



OREGON JUDICIAL DEPARTMENT  
Office of the State Court Administrator

October 2, 2024  
**(SENT BY EMAIL)**

The Honorable Janeen Sollman, Co-Chair  
The Honorable Paul Evans, Co-Chair  
Joint Emergency Board Interim Subcommittee on Public Safety  
900 Court Street NE, Room H-178  
Salem, OR 97301

Re: Amended Responses to Committee Questions – Unrepresented Defendant  
Persons Crisis

Dear Co-Chair Sollman and Co-Chair Evans:

The Oregon Judicial Department (OJD) is submitting this information in response to questions posed to Deputy State Court Administrator Phil Lemman during his presentation on Judicial District Unrepresented Persons Crisis Plans on September 23, and other issues that arose in subsequent public defense presentations.

**1. How many people have been released from custody due the federal court injunction in *Betschart*, and how many crimes have they subsequently committed?**

The federal court order in *Betschart* requires sheriffs to release in-custody defendants who have not had attorney representation for seven days following their initial court appearance, with some limited exceptions. While OJD does receive some information when jails release defendants, and courts sometimes have an opportunity to have a hearing before a *Betschart* release, it is not always possible, jail release is not a court function, and the information courts receive does not always include an accurate description of the underlying reason for the release. Jails release individuals for a range of reasons, including payment of security release and emergency “matrix” releases to reduce jail overcrowding. Having OJD develop a single, reliable list would require new communication pathways between sheriffs and the courts. OJD would be happy to participate in a deeper discussion on this point.

**2. Has the timeline to appeal the 9th Circuit Court of Appeals decision in *Betschart* expired?**

The 9th Circuit decision affirming the district court's preliminary injunction was issued on May 31, 2024. That decision returned the case to the federal district court. The next anticipated step in the litigation likely is further proceedings for the court to consider issuing a permanent injunction. OJD is not a party to that litigation, and we would defer to the Oregon Department of Justice for a more detailed response.

**3. Provide the April and September letters from the Presiding Judge of the Multnomah County Circuit Court to the Oregon Public Defense Commission (OPDC).**

Presiding Judge Judith Matarazzo has sent two letters this year to the OPDC, requesting information and assistance in managing the public defense crisis in Multnomah County, which we have attached.

We also want to clarify the circumstances leading up to judges being invited to testify to the Commission. The first letter from Judge Matarazzo, sent April 16, 2024, was submitted as public comment to the Commission. OPDC had met in Portland the previous month to hear about the current state of public defense in Multnomah County, and invited defense providers to participate but not the court. Chief Criminal Judge Michael Greenlick provided information to the Commission at the following meeting—on his own initiative, without an invitation, and in the public comment portion of the Commission's April agenda. Chair Nash invited Judge Greenlick to speak at a future meeting, and he did so at the Commission's July 24 meeting, the first reserved time on the OPDC agenda for judicial input. At the Chief Justice's request, presiding judges from the Washington and Lane County circuit courts were later invited to OPDC meetings to describe conditions in their judicial districts. OJD is grateful to now have judges testifying to the OPDC and hopes that the continued dialog will result in more transparency and problem-solving within public defense in each county.

**4. Describe what limitations, if any, exist in a judge's ability to appoint an attorney to represent a person eligible for public defense.**

Judges are responsible for determining financial eligibility and appointing attorneys at arraignment when a person requests and is eligible for court-appointed counsel, but OPDC is responsible for approval of attorney qualifications, availability, and payment. Given the crisis, judges and courts are

regularly stepping in to identify and appoint lawyers who they believe to be both qualified and available to take the appointment. But there are administrative barriers to that approach, and a few cases have resulted in mandamus actions, supported by OPDC, which allege that the court has exceeded their lawful authority.

The same statute that requires courts to appoint counsel also provides that “appointment of counsel . . . under this section is subject to ORS 135.050, 135.055, and 151.485 to 151.497.” Those statutes require the OPDC executive director to review whether the attorney compensation complies with the policies, procedures, standards, and guidelines of the commission. The basic structure is as follows:

- Attorneys who provide representation through an OPDC contract are qualified to take certain case types, and are limited, by the contractual agreement, to taking no more than a defined number of cases per month and per year. Appointment of these attorneys can happen at arraignment if the contract entity indicates that the attorney has capacity to take a case. Contract entities usually indicate in advance of arraignment the number of cases they can accept each day or week. When attorney availability is lower than the number of cases, individuals for whom an attorney could not be found are placed on the unrepresented list. For cases on the list, attorneys can be appointed at an hourly rate, assuming that a willing attorney can be identified and the appointment is approved by OPDC.
- Attorneys who have completed their contractual requirement are permitted to take additional cases but must secure OPDC approval for each individual case they take above the contractual agreement.
- Attorneys who are not on contract but are willing to provide representation on an hourly basis must also get OPDC approval on a case-by-case basis.

This means that while a judge can appoint a lawyer, OPDC can—and does—decline to approve the attorney appointment. If a lawyer agrees to take a case and then OPDC does not approve the appointment, the lawyer doesn’t get paid for any work done on the case. This has understandably had a chilling effect on lawyers’ willingness to work on cases prior to authorization by OPDC.

Some lawyers have accepted cases prior to OPDC approval, but that tends to be the exception rather than the rule since they may end up doing work without compensation. It is also important to note that the OPDC approval process for

lawyer appointments can be extremely slow because it is a case-by-case analysis. Each case is individually approved (as opposed to authorizing an attorney in advance to take a certain number and type of cases).

Despite the legal and practical challenges, most courts do reach out to defense attorneys regarding unrepresented cases to see if the attorney can accept the case. Once the attorney agrees to accept the appointment, the court or the attorney must contact OPDC for approval to take the case on an hourly basis. Response time from OPDC varies, but often it takes multiple days—sometimes much longer—for the court to receive a response.

**5. Describe the level of collaboration with OPDC in developing responses to the public defense crisis.**

The level of collaboration between OPDC and OJD varies. Positive examples of collaboration include close consultation between OPDC and OJD when OPDC was developing its guidance for the SB 337 plans, consultation between OPDC and OJD data teams following the update of a long-term data-share agreement between the two entities and testing an appointment-request form in three judicial districts before implementing the form statewide. In addition, OPDC recently has made time available on meeting agendas to hear from presiding judges about issues in individual communities, and the OPDC Chair and Director continue to meet with OJD leadership and other stakeholders on a regular basis, including meetings between the Chief Justice and State Court Administrator.

Improvements could be made by OPDC engaging with courts in a way that demonstrated a strong commitment to collaborative problem-solving, rather than simply information sharing. A few examples where a proactive approach would be helpful are listed below.

- OJD made repeated requests to have standing time on the OPDC agenda for judges to provide information, which was only recently approved (after the first Multnomah County letter, referenced above).
- OPDC was going to implement its attorney-request form statewide without consulting courts until OJD requested information sessions so that all courts could learn about the process and ask questions.
- Many courts have indicated that meetings with the OPDC leadership and staff are pleasant but that they do not result in solutions—just explanations about why things can't be improved until the larger systemic problems are resolved.

- Responses from OPDC staff to courts about urgent and immediate problems remain inconsistent. While some courts do receive a timely response, many are often delayed or nonexistent. One court recently placed an urgent request for an attorney. The court made multiple requests over seven days without receiving any response from OPDC, and then independently found an available attorney within 10 minutes.

**6. Please provide any additional information that would be helpful for the subcommittee to understand the nature of the current crisis and potential solutions.**

Mr. Lemman referred to the shortcomings of using Maximum Attorney Caseload (MAC) contracting rubric to predict actual attorney availability. OJD's understanding is that OPDC has current contracts for 541.47 MAC. Director Kampfe testified at the hearing that there is a statewide MAC utilization rate of just under 90 percent. If we use a 90 percent utilization rate, it suggests that 54.24 MAC remains available under current OPDC contracts if every attorney was working at their maximum contracted—and compensated—level. As the subcommittee may recall, the OJD presentation yesterday showed that just over 22 MAC would provide representation for all currently unrepresented defendants. While the solution is not that simple, these numbers illustrate that OPDC's contracting may have actually covered the need for representation if contracts specified the expected attorney caseload (regardless of individual attorney capacity). OJD is working with OPDC to get a clear picture of the relationship between unfulfilled MAC and unrepresented persons on a county-by-county basis, which we believe could be critical to identifying barriers and addressing the crisis in the short term.

While no attorney should handle more cases than they are ethically able to handle, the current contracting model results in a significant lack of transparency in terms of what is expected from each contract entity, and no apparent method by which OPDC can reliably forecast provider performance, even if dramatically below the MAC standard.

**7. Why doesn't OJD just talk to OPDC and work this out?**

It is important to note that long-standing Oregon law—unchanged in the legislature's recent deliberations on SB 337 and other legislation—prohibits the Chief Justice and OJD from exercising any administrative authority over OPDC and its executive director. ORS 151.213(1). Even though it currently is housed

in the judicial branch, OPDC is an independent agency and is not obligated to pursue OJD's suggestions.

As the information above and other testimony has demonstrated, OJD is in regular communication with OPDC at many levels and has provided multiple suggestions over many years to address concerns and reduce the defense crisis. OJD can and has made suggestions and has taken all steps within its authority to mitigate the crisis, but the reasons for the unrepresented crisis and the authority to fix it rest with OPDC.

### **Conclusion**

OJD agrees with OPDC's concerns about attorneys not taking more cases than they can manage and agrees that no attorney should be put in that position. The problem, from OJD's perspective is that the system OPDC designed in an attempt to remedy the problem does not serve individuals charged with a crime, victims and witnesses, or the public. Below are several examples of problems with the current approach.

- Some attorneys are capable of taking more cases than OPDC allows. Judges routinely hear from attorneys that they feel they can take more cases than the agency is willing to allow. When the agency won't allow them to take more public defense cases, those attorneys simply take on more privately retained cases.
- Some contract entities provide representation in far fewer cases than the MAC but are paid the same amount as entities that take a full MAC caseload. To the extent that the reasons for variation can be identified, OJD suggests that OPDC identify the reasons so that future contracts can account for that variation with clear expectations (which could include more weighting of specific case types or MAC reductions if needed), accounting mechanisms, forecasting, and outcomes.
- OPDC approves hourly paid representation on a case-by-case basis, which dramatically slows the appointment process.

OJD continues to believe that short-term solutions are available.

- While no attorney should ever take more cases than they can manage, having transparency and clarity in the expectations and fulfillment of MAC would allow for better forecasting and utilization of state resources.
- OPDC could consider adopting a short-term model that allows providers to take hourly cases without requiring individual case approval to facilitate a faster appointment process.

- OPDC could modify its approach to MAC on cases on warrant status by requiring withdrawals at a specified time and re-evaluating how MAC is awarded in those cases. Without an agency directive, attorneys sometimes stay assigned to the case longer than necessary.
- OPDC's state trial lawyers could take more cases than they are current accepting and could take more serious felony cases (courts report that very few of the serious felony cases are handled by OPDC trial attorneys).

Oregon courts remain committed to collaborating with all stakeholders to resolve this crisis, but we have reached the limits of our authority and ability. OJD has made suggestions for addressing the crisis and continues to believe that OPDC could implement short- and medium-term approaches that could dramatically reduce the number of unrepresented individuals. Ultimately, the only entity with the ability to make these adjustments is OPDC. OJD feels fortunate that OPDC continues to work toward long-term solutions and hopes that collaborative efforts, along with OPDC action, will result in a rapid reduction in the number of people without lawyers.

Please let us know if you have additional questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Nancy J. Cozine". The signature is fluid and cursive, with a large loop at the end.

Nancy J. Cozine  
State Court Administrator

NC:jm/24eNC036jm  
Attachments