

To: Chair Sollman and Evans, Members of the Public Safety Subcommittee
From: Oregon Public Defense Commission
Date: April 24, 2023
Subject: Update on the Unrepresented Defendant Crisis

Committee members,

The purpose of this memo is to provide an update on the current state of the unrepresented defendant crisis in Oregon, as well as to discuss the efforts that the Public Defense Services Commission has undertaken to help resolve the crisis. Additionally, this memo will provide suggestions for additional efforts that the Commission could undertake to address the crisis and recommend collaborative efforts that could be taken by the public safety system or the legislature.

Current State of the Crisis

The unrepresented crisis is a symptom of a much larger structural problem. This underlying problem, Oregon's long-term underfunding of public defense and the Commission's lack of oversight and accountability, has been constructively denying Oregonian counsel for years. In 2021, in order to address the unconstitutional fee-per-case structure that the [6th Amendment Report](#) highlighted, the Commission adopts an FTE model. This change lay bare the reality that Oregon does not have enough public defenders to meet the need and thus resulted in an actual denial of counsel.

Oregon was denying peoples' 6th amendment rights because high caseloads and inherent financial conflicts of interest meant the counsel the State was providing wasn't effective; today we are denying people their 6th Amendment right because the counsel simply does not exist.

In the short term, the unrepresented list will continue to grow. Contractors are beginning to shut off as they hit their contracted case limits, limits based on a combination of regional and national standards. The increased hourly rate program has brought in new attorneys; however, we are beginning to see that program plateau, and even at its height it could only supplement the work done by contracted providers.

At its core, the unrepresented persons' crisis is a supply and demand problem, and we currently do not have the supply of qualified attorneys to meet the demand of cases filed. Until we can stabilize and rebuild a workforce that has been under-resourced for years, this problem will continue.

Efforts Undertaken by the Commission

The Commission has undertaken various efforts to address the crisis. The efforts centered around:

- (1) Increasing the number of lawyers accepting appointment to public defense cases;
- (2) incentivizing public defenders to qualify to represent people on the most serious cases;

- (3) supporting public defense lawyers by increasing access to training, supervision, and investigation;
- (4) retaining public defenders by incentivizing them to continue practicing public defense in their current jurisdiction; and
- (5) collaborating with justice system partners to share data and ideas about how to reduce the number of unrepresented persons in Oregon.

Programs to Increase Capacity

The commission ran three programs to increase the number of lawyers accepting appointment to public defense cases:

- (1) Targeted funding to add contracted lawyers in Lane, Marion, Multnomah, and Washington Counties;
- (2) hiring incentives to add new contracted lawyers; and
- (3) an increased hourly rate for attorneys and investigators to accept appointment for unrepresented person's cases.

The most successful of these programs were those that increased contracted lawyers to the pool of public defenders across the state. However, to fully realize those gains we need to maintain those newly added lawyers as well as existing public defenders. The program that added the greatest flexibility, data, and oversight, while making a significant dent in the unrepresented persons' crisis was the increased hourly rate program.

Incentive to Increase Attorney Qualification

The commission recognized that the greatest need across the state was for felony-qualified representation. However, years of attrition left Oregon's public defense system with an insufficient number of felony-qualified lawyers to meet that need. The commission sought to address that gap by contracting with providers to incentivize increased qualification and to require that providers accept appointments on the most serious case type for which they are qualified.

While the goal of increased attorney qualifications was achieved, and it had several unintended negative consequences. The contracts required providers to submit a list of all lawyers who worked under their contract to the agency and encouraged them to request contract amendments whenever an attorney up-qualified so that they were eligible for an increased payment. Due to a combination of high attrition and up-qualification providers submitted frequent requests for contract amendments and the agency found itself with an unruly administrative burden of amending twenty to forty contracts a month. This created an increased workload for agency staff and less certainty in budget forecasts. Indeed, since experienced lawyers continued to leave public defense and providers filled vacancies with less experienced new hires money rolled back to the agency creating unexpected savings. Additionally, entities that traditionally hired and trained newer lawyers, such as the non-profit public defender offices, received lower-value contracts than private law firms staffed with experienced lawyers handling mixed public and private caseloads. Finally, the long-term consequences of pushing lawyers to handle more

serious cases as quickly as possible are unknown. However, there is concern that this will lead to burn out if lawyer feel ill prepared to represent clients on increasingly complex cases attached to significant losses of liberty.

In the next contract cycle, the agency will fund contracted lawyers at two tiers, similarly to the public defense services appellate division and the department of justice. This change will still allow the agency to provide increased compensation to more experienced lawyers while reducing static caused by the four-tiered approach. The two-tiered approach in the 2023-25 contracts aligns with the agency's request in POP 101.

Supporting Public Defenders

Three of the programs run by the commission included components aimed at better supporting public defenders. These included:

- (1) Training, supervision, and increased investigator funding for non-profit public defender offices;
- (2) increased hourly rate for investigators accepting cases off the unrepresented list; and
- (3) the supervised civil attorney program.

The increased funding for training, supervision, and increased investigator funding for non-profit public defenders allowed the offices receiving those funds to make meaningful investments in workforce development. The better training, supervision, and case support meant that offices could boast supportive work environments in recruiting materials, retain existing public defenders by resourcing them to make a positive impact for their clients, and responsibly up-qualify lawyers at an expedited rate. Because many providers had already provided these services as an unfunded mandate, it also meant that they could increase salary for public defenders. This program has been well received by the provider community and entities who did not have access to it during FY2022-23 have asked that it be expanded next biennium. The agency supports this request in POP 102.

The increased hourly rate for investigators taking cases off the unrepresented list is a critical component of that program. Investigation is a key performance measure for quality public defense. Hourly lawyers accepting appointment on unrepresented cases need access to investigators to competently do their work. Oregon's current hourly rate for investigators is far below the federal rate (40/hr to 90/hr). Because Oregon's hourly rate was not competitive lawyers had difficulty securing investigators to support their work until the commission raised the hourly rate. This increase has been vital to the success of the increased hourly rate and the agency is asking to continue it in POP 114.

The supervised civil attorney program has not been successful in supporting public defenders largely due to a lack of interest by the civil bar. The agency continues to be open to civil attorneys interested in the program, but it is not a high priority given its lack of success in decreasing the unrepresented crisis.

Retaining Public Defenders

Two of the commission's programs targeted retention of existing public defenders:

- (1) increased support through training, supervision, and investigation (discussed above); and
- (2) retention incentives.

The agency is providing a \$15,000 retention bonus per full time public defender (at a prorated rate). Beginning in February and running through June 2023, a portion of this bonus is being paid monthly, with the bulk of the funding coming in the June payment, for every lawyer that remained with the same contractor for those five months. This program was aimed at:

- (1) keeping existing public defenders;
- (2) retaining lawyers licensed in 2022 until they become felony qualified in July of 2023;
- (3) reducing churn caused by public defenders moving from one contract to another; and
- (4) increasing data collection compliance by tying payments to monthly caseload reports.

Currently, the agency is still awaiting a report back on the attrition components, and monthly caseload reporting has improved.

Collaboration with Criminal Justice Partners

Collaboration with criminal justice partners has been a bright spot of the agency's efforts to mitigate the unrepresented persons crisis. The agency collaborated with partners by:

- (1) Executing data sharing agreements with the Oregon Judicial Department;
- (2) participating in summits with county public safety stakeholders;
- (3) funding grassroots efforts to mitigate the number of unrepresented persons;
- (4) participating in the tri-branch workgroup; and
- (5) traveling to impacted counties to talk with public defenders, prosecutors, and judicial employees about how they can prioritize their limited public defense resources.

The Oregon Judicial Department's (OJD) data is invaluable to the commission in our efforts to combat the unrepresented persons crisis. In August of 2022, during the unrepresented persons crisis, the agency fully staffed our data team. This allowed us to partner with OJD to share valuable information about the crisis including the who, what, when, and where of unrepresented persons. OJD's data is now a foundational component of the agency's tracking and data collection. We are looking to expand this collaboration into caseload data so that the agency can better assess current jurisdictional capacity.

Early in the unrepresented persons crisis then Chief Justice Walters convened several county summits to talk with courts, district attorneys, and providers about local practices that impacted public defense capacity. Many of the system issues raised, such as, discovery practices, court wait time, remote appearances, and omnibus hearings were later taken up by the Uniform Trial Court Rules (UTCRC), the Chief Justice's Criminal Justice Advisory Committee, and the Tri-branch Workgroup. The Chief Justice also worked with the Oregon State Bar to create a temporary practice permit for out of state lawyers relocating to Oregon serve as public defenders.

These lawyers are now working in public defense offices and in solo practices with public defense supervisors available to support their practices.

The Chief Justice convened a tri-branch workgroup lead by key legislators and supported by the judicial and executive branches to identify solutions to the unrepresented persons crisis. The legislature identified key stakeholders, including the Public Defense Services Commission, and we have remained active participants in all facets of the workgroup. We are very thankful for the time an effort that the tri-branch workgroup members have put towards meaningful reform.

Local providers also developed grassroots efforts like Multnomah County’s resolution docket and Washington county’s Wingspan program. The commission worked with Washington County to fund defense attorneys for their Wingspan Program which provided limited scope representation to about 100 people who were unrepresented and resulted in 69% of individuals choosing to resolve their cases without a trial. The commission remains open to replicating these efforts in additional jurisdictions and supporting other local efforts to address the crisis.

Finally, the Commission is traveling around the state to talk with local public safety leaders about how the shortage of public defenders is impacting their communities, ways in which they can prioritize their limited public defense resources, and opportunities to partner with the agency to address the growing unrepresented persons crisis in their communities. The agency has visited with public defenders, court employees, and district attorneys in Coos County, Douglas County, Klamath County, Jackson County, and Linn County. We have plans to travel to Benton and Malheur and Umatilla Counties this spring. As the unrepresented persons crisis spreads around the state, the commission is committed to partnering with local public safety stakeholders to support their efforts to provide public defense services to all qualified individuals.

Results

The results of all of these programs can be seen in the chart below. The Commission has been successful in increasing attorney MAC across the state by 11% from where we were when contracts were signed in July. Unfortunately, these gains have mainly been seen in increased misdemeanor qualified attorneys (newly licensed, inexperienced attorneys), while the most need in the unrepresented numbers is for minor felony attorneys.

Increase in Criminal MAC since July 2022			
Qualfication	July 22	Current	% Increase
Misdemeanor	47.15	69.18	47%
Minor Felony	66.76	76.89	15%
Major Felony	150.97	157.89	5%
Murder	146.3	153.32	5%
Total	411.18	457.28	11%

Suggestions for Additional Efforts

Address the underlying causes

The efforts undertaken by the Commission so far have predominantly been short term fixes. We have been putting band-aids on the problem and running a bevy of programs to try to mitigate the crisis. For the most part, these programs sunset at the end of the biennium. The Commission's long term plan to address the unrepresented persons crisis is to stabilize the workforce. If public defenders in Oregon are paid a reasonable amount for their work, and given the support, supervision and training to handle their workloads, we believe we will see less attrition, and more lawyers joining and staying in the career.

The commission has three POPs to stabilize the public defense workforce by retaining existing providers and building support services to empower public defenders to be effective in their advocacy thereby reducing burn out and keeping more qualified advocates doing this work. POP 101 increases resources for contracted public defenders, assistants, and investigators to be comparable with PDSC's appellate division and the department of justice. POP 102 builds on POP 101 by adding additional resources for supervision, social workers, and paralegals. POP 114 increases hourly compensation for non-contract attorneys and investigators. These POPs will allow the agency to appropriately resource public defenders so we can stabilize the existing system and recruit new providers to good jobs.

In addition to these POPs, the underlying issues within the way Oregon provides public defense need to be addressed. The Tri-branch workgroup is doing much of this work in SB 337, and many of those structural changes will result in a decrease to the unrepresented crisis. The agency also plans to begin strategic planning after session, further setting and prioritizing goals and providing leadership and direction for the agency. Both of these efforts are strongly informed by the 6th Amendment Center Report.

Efforts Underway

In the nearer future, the Commission plans to strengthen partnerships within the public safety community. These partnerships will allow us to better identify barriers to getting people counsel, and better implement solutions to the crisis. These partnerships need to extend beyond just provider communities and include District Attorneys, Courts, and impacted communities.

Accurate and robust data is essential to identifying the where/why/when of the unrepresented crisis. We are improving our data both in the partnership with OJD mentioned above, and through POP 105 which would allow us to move to the next step of our Financial and Case Management System. This system is essential for the agency to modernize how we collect and use data. The agency has also been tracking attrition and movement of the bar class licensed in October of 2022. This information will allow us to see the career path of a new public defense lawyer, and help answer questions like: Are they moving between provider contracts? How many are leaving the profession? Where are they leaving and why? What factors contribute to an attorney staying in the profession?

In July 2023 the agency will enter new contracts that include two important changes that address the forces currently accelerating the crisis, namely that many public defenders are hitting their

maximum attorney caseload before the end of the contract period. The first contract change is to prorate the maximum attorney case load to be both an annual maximum and a monthly maximum. Second, the agency included a 15% caseload differential from the maximum with a requirement that providers consult with the agency if they are above or below the maximum attorney caseload for an extended period of time. These changes are designed to prevent public defenders from frontloading their contracts and running out of capacity before the end of the contract cycle and to account for differences that may mean a particular providers ethical limit is higher or lower than the contracted maximum.

Also beginning in July 2023 the agency will be starting an hourly pilot program for attorneys under .5 MAC. This program will provide the agency with timekeeping information and qualitative information so the agency can better understand how public defenders are using their time. Our goal is to be able to extend this program in the future.

Efforts being planned

These efforts are currently being planned or considered, but either do not currently have position authority or funding or will require further efforts by the agency to move forward.

Trial level state employees: SB 337 directs the agency to hire trial level state employed public defenders and have them be 30% of the public defense workforce by 2035. State employees would help alleviate the unrepresented crisis by being able to work on complex cases that may take specific expertise/resources, being able to work across county lines for defendants who have cases in multiple jurisdictions, and by allowing the agency to direct their work and send them to jurisdictions facing defender shortages. The agency would be able to stand up an initial contingent of trial level state employees relatively quickly, as we already employ and manage Appellate level state employees. The agency would need position authority to implement this solution, authority we hope to receive from SB 337, though the Legislature could do it in a separate appropriation. Trial level state employees have not been requested in the agency's budget or revised POPs, though it was priced out in the original POP 106.

Workforce development: Developing the public defender workforce is an important part of a long-term solution to the lack of public defenders. The agency is asking for a workforce development specialist through POP 104 to develop and implement a workforce development plan. This would include outreach to law schools to increase interest in public defense work and developing and implementing programs like a rural fellowship program or facilitating externships in public defense office.

Move to a workload model: Currently the Parent Child Representation Program is the only segment of public defense that utilized a workload, rather than caseload, model. This is a failing of the current MAC system, one that would take additional investment to fix. Frankly, the commission does not have the resources, or the attorneys, to move to an open workload model at this time. However, it is a long-term goal of the agency, and would reduce attrition by providing more reasonable caseloads, as well as increase quality of representation by allowing attorneys the time and space to work with clients.

Collaborative Efforts by Public Safety System or Legislature

The Commission has undertaken various programs to address the unrepresented crisis and continues to focus on way we can reduce the number of unrepresented individuals. However, many factors that play a part in this crisis are out of the commissions control. The agency is trying to address a supply and demand problem when they have little to no control over the demand side of the issue.

The Commission would recommend that public safety system partners and the legislature could take the below actions. These actions would both reduce the need for public defenders and the demands on public defenders' time.

Public Safety System:

- Reducing the demand for public defenders by prioritizing changing decisions.
- Supporting public defenders through improved court efficiency and case processing.
- Establishing early resolution dockets.

Legislature:

- Investing in housing, mental health, and early childhood programs to address underlying issues that contribute to criminal behavior.
- Considering the impact on defense resources when making decisions on new crimes or increasing severity.
- Encourage alternative forms of dispute resolution, such as restorative justice, which could help reduce the number of cases filed in criminal courts and alleviate some of the burden on public defenders.
- Adopting a uniform criminal code.
- Adopting a plan similar to [New Mexico's 5-year plan](#).

These efforts would not only alleviate the immediate crisis, but also work towards preventing future crises by addressing root causes of criminal behavior and ensuring fair and efficient access to legal representation.

Conclusion

The current state of the unrepresented crisis in Oregon's public defense system is dire, and action is urgently needed to address the issue. From the perspective of the Commission, Oregon has been constructively denying counsel for years, and today's unrepresented crisis arose from the Commissions move away from the unconstitutional fee-per-case system. Today we have an actual denial of counsel in the unrepresented crisis, and the crisis is only going to get worse as providers reach their contractual capacity.

The Commission has undertaken several efforts to help resolve the crisis, these efforts have been aimed at increasing the number of lawyers accepting appointment to public defense cases; incentivizing public defenders to qualify to represent people on the most serious cases; supporting public defense lawyers by increasing access to training, supervision, and

investigation; retaining public defenders by incentivizing them to continue practicing public defense in their current jurisdiction; and collaborating with justice system partners to share data and ideas about how to reduce the number of unrepresented persons in Oregon. While these efforts have been successful to some extent, they have not been enough to address the scale of the crisis.

Future effort by the Commission looks like stabilization of public defense providers through increased pay and support, and a reform to the underlying system that led to this crisis. The tri-branch workgroup bill will inform the agency's strategic plan, creating a public defense system that collects and uses robust data, provides true oversight, and is free of financial conflicts of interest.

In addition to these efforts, the Commission would recommend that the public safety system and legislature also take action to help address the crisis. Long term this looks like investing in programs that prevent the need for a public defender in the first place, like housing and mental health services. Short term this requires DAs and the legislature to consider the impact on the defense when bringing charges or creating new crimes. It could also include looking to other states that have faced similar problems, such as New Mexico's five-year plan.

Overall, the unrepresented crisis in Oregon's public defense system is a complex issue that requires a multi-faceted approach to address. The Commission is committed to addressing the unrepresented defendant crisis in Oregon, and they will continue to undertake efforts to resolve the crisis. However, they acknowledge that the situation is complex and will require collaboration with other stakeholders. The Commission hopes that this memo provides useful information for addressing the crisis and improving access to justice for all Oregonians.

Thank you for your attention to this important matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'JK', is positioned above the typed name.

Jessica Kampfe

Executive Director

Office of Public Defense Services