

How secure is it for an attorney and/or non-attorney staff to conduct discovery or review discovery remotely?

Oregon law directs that the district attorney shall disclose discovery to a represented defendant. This process is facilitated at the local level between district attorneys and public defenders without oversight by the Public Defense Services Commission (PDSC). The process varies greatly from one jurisdiction to the next with some district attorney's offices providing physical copies of discovery and others providing electronic discovery. Those district attorney's offices that do provide electronic discovery are not uniform in the platforms or procedures that they use. Public Defense Services Commission has not heard any concerns / complaints from public defenders about security issues with electronic discovery.

Many defense attorneys keep and review case discovery electronically. The Oregon State Bar ethics rules have requirements for the electronic storage of client case documents that all attorneys are required to follow in order to protect confidentiality. Since the providers that OPDS contracts with are independent contractors, OPDS can only require that all attorneys comply with their ethical obligations as set out by the Bar.

Regarding [SB 5532](#) – Appropriations:

Question: What percent of the public defense budget is allocated for representation of all family members in Juvenile Dependency and Termination of Parental Rights Proceedings? I have read previously published reports out OPDS that upwards to 40 percent of the PDSC budget has been allocated to such cases in recent years. (See page 3 of the attached PPT referencing 31percent around 2016 when fewer counties were participating.)

The PDSC budgeted 19% of its total budget for trial level juvenile services in 2021-23 biennium and 23% in 2023-25 biennium. The agency subcontracts with providers to provide dependency, termination of parental rights, and delinquency representation as part of the same contract. Lawyers representing parents, children and youth in the child welfare system as well as the juvenile justice system are required to know and understand the continuum of resources in both systems so they can adequately and effectively advocate for the child, youth and family to receive the treatment and support needed to ensure that the issues that brought them into the child welfare/juvenile justice system are addressed. Oregon State Bar Performance Standards for lawyers representing youth involved in the juvenile justice system require that lawyers continue to represent youth who are within the juvenile court's jurisdiction for the purpose of advocating for the youth to have the resources they need as they transition out of the juvenile justice system which often involves transitioning the youth into resources available in the child welfare system. Similarly, youth will often move from the child welfare system into the juvenile justice system requiring significant coordination between the two systems.

Considering the crisis that we find ourselves in:

Question: Have you or your team ever considered eliminating the provision of public defense services to those individuals not required to receive public defense lawyers by the US and Oregon constitutions? I understand that, currently, we provide, by statute, public defense lawyers to every parent, guardian, and child in dependency cases even when there is no criminal charge with the potential to lead to jail time. (ORS 419B.195 etc)

For decades, the Oregon legislature has made the policy choice to provide a statutory right to counsel to financially-eligible persons in cases where the United States Supreme Court has not yet determined that counsel is constitutionally required in every case, including in juvenile dependency, termination of parental rights, civil commitment and post-conviction matters. Indeed, the 2021 legislature created a new right to counsel for protected persons in probate guardianship matters. Because the Oregon legislature has consistently determined that it is cost beneficial to provide defense counsel in these cases, PDSC has not considered asking the legislature to remove the statutory requirements.

Similar to the role that defense counsel plays in criminal matters, defense counsel for parents and children, for example, play a key role in protecting their clients' rights, holding the State accountable, and ensuring that State funds are expended on resources like foster care only when legally permitted. When previous legislatures have considered eliminating the appointment of counsel for parents and children, they also considered the cost of having a child welfare system without any substantial checks and balances, as well as the cost of increased number of children in foster care for longer periods of time. Each of those legislatures has ultimately determined that continued appointment of court-appointed counsel in these cases provided benefits to the State that justified the cost-expenditures.

It is also important to note that attorneys serving as court-appointed counsel in dependency and termination of parental rights cases would not necessarily move to handling criminal cases. Representation of clients in dependency and termination of parental rights cases is a specialty which requires lawyers to obtain specific training that does not translate into the same training needed to handle criminal cases. While there are many attorneys who handle both types of cases and the capacity of those lawyers to take on additional criminal cases may be increased incrementally, the lawyers who specialize in dependency and termination cases are not trained in or qualified to handle criminal cases. It is expected that many of those lawyers would opt to move to different areas of legal practice, such as family law, instead of taking criminal cases.

The relevant caselaw and statutes are set forth below:

Juvenile Delinquency

The United States Supreme Court held in *In Re Gault*, 387 U.S. 1 (1967) that children have a constitutional right to counsel when they are subject to a juvenile delinquency petition. ORS 419C.200 codifies this right and requires that the court must appoint counsel to represent a youth at all stages of a proceeding where the offense alleged in the petition is classified as a crime; at any proceeding concerning an order or probation; and in any case where the youth would be entitled to appointed counsel if the youth was an adult charged with the same offense. ORS 419C.200 further allows the court to appoint counsel in any other proceeding within the jurisdiction of the juvenile court. ORS 419C.200(2) prohibits the court from accepting from the youth a waiver of counsel except in very limited and narrow exceptions.

Additionally, ORS 419C.245 requires appointment of counsel for a youth prior to entering into a formal accountability agreement (a diversion-type process) with waiver of counsel only available in limited circumstances. ORS 163A.130(12) allows for the appointment of counsel in certain cases to represent the youth in obtaining relief from the requirement to register as a sex offender. ORS 419C.535 (1) requires appointment of counsel to represent a young person under the supervision of the Juvenile Psychiatric Security Review Board.

Juvenile Dependency & Termination-of-Parental-Rights Cases

The United States Supreme Court has held that parents have a fundamental liberty interest in the "care, custody, and management of their children" that is protected by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Santosky v. Kramer*, 455 US 745, 753-54 (1982). The Supreme Court has further

held that due process does not require the appointment of counsel for every parent subject to a petition to terminate their parental rights but instead left “the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court, subject, of course, to appellate review.” *Lassiter v. Dept. of Social Services*, 452 US 18, 31-32 (1981). And, although the United States Supreme Court has not addressed whether children have a similar right to counsel in juvenile dependency proceedings, the United States Ninth Circuit Court of Appeals has held that children have a “constitutional interest in familial companionship and society” similar to that of parents. *Smith v. City of Fontana*, 818 F2d 1411, 1418 (9th Cir 1987), *overruled on other grounds by Hodgers-Durgin v. de la Vina*, 199 F3d 1037 (9th Cir 1999).

ORS 419B.518(1) requires that, in termination-of-parental-rights proceedings, “[i]f the parents are determined to be financially eligible, and request the assistance of appointed counsel, the court shall appoint an attorney to represent them at state expense.”

ORS 419B.195 requires appointment of counsel for financially eligible children in juvenile dependency cases, and ORS 419B.205(1) authorizes appointment of counsel for financially eligible parents and guardians in juvenile dependency cases “whenever the nature of the proceedings and due process so require.” Per the Oregon Judicial Department, the “current practice in Oregon is to appoint counsel for each parent or guardian and the child or children, provided they are financially eligible.” Oregon Juvenile Dependency Benchbook, *Shelter Hearing* at 3 (July 2021),

<https://www.courts.oregon.gov/programs/jcip/SiteAssets/Lists/JuvDepBenchbook/EditForm/Shelter.pdf>

I understand [HB 2467](#), also in Ways and Means, establishes a Public Defense Services Student Loan Repayment Assistance Program, through the Oregon State Bar, to provide forgivable loans to eligible public defense attorneys for outstanding student loans.

Question: Is a similar loan repayment program being made available made to deputy district attorneys?

This is a question for Oregon District Attorney Association.

I hear and read frequently that there is a shortage of public defense lawyers in Oregon.

Question: How many lawyers are we paying to be prosecutors in Oregon and how many lawyers are we paying to be public defense attorneys?

Oregon subcontracts public defense to a variety of providers most of whom are part time public defenders and the state pays private bar lawyers who accept ad hoc appointments at an hourly rate. The agency currently has 976 active attorneys in our trial level public defense database. Since many lawyers handle public defense parttime the total head count is a less useful metric than how many maximum public defense caseloads the state pays for in Oregon. The agency currently pays for 450.88 criminal caseloads and 100.96 juvenile (non-PCR) caseloads, and has a forecasted need for 481.64 criminal and 116.84 juvenile (non-PCR) caseloads in the 2023-25 biennium if caseloads maximums remain the same.

It is not reasonable to expect that there should be equal numbers of defense attorneys and prosecutors as the professional and ethical requirements of each are significantly different. Unlike prosecutors, defense attorneys have clients. Having clients creates job tasks and ethical requirements that prosecutors do not have. Prosecutors are supported by state and, at times, federal law enforcement with all their resources to investigate and litigate their cases. While it may appear that prosecutors and defense attorneys have the same caseload, the workload is very different.

The proposal you are advocating for makes most public defense lawyers state employees, funded by the state.

Question: Is this same paradigm also being considered for deputy district attorneys to meet the stated goal of equalizing the pay and benefits for these lawyers all assigned to the same caseloads?

SB 5532 and Public Defense Services Commission's (PDSC) Policy Option Packages do not create state employee trial level public defenders. SB 337, the public defense reform bill from the tri-branch workgroup, states that by January 1, 2035, at least 30 percent of all appointed counsel at the trial level must be attorneys employed by the Oregon Public Defense Commission.

Currently, PDSC subcontracts with defense attorneys to provide public defense representation. These contracts, for the most part, are county-based contracts, meaning that the defense attorney contracts to take public defense appointments in a specific county. PDSC has found that while we can request that attorneys take cases in counties outside of the county the attorney has a contract, we have no way to require that an attorney take cases outside of their contract and often must give attorneys incentives to take cases outside of the contracted-for county. This contracting model does not allow PDSC the flexibility to move resources to areas of need to help resolve shortages.

By contrast, the Department of Justice has the ability, and often exercises this ability, to have attorneys employed by the Department of Justice assist local prosecutors by handling cases in counties where the local prosecutor does not have the experience or the capacity to handle cases. Additionally, the Department of Justice attorneys prosecute juvenile dependency and termination of parental rights, child support enforcement, state post-conviction relief, habeas, and cases before the psychiatric security review board.

The PDSC's budget is not proposing the creation of any state level trial level public defenders. Instead, PDSC has advocated for defense attorneys' payments to be equal to the salary and benefits provided by the State to the trial-level attorneys in the Department of Justice to ensure that the State is paying all trial-level lawyers that the State is statutorily obligated to finance the same amount.