹⁰
- e) Consider amending the portion of the contract that gives partial credit for shorter durations of representation as a way to ensure that MAC capacity is not allocated to cases where the represented individual is in warrant status and never engaged with their lawyer.¹¹

⁸ Section 7.1.2.5 Case Closure (c) A bench warrant for a client's FTA has been active for 180 days, *Public Defense Legal Services Contract Terms for Criminal Case Types* (July 1, 2022, to June 30, 2023).

⁹ Exhibit B I.1.3. A bench warrant for a client's FTA has been active for 180 days, *Draft Public Defense Services Commission Contract for Public Defense Services (2023)*.

¹⁰ Section 7.1.2.6 Reappointment to Prior Clients, *Public Defense Legal Services Contract Terms for Criminal Case Types* (July 1, 2022, to June 30, 2023).; omitted from the 2023 PDSC Draft Contract and Exhibit.

¹¹ Section 10.5, Partial Representation, *Public Defense Legal Services Contract Terms for Criminal Case Types* (July 1, 2022, to June 30, 2023).

4. Increase Capacity through Other Available Resources

- a) Authorize a payment or MAC credit for attorneys to provide limited representation to in-custody individuals through the date of a release hearing process. This would ensure that lack of representation is never the reason that an individual is held in custody.
- b) Allow representation on specialized docket (such as specialty courts, DUII diversion, arraignment) at a flat rate, rather than based on caseload. This type of model more accurately reflects the demand on the attorney's time.
- c) Expedite identification of attorneys with criminal law experience to fill the state-paid positions so that they can be assigned to represent individuals on a short-term basis until a contract attorney becomes available.

5. Longer-Term Considerations

- a) Improve payment rates. Contract rates continue to be a barrier for recruiting and retaining public defense providers. The commission could consider the following contract adjustments for all providers:
 - Cost of living adjustments to account for regional differences in the cost of cost of living and doing business.
 - Scale rates based on case complexity and caseload size.
 - Permit contract rate differential for more experienced attorneys. This incentive encourages flexibility in contracting and case assignment and discourages turnover.
 - Funding for a second attorney on cases with higher level charges that go to trial.
- b) Expedite a shift to an open caseload model for contracts, with time to disposition standards, a much more effective contracting methodology. OJD realizes that the Commission has not elected to pursue this approach in the next contract cycle, but OJD encourages the Commission to develop this model as soon as possible.
- c) Set an expected attorney MAC that considers the number of attorneys available and the number of expected filings (e.g., consider changing MAC misdemeanor standard from 300 to 320 if that would resolve the crisis).
- d) Limit full-value contracts to those willing and able to handle a full-contract caseload. The proposed contracts for the next biennium reflect a recommendation that a full-time provider can be appointed to 300 MAC of weighted cases per year. But some providers who contract for the full annual payment lack the capacity to represent enough individuals for a full, 300-MAC caseload, whether because of inexperience or self-imposed or supervisor-imposed caseload limits. All attorneys have an ethical obligation to provide "competent representation," which "requires the legal knowledge, skill,

thoroughness and preparation reasonably necessary for the representation."¹² And no one wants providers to represent more clients than the number for which they can provide competent representation. But, the disconnect between the number of providers contracted for the expected caseload and the number of providers actually handling that caseload makes accurate capacity projections impossible, fuels resentment among the providers who handle far greater caseloads for the same amount of money, and allocates funds to low-capacity providers that could be used to purchase additional provider capacity through programs designed to fund the cost of actual attorney capacity – through an hourly or excess-MAC program. One way to address those challenges in future contracts is to require that those electing to accept a full-payment contract represent that they have the capacity to handle the recommended MAC for a full-payment contract and that they, in good faith, intend to work toward that capacity.

¹² Oregon Rules of Professional Conduct Rule 1.1, Competence.