

# THE RIGHT TO COUNSEL IN OREGON

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## EVALUATION OF TRIAL LEVEL PUBLIC DEFENSE REPRESENTATION PROVIDED THROUGH THE OFFICE OF PUBLIC DEFENSE SERVICES



JANUARY 2019



SIXTH  
AMENDMENT  
CENTER

The Right to Counsel in Oregon: Evaluation of Trial Level Public Defense Representation Provided Through the Office of Public Defense Services  
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PREPARED BY

The Sixth Amendment Center is a non-partisan, non-profit organization providing technical assistance and evaluation services to policymakers and criminal justice stakeholders. Its services focus on the constitutional requirement to provide effective assistance of counsel at all critical stages of a case to the indigent accused facing a potential loss of liberty in a criminal or delinquency proceeding.

PREPARED FOR

The Oregon Public Defense Services Commission is a state agency responsible for establishing and maintaining the public defense system for Oregon's entire state courts system.

# EXECUTIVE SUMMARY

In 1963, the U.S. Supreme Court declared in *Gideon v. Wainwright* that it is an “obvious truth” that anyone who is accused of a crime and who cannot afford the cost of a lawyer “cannot be assured a fair trial unless counsel is provided for him.” In the intervening 55 years, the U.S. Supreme Court has clarified that the Sixth Amendment right to counsel means every person who is accused of a crime is entitled to have an attorney provided at government expense to defend him whenever that person is facing the potential loss of his liberty and is unable to afford his own attorney. Moreover, the appointed lawyer needs to be more than merely a warm body with a bar card. The attorney must also be effective, the U.S. Supreme Court said again in *United States v. Cronin* in 1984, subjecting the prosecution’s case to “the crucible of meaningful adversarial testing.” Under *Gideon*, the Sixth Amendment right to effective counsel is an obligation of the states under the due process clause of the Fourteenth Amendment.

The State of Oregon attempts to fulfill its Fourteenth Amendment obligation in trial courts primarily through an array of contracts let by the Public Defense Services Commission (PDSC), and administered by the Office of Public Defense Services (OPDS), with public defender offices, private law firms, consortia of individual attorneys and law firms, non-profit organizations, and occasionally individual lawyers. In doing so:

- 1. The State of Oregon has created a complex bureaucracy that collects a significant amount of indigent defense data, yet does not provide sufficient oversight or financial accountability. In some instances, the complex bureaucracy is itself a hindrance to effective assistance of counsel.**
- 2. The complex bureaucracy obscures an attorney compensation plan that is at root a fixed fee contract system that: pits appointed lawyers’ financial self-interest against the due process rights of their clients; and is prohibited by national public defense standards.**

These are the two principal findings of the present report, *The Right to Counsel in Oregon*. As explained in Chapter I (pp. 5 – 16), the PDSC contracted the Sixth Amendment Center (6AC) to evaluate adult trial level right to counsel services provided through the OPDS. This study looks closely at a representative segment of services in Clackamas, Douglas, Grant, Harney, Lane, Marion, Morrow, Multnomah, and Umatilla counties.

Chapter II (pp. 17 – 68) sets out in detail the State of Oregon’s role in providing right to counsel services, including the statutory structure and funding of PDSC/OPDS, the contract bureaucracy created by PDSC to provide services statewide, and the specific delivery models employed in the sample jurisdictions.

Chapters III and IV relate the basis of our two principal findings. Chapter III (pp. 69 – 116) looks specifically at the selection, qualification, training, and supervision of attorneys contracted by PDSC to provide indigent defense services. Chapter IV (pp. 117 – 205) assesses the workload capacity and compensation of public defense attorneys.

As stated in the first finding, the complex PDSC/OPDS bureaucracy hides a stunning lack of oversight. For example, although PDSC/OPDS requires all potential public defense providers to submit lengthy and detailed proposals for contracts, the subsequent contracts expressly allow consortium contractors to enter into side agreements and subcontracts, without notice to or oversight by PDSC/OPDS. Furthermore, PDSC/OPDS does not require any of the contractors to explain the manner in which the contractor assigns cases to its constituent individual attorneys. In short, PDSC/OPDS devolves onto its contractors the state’s responsibilities under the Fourteenth Amendment, including the selection of the individual attorneys who provide the right to counsel, how those individual attorneys are appointed to the cases of specific defendants, and how and how much the individual attorneys are paid for their work. That is, PDSC/OPDS does not have any way of knowing who the attorneys are or how many attorneys are providing right to counsel services on any given day. PDSC/OPDS does not require the contracting entities to explain how much money is spent on overhead and what is acquired, how much money is paid to a contract administrator and what services are provided in exchange, or how much money is paid to the constituent individual attorneys and what services those attorneys provide in exchange.

The 6AC explains in great detail the complex “case credit” system devised by PDSC/OPDS. When all is said and done, that system does not allow PDSC/OPDS to know the actual number of cases being handled by every attorney at any point in time. Thus, PDSC/OPDS has no means of knowing on an ongoing basis whether its contract providers have sufficient attorneys with sufficient time to provide effective assistance of counsel. Not surprisingly, examples of excessive caseloads abound throughout the state. For example, the Metropolitan Public Defender Services, Inc. is a non-profit public defender office with two office locations (Multnomah and Washington Counties). According to OPDS records, one Metropolitan Public Defender Services attorney handled a caseload that under national standards requires at least 4.3 attorneys (e.g., misdemeanor attorneys should handle no more than 400 such cases and nothing else; OPDS data shows this attorney handled 1,265 misdemeanors in 2017). The same lawyer also handled 111 dependencies, 166 probation violations, 110 specialty

court proceedings, and two termination of parental rights cases – all cases types not addressed by the national standards.

PDSC/OPDS's compensation scheme compounds these caseload problems, because the "case credits" system ultimately pays most contractors a fixed fee per case without regard to how much or how little time the case requires of the attorney. This compensation plan creates an incentive for most contractors and their constituent attorneys to handle as many cases as possible and to do so as quickly as possible, rather than focusing on their ethical duty of achieving the client's case-related goals. American Bar Association standards specifically state that contracts with private attorneys for public defense services should never be let primarily on the basis of cost. Furthermore, a federal court in 2013 called the use of fixed fee contracts an "[i]ntentional choice[]" of government that purposely leaves "the defenders compensation at such a paltry level that even a brief meeting [with clients] at the outset of the representation would likely make the venture unprofitable."

In Chapter V (pp. 206 – 228), the 6AC makes two principal recommendations to rectify these deficiencies:

- 1. The State of Oregon should require that services be provided free of conflicts of interest, as is constitutionally required, by abolishing fixed fee contracting and other forms of compensation that produce financial disincentives for public defense lawyers to provide effective assistance of counsel.**
- 2. With the abolition of fixed fee contracting, PDSC/OPDS should pay private lawyers at an hourly rate that accounts for both actual overhead and a reasonable fee, and/or hire government employed attorneys for trial level services. OPDS should have the appropriate resources to provide oversight of such a private attorney and state public defender employee system.**

It is clear that the contracts currently used in Oregon cause conflicts of interest between the indigent defense attorney's financial self-interest and the legal interests of the indigent defendant. Oregon should follow the lead of other states that have recently banned these practices, including Idaho, Michigan, Nevada and Washington. In its place, PDSC/OPDS should determine appropriate hourly rates and/or determine whether effective use of taxpayer resources and other efficiencies call for public defender offices staffed by salaried state employee attorneys.

In order for PDSC to exercise such authority, it is imperative that the statutory language be amended to account for two further findings:

- 3. The composition of the Public Defense Services Commission does not adhere to national standards, in that all commissioners are appointed by the judiciary, while the legislative and executive branches of government have no equal voice in the commission's affairs.**
- 4. The Public Defense Services Commission lacks the necessary statutory scope to ensure the state's Fourteenth Amendment obligation to provide effective Sixth Amendment assistance of counsel in every courthouse in Oregon.**

In the 1979 case of *Ferri v. Ackerman*, the United States Supreme Court states that “independence” of appointed counsel to act as an adversary is an “indispensable element” of “effective representation.” Two years later, the Court determined in *Polk County v. Dodson* that states have a “constitutional obligation . . . to respect the professional independence of the public defenders whom it engages.” Observing that “a defense lawyer best serves the public not by acting on the State’s behalf or in concert with it, but rather by advancing ‘the undivided interests of the client,’” the Court also noted that “a public defender is not amenable to administrative direction in the same sense as other state employees” because he “works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client.” This is confirmed in *Strickland v. Washington*, where the U.S. Supreme Court states that “independence of counsel” is “constitutionally protected” and that “[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.”

Heeding these admonitions from the Court, national standards call for states to create independent statewide commissions in which members are selected by diverse appointing authorities, so that no single branch of government has the ability to usurp power over the chief defender or exert outsized influence over the delivery of public defense services. Instead the power to appoint PDSC members in Oregon rests entirely with the Chief Justice. As the American Bar Association explains, “[r]emoving oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense.” Currently, the legislative and executive branches of Oregon government are excluded from holding any stake in or responsibility for the success of the public defense system, as are members of the client community, academicians, researchers, minority constituents, and others who might have much to contribute. The Chief Justice certainly could choose to appoint persons from these stakeholder groups, but nothing requires their participation or that their input be considered.

The 6AC therefore recommends that the Oregon legislature amend the PDSC statute to ensure that the commission members are appointed by diverse authorities such that no single branch of government has a majority of appointments. The 6AC offers a number of examples from other states for the legislature's consideration. Similarly, it is recommended that although PDSC currently has extensive regulatory authority to promulgate and enforce standards, the Oregon legislature should direct PDSC to promulgate and enforce specific right to counsel standards. Chapter V also offers examples from other states on this front.

Finally, Chapter V also explains that the State of Oregon is not upholding its Fourteenth Amendment obligations to provide effect representation in all misdemeanor cases where jail is a possible sanction. All state law misdemeanors adjudicated in justice and municipal courts carry jail time as a possible punishment, as do some county and city misdemeanors offenses. Accordingly, any defendant who cannot afford to hire his own attorney is entitled under both federal and state law to have counsel provided at public expense. Yet the State of Oregon has no mechanism to know whether it is fulfilling its obligation to provide counsel to the poor who face incarceration in the justice and municipal courts, as PDSC has no statutory authority to do so.

Misdemeanors matter. For most people, our nation's misdemeanor courts are the place of initial contact with our criminal justice systems. Much of a citizenry's confidence in the courts as a whole – their faith in the state's ability to dispense justice fairly and effectively – is framed through these initial encounters. Although a misdemeanor conviction carries less incarceration time than a felony, the collateral consequences can be just as great. Going to jail for even a few days may result in a person's loss of professional licenses, exclusion from public housing, inability to secure student loans, or even deportation. A misdemeanor conviction and jail term may contribute to the break-up of the family, the loss of a job, or other consequences that may increase the need for both government-sponsored social services and future court hearings (e.g., matters involving parental rights) at taxpayers' expense.

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# CHAPTER I

## INTRODUCTION

### A. THE RIGHT TO COUNSEL IN OREGON

The Sixth Amendment to the United States Constitution states that in “all criminal prosecutions” the accused shall enjoy the right, among others, to “have the Assistance of Counsel for his defence.”<sup>1</sup> In 1963, the U.S. Supreme Court declared it an “obvious truth” that anyone who is accused of a crime and who cannot afford the cost of a lawyer “cannot be assured a fair trial unless counsel is provided for him.”<sup>2</sup> Since *Gideon v. Wainwright*, the Sixth Amendment right to counsel means every person who is accused of a crime is entitled to have an attorney provided at government expense to defend him in all federal and state courts whenever that person is facing the potential loss of his liberty and is unable to afford his own attorney. Moreover, the appointed lawyer needs to be more than merely a warm body with a bar card.<sup>3</sup> The attorney must also be effective,<sup>4</sup> subjecting the prosecution’s case to “the crucible of meaningful adversarial testing.”<sup>5</sup>

Early on, many thought *Gideon* applied only to felonies. The Supreme Court has since expressly clarified that the Sixth Amendment also requires the appointment of counsel for the poor threatened with jail time in misdemeanors,<sup>6</sup> misdemeanors with suspended sentences,<sup>7</sup> direct appeals,<sup>8</sup> and appeals challenging a sentence imposed following a guilty plea where the sentence was not agreed to in advance.<sup>9</sup> Children in delinquency proceedings, no less than adults in criminal courts, are entitled by the Fourteenth Amendment due process clause to appointed counsel when facing the loss of liberty.<sup>10</sup>

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<sup>1</sup> U.S. CONST. amend. VI.

<sup>2</sup> *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

<sup>3</sup> As the Court noted in *Strickland v. Washington*, 466 U.S. 668, 685 (1984), “[t]hat a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command.”

<sup>4</sup> *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (“It has long been recognized that the right to counsel is the right to the effective assistance of counsel.”). To be effective, an attorney must be reasonably competent, providing to the particular defendant in the particular case the assistance demanded of attorneys in criminal cases under prevailing professional norms, such as those “reflected in American Bar Association standards and the like.” *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984).

<sup>5</sup> *United States v. Cronin*, 466 U.S. 648, 656 (1984).

<sup>6</sup> *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

<sup>7</sup> *Alabama v. Shelton*, 505 U.S. 654 (2002).

<sup>8</sup> *Douglas v. California*, 372 U.S. 353 (1963).

<sup>9</sup> *Halbert v. Michigan*, 545 U.S. 605 (2005).

<sup>10</sup> *In re Gault*, 387 U.S. 1 (1967). “[I]t would be extraordinary if our Constitution did not require

Oregon's first constitution was adopted in 1857 and became effective upon statehood on February 14, 1859.<sup>11</sup> It guaranteed that, "in all criminal prosecutions, the accused shall have the right . . . to be heard by himself and counsel . . ."<sup>12</sup> and that same right remains in Oregon's constitution today.<sup>13</sup>

In 1960, the Oregon Supreme Court noted it was "very likely" that the state's constitutional right to counsel did not confer on any court the power to appoint counsel, but rather protected the right of a defendant to be heard by any attorney he chose to hire.<sup>14</sup> Nonetheless, the court found that "all courts of this state have inherent power to appoint counsel for an indigent person accused of a crime when it is established that a need for counsel exists and provided that the situation is not met by" an existing statute.<sup>15</sup>

In 1969 – three years ahead of the U.S. Supreme Court – the Oregon Supreme Court held that the Sixth Amendment to the U.S. Constitution guarantees the right to counsel in misdemeanor cases just as in felonies.<sup>16</sup> "We hold that no person may be deprived of his liberty who has been denied the assistance of counsel as guaranteed by the Sixth Amendment. This holding is applicable to all criminal prosecutions, including prosecutions for violations of municipal ordinances. The denial of the assistance of counsel will preclude the imposition of a jail sentence."<sup>17</sup> Importantly, the court also held that the Oregon Constitution "mandates the appointment of counsel for all indigent defendants whose conviction may result in a loss of liberty."<sup>18</sup>

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the procedural regularity and the exercise of care implied in the phrase 'due process.' Under our Constitution, the condition of being a boy does not justify a kangaroo court." *Id.* at 27-28. "A proceeding where the issue is whether the child will be found to be 'delinquent' and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child 'requires the guiding hand of counsel at every step in the proceedings against him.' . . . [T]he assistance of counsel is essential for purposes of waiver proceedings, [and] we hold now that it is equally essential for the determination of delinquency, carrying with it the awesome prospect of incarceration in a state institution until the juvenile reaches the age of 21." *Id.* at 36.

<sup>11</sup> See OREGON STATE ARCHIVES, TRANSCRIBED 1857 OREGON CONSTITUTION, <http://sos.oregon.gov/archives/exhibits/constitution/Documents/transcribed-1857-oregon-constitution.pdf>, last visited Sept. 26, 2018.

<sup>12</sup> OR. CONST. OF 1857, art. I, § 11 (1857).

<sup>13</sup> OR. CONST. art. I, § 11.

<sup>14</sup> *Oregon v. Delaney*, 351 P.2d 85, 221 Or. 620, 639 (Or. 1960).

<sup>15</sup> *Oregon v. Delaney*, 351 P.2d 85, 221 Or. 620, 641 (Or. 1960).

<sup>16</sup> *Stevenson v. Holzman*, 458 P.2d 414, 417 (Or. 1969).

<sup>17</sup> *Stevenson v. Holzman*, 458 P.2d 414, 418 (Or. 1969).

<sup>18</sup> *Stevenson v. Holzman*, 458 P.2d 414, 419 (Or. 1969).

Under Oregon statutes today, every financially eligible defendant in a criminal case is entitled to appointed counsel.<sup>19</sup> Similarly, children in delinquency and criminal matters are entitled to public counsel.<sup>20</sup> A “crime” in Oregon is either a felony or a misdemeanor.<sup>21</sup> Felonies carry more than one year in prison<sup>22</sup> and are classified as aggravated murder, Class A, Class B, Class C, or unclassified.<sup>23</sup> Oregon has the death penalty for aggravated murder.<sup>24</sup> Misdemeanors carry up to 364 days in prison and are classified as Class A, Class B, Class C, or unclassified — even a Class C misdemeanor carries the possibility of up to 30 days in jail.<sup>25</sup> Thus, adults and children who cannot afford to hire their own attorney and who are charged with any misdemeanor or felony are entitled under Oregon statutes to have counsel appointed to represent them.

“States are free to provide greater protections in their criminal justice system than the Federal Constitution requires,”<sup>26</sup> but they cannot provide less. Though the federal constitution does not require it,<sup>27</sup> Oregon statutorily provides public representation to indigent defendants in their post-conviction and habeas corpus proceedings from a criminal conviction or delinquency adjudication.<sup>28</sup>

The U.S. Supreme Court has yet to expand *Gideon*’s promise to civil matters, but Oregon has done so. Oregon provides public representation to indigent parents in

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<sup>19</sup> OR. REV. STAT. §§ 135.040, 135.045, 135.050 (2017); *see also* OR. REV. STAT. §§ 33.055, 33.065 (2017) (contempt proceedings); OR. REV. STAT. § 136.611(3)(b) (2017) (material witness proceedings).

<sup>20</sup> OR. REV. STAT. §§ 163A.030, 163A.130, 419C.005, 419C.200, 419C.245, 419C.349, 419C.352, 419C.364 (2017).

<sup>21</sup> OR. REV. STAT. § 161.515 (2017). A “violation” is not punishable by incarceration, is tried by a judge without a jury, and interestingly prosecutors are not allowed to appear in violation proceedings unless the defendant shows up with an attorney. OR. REV. STAT. §§ 153.008, 153.075 (2017). “Defense counsel shall not be provided at public expense in any proceeding in which only violations are charged.” OR. REV. STAT. § 153.076(5) (2017).

<sup>22</sup> OR. REV. STAT. § 161.525 (2017).

<sup>23</sup> OR. REV. STAT. §§ 161.535, 161.605, 161.625 (2017).

<sup>24</sup> OR. CONST. art. I, § 40; OR. REV. STAT. §§ 163.105(1)(a), 163.150 (2017).

<sup>25</sup> OR. REV. STAT. §§ 161.545, 161.555, 161.615, 161.635 (2017).

<sup>26</sup> *California v. Ramos*, 463 U.S. 992, 1014 (1983). *See, e.g.*, *Oregon v. Hass*, 420 U.S. 714, 719 (1975); *Cooper v. California*, 386 U.S. 58, 62 (1967); *O’Connor v. Johnson*, 287 N.W.2d 400, 405 (Minn. 1979) (“The states may, as the United States Supreme Court has often recognized, afford their citizens greater protection than the safeguards guaranteed in the Federal Constitution. Indeed, the states are ‘independently responsible for safeguarding the rights of their citizens.’”); *South Dakota v. Opperman*, 247 N.W.2d 673, 674 (S.D. 1976) (“There can be no doubt that this court has the power to provide an individual with greater protection under the state constitution than does the United States Supreme Court under the federal constitution.”).

<sup>27</sup> *Murray v. Giarratano*, 492 U.S. 1, 10 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 555-57 (1987); *Ross v. Moffitt*, 417 U.S. 600, 610-12, 617-18 (1974).

<sup>28</sup> OR. REV. STAT. §§ 34.355, 138.590, 138.694 (2017).

any termination of parental rights proceedings,<sup>29</sup> to indigent parents and children in dependency cases,<sup>30</sup> and to all people who are the subject of a civil commitment proceeding.<sup>31</sup>

This report is concerned principally with the right to counsel that is mandated by the Sixth Amendment, as it is provided to adults at the trial level in Oregon; that is, representation provided to indigent adults who face the possible loss of their liberty as punishment for a crime. Throughout Oregon though, many of the same systems and attorneys provide all right to counsel services – both those that are required under the federal constitution and those that, although not mandated by the Sixth Amendment, are required or allowed under Oregon law. This means that indigent defense attorneys are appointed to represent adults and children in a variety of case types and must be competent not only in criminal and delinquency law but also in a broad range of civil law areas. (*See* discussion of attorney qualifications, supervision, and training in Chapter III.B., beginning at page 103.)

This report is further limited to the evaluation of only those public representation services that are the responsibility of the Oregon Public Defense Services Commission (PDSC). The PDSC is a state agency responsible for establishing and maintaining the public defense system for the entire Oregon state courts' system,<sup>32</sup> and at the trial level that is the circuit courts.<sup>33</sup> PDSC does not, however, have authority over the provision of the right to counsel in any justice courts<sup>34</sup> (established by counties) nor in any municipal courts<sup>35</sup> (established by cities). Instead, the right to counsel in justice courts and municipal courts is provided, if at all, by counties and cities respectively.<sup>36</sup> As a result, an indigent defendant charged with a misdemeanor may receive very different representation than that described in this report, depending on whether the offense is prosecuted in a justice or municipal court rather than a circuit court. (*See* discussion of the absence of state oversight in justice and municipal courts at pages 11 - 12 and 213 - 216.) Further, there is nothing that prohibits the attorneys who provide services through the PDSC from also providing right to counsel services in justice and municipal courts, and to the extent they do so, their workloads and the effectiveness of services they provide may be affected by those dual roles. (*See* discussion of attorney caseloads in Chapter IV.D., beginning at page 181.)

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<sup>29</sup> OR. REV. STAT. § 419B.518 (2017).

<sup>30</sup> OR. REV. STAT. §§ 161.346(7)(d), 426.100(3), 426.307(3) (2017).

<sup>31</sup> OR. REV. STAT. §§ 161.346, 426.100, 426.307 (2017).

<sup>32</sup> OR. REV. STAT. §§ 151.213, 151.216 (2017).

<sup>33</sup> OR. CONST. original art. VII, § 9 (given the status of a statute and subject to change by statute, pursuant to OR. CONST. art. VII, § 2); Or. Rev. Stat. §§ 1.001, 1.185, 1.187, 3.130, 3.132, 3.136, 3.255, 3.265, 3.260, 3.270, 157.005, 157.010, 221.359 (2017).

<sup>34</sup> OR. REV. STAT. § 51.020 (2017).

<sup>35</sup> OR. REV. STAT. § 221.336 (2017).

<sup>36</sup> OR. REV. STAT. §§ 135.055, 151.010 (2017) (counties' justice courts); OR. REV. STAT. § 135.055(3)(d)(C) (2017) (cities' municipal courts).



## B. OREGON COURT STRUCTURE & JURISDICTION

The right to counsel is carried out in the courts. The Oregon Supreme Court is the court of last resort with seven elected justices exercising discretionary review,<sup>37</sup> except death sentence cases are heard on direct appeal to the Supreme Court.<sup>38</sup> The Chief Justice, chosen by the justices of the Oregon Supreme Court, has administrative authority over all of the state's courts,<sup>39</sup> including through the adoption of rules of court.<sup>40</sup> There is one Court of Appeals, with 13 elected judges, that decides direct appeals from the circuit courts and from the very few justice and municipal trial courts that are courts of record.<sup>41</sup>

The trial court system is made up of circuit courts (established & funded by the state), county courts (mandated by the state, but administered & funded by counties), justice courts (established & funded by counties), and municipal courts (established & funded by municipalities).

**Judicial districts & circuit courts.** Oregon's 36 counties<sup>42</sup> are divided into 27 judicial districts.<sup>43</sup> Twenty-one of the judicial districts each cover a single county; only six of the judicial districts comprise multiple counties that are less populous but can be very geographically large.<sup>44</sup>

Each judicial district has a circuit court. The circuit courts are Oregon's state established and state funded trial courts.<sup>45</sup> They have general trial jurisdiction in all civil and criminal cases and they hear appeals from any non-record justice or municipal courts located within their geographic area.<sup>46</sup> All circuit court judges are elected.<sup>47</sup> The number of circuit court judges within a single judicial district ranges from one

<sup>37</sup> OR. CONST. art. VII, § 1; OR. REV. STAT. § 2.010 (2017).

<sup>38</sup> OR. REV. STAT. § 138.052 (2017).

<sup>39</sup> OR. REV. STAT. §§ 1.002, 2.045 (2017).

<sup>40</sup> OR. REV. STAT. §§ 1.006, 3.423 (2017).

<sup>41</sup> OR. CONST. art. VII, § 1; OR. REV. STAT. §§ 2.510, 2.516, 2.540, 138.035, 157.005, 221.359 (2017).

<sup>42</sup> Oregon's counties are: Baker, Benton, Clackamas, Clatsop, Columbia, Coos, Crook, Curry, Deschutes, Douglas, Gilliam, Grant, Harney, Hood River, Jackson, Jefferson, Josephine, Klamath, Lake, Lane, Lincoln, Linn, Malheur, Marion, Morrow, Multnomah, Polk, Sherman, Tillamook, Umatilla, Union, Wallowa, Wasco, Washington, Wheeler, and Yamhill.

<sup>43</sup> OR. CONST. art. XVIII, § 11; OR. REV. STAT. § 3.012 (2017) (prior to amendment by 2017 Or. Laws ch. 631 § 1; eff. until January 7, 2019).

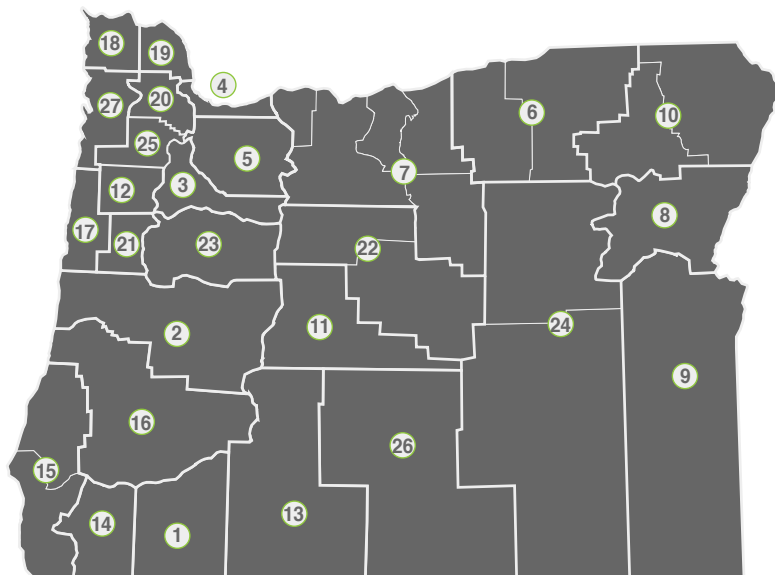
<sup>44</sup> OR. REV. STAT. § 3.012 (2017) (prior to amendment by 2017 Or. Laws ch. 631 § 1; eff. until January 7, 2019).

<sup>45</sup> OR. CONST. original art. VII, § 9 (given the status of a statute and subject to change by statute, pursuant to OR. CONST. art. VII, § 2); OR. REV. STAT. §§ 1.001, 1.185, 1.187 (2017).

<sup>46</sup> OR. CONST. original art. VII, § 9 (given the status of a statute and subject to change by statute, pursuant to OR. CONST. art. VII, § 2); OR. REV. STAT. §§ 3.130, 3.132, 3.136, 3.255, 3.265, 3.260, 3.270, 157.005, 157.010, 221.359 (2017).

<sup>47</sup> OR. CONST. art. VII, § 1.

Map of Oregon's judicial districts



in each of Baker County's 8th Judicial District, Grant and Harney counties' 24th Judicial District, and Lake County's 26th Judicial District, up to 38 judges in Multnomah County's 4th Judicial District.<sup>48</sup>

A circuit court is expressly authorized to create specialized subject-matter departments.<sup>49</sup> In particular, Oregon statutes encourage the circuit courts to create a "family court department" to exercise jurisdiction over all family and family-related

matters.<sup>50</sup> A family court department can preside over divorce, spousal property, child custody & support, child protective proceedings, dependency, and delinquency, but also over "any other proceeding in which a family is involved" including "any criminal proceeding that involves domestic violence or other crime between family members."<sup>51</sup>

Because of the dramatic differences in number of judges, county populations, and county geographic areas, the experiences of the participants in the court systems of the various counties can be very different. For example, Grant and Harney counties together are a single judicial district covering 14,661 square miles<sup>52</sup> with only one judge for the combined population of only 14,479.<sup>53</sup> By way of contrast, Multnomah County is geographically the smallest judicial district in the state at 431 square miles,<sup>54</sup> but it has 38 judges for its population of 807,555.<sup>55</sup>

<sup>48</sup> OR. REV. STAT. § 3.012 (2017) (prior to amendment by 2017 Or. Laws ch. 631 § 1; eff. until January 7, 2019).

<sup>49</sup> OR. REV. STAT. § 3.225 (2017).

<sup>50</sup> OR. REV. STAT. §§ 3.255, 3.405 (2017).

<sup>51</sup> OR. REV. STAT. § 3.408 (2017).

<sup>52</sup> *QuickFacts, Grant County, Oregon*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/grantcountyoregon>; *QuickFacts, Harney County, Oregon*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/harneycountyoregon>.

<sup>53</sup> *QuickFacts, Grant County, Oregon*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/grantcountyoregon>; *QuickFacts, Harney County, Oregon*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/harneycountyoregon>.

<sup>54</sup> *QuickFacts, Multnomah County, Oregon*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/multnomahcountyoregon>.

<sup>55</sup> *QuickFacts, Multnomah County, Oregon*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/multnomahcountyoregon>.

**County courts.** At one time, all of Oregon's counties had a county court, made up of the county judge and two county commissioners, that acted as the governing body of the county.<sup>56</sup> Today, there are only six counties with a county court that retains any judicial functions: in Gilliam, Sherman, and Wheeler, the county court has juvenile and probate jurisdiction; in Grant, Harney, and Malheur, the county court has only probate jurisdiction.<sup>57</sup>

**Justice courts and municipal courts.** Each county may, if it wishes, establish not more than six justice of the peace court districts,<sup>58</sup> with one justice per district who is elected to a six-year term.<sup>59</sup> In most counties a justice court cannot operate within the county seat or any other portion of the county where the circuit court regularly holds court<sup>60</sup> – in other words, justice courts generally only exist in outlying parts of a county.

Similarly, any city in Oregon may, if it wishes, establish a municipal court.<sup>61</sup> Alternatively, any city can contract with the State Court Administrator for the circuit court to provide all of the city's judicial services,<sup>62</sup> and Multnomah County's 4th judicial district circuit court is required by statute to handle all of Portland's municipal court duties.<sup>63</sup> Municipal court judges are appointed by the city council, unless the city charter provides for election of judges.<sup>64</sup>

It is up to each county/city as to whether to require that its justice/municipal court judges be lawyers.<sup>65</sup> Justice/municipal court judges who are not lawyers have to complete a National Judicial College course or its equivalent within 12 months of taking office.<sup>66</sup> Justice court judges, but not municipal court judges, must obtain 30 hours of continuing education every two years.<sup>67</sup>

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<sup>56</sup> OR. REV. STAT. § 203.111 (2017); OREGON BLUE BOOK, COUNTY COURTS (2017), <http://bluebook.state.or.us/state/judicial/judicial37.htm>.

<sup>57</sup> OREGON BLUE BOOK, COUNTY COURTS (2017), <http://bluebook.state.or.us/state/judicial/judicial37.htm>.

<sup>58</sup> OR. REV. STAT. § 51.020 (2017).

<sup>59</sup> OR. REV. STAT. §§ 51.010, 51.210 (2017).

<sup>60</sup> OR. REV. STAT. § 51.020(1) (2017). There is a grandfathered exception for justice of the peace courts that existed on January 15, 1998 in the counties of Baker, Gilliam, Grant, Harney, Morrow, Sherman, Tillamook, and Wheeler. *Id.*

<sup>61</sup> OR. REV. STAT. § 221.336 (2017).

<sup>62</sup> OR. REV. STAT. § 221.357 (2017). Additionally, any city located within a justice of the peace district can contract with the county for the justice of the peace to hear the city's ordinance violations or for the provision of all judicial services. OR. REV. STAT. §§ 51.035, 51.037 (2017). Further, any city can contract with any other city for the other city to provide the first city's judicial services. OR. REV. STAT. § 221.355 (2017).

<sup>63</sup> OR. REV. STAT. § 3.136(1) (2017).

<sup>64</sup> OR. REV. STAT. § 221.140 (2017).

<sup>65</sup> OR. REV. STAT. §§ 51.020(2), 51.240, 221.142 (2017).

<sup>66</sup> OR. REV. STAT. §§ 51.240, 221.142 (2017).

<sup>67</sup> OR. REV. STAT. § 51.245 (2017).

Justice courts, where they exist, have jurisdiction over all misdemeanors under state law and county ordinance – excluding designated drug-related misdemeanors<sup>68</sup> – that are committed or triable anywhere in the county within which the court is located.<sup>69</sup> Municipal courts have jurisdiction over those misdemeanors under state law and city ordinance that are committed or triable within the city that established the court,<sup>70</sup> excluding designated drug-related misdemeanors.<sup>71</sup>

By far most justice/municipal courts are *not* courts of record.<sup>72</sup> For a county to establish its justice court as a court of record, the judge must be a lawyer, the court must have a court reporter or other audio recording device, *and* the justice court cannot be “located within 50 driving miles of the circuit court for the county in which the justice court is located.”<sup>73</sup> For a city to establish its municipal court as a court of record, the judge must be a lawyer and the court must have a court reporter or other audio recording device.<sup>74</sup> For non-record courts, if a person wants a transcript of the proceedings that occur in court, they must arrange for their own court reporter to be present during the proceedings.<sup>75</sup>

Oregon has solved the problem plaguing many states of how to know whether and where local courts exist. Every county and city that creates or dissolves a court is required to give notice to the State Court Administrator, which maintains a registry of the courts.<sup>76</sup>

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<sup>68</sup> Justice courts and municipal courts cannot exercise jurisdiction over any “designated drug-related misdemeanor,” which is possession of Schedule I, Schedule II, methadone, oxycodone, heroin, meth, and cocaine. OR. REV. STAT. § 423.478 (2017).

<sup>69</sup> OR. REV. STAT. § 51.050 (2017).

<sup>70</sup> OR. REV. STAT. § 221.339 (2017).

<sup>71</sup> Justice courts and municipal courts cannot exercise jurisdiction over any “designated drug-related misdemeanor,” which is possession of Schedule I, Schedule II, methadone, oxycodone, heroin, meth, and cocaine. OR. REV. STAT. § 423.478 (2017).

<sup>72</sup> OREGON STATE COURTS, OTHER COURTS – JUSTICE/MUNICIPAL COURTS OF RECORD, <http://www.courts.oregon.gov/courts/Pages/other-courts.aspx>.

<sup>73</sup> OR. REV. STAT. §§ 51.025, 51.240(3) (2017).

<sup>74</sup> OR. REV. STAT. § 221.342 (2017).

<sup>75</sup> OR. REV. STAT. §§ 51.105, 221.358 (2017).

<sup>76</sup> OR. REV. STAT. § 1.855 (2017). A list of all existing justice and municipal courts with location and contact information, alphabetically by county, is available at: [http://www.courts.oregon.gov/courts/Documents/rpt\\_JP-Muni\\_Court\\_Registry\\_by\\_County.pdf](http://www.courts.oregon.gov/courts/Documents/rpt_JP-Muni_Court_Registry_by_County.pdf). The local courts are required to report information about their caseloads, revenues, and expenditures to the League of Oregon Cities and the Association of Oregon Counties. OR. REV. STAT. § 1.860 (2017). The League and the Association are then required to report that information, by October 1 in even-numbered years, to the Legislative Fiscal Officer. OR. REV. STAT. § 1.860 (2017). The Legislative Fiscal Officer provides a summary of the information to the legislature’s Joint Committee on Ways and Means, with a copy to the League and the Association. OR. REV. STAT. § 1.860 (2017).

## C. BRIEF HISTORY OF PUBLIC DEFENSE SERVICES IN OREGON

In 1955, the Oregon legislature authorized the appointment of counsel at trial when a criminal defendant was “without funds and unable to retain his own counsel”<sup>77</sup> and required the counties to pay the appointed attorney, in amounts ranging from \$5 for a misdemeanor up to \$150 for manslaughter or murder.<sup>78</sup>

In 1963, the legislature created the state funded Public Defender Committee.<sup>79</sup> The committee was responsible for appointing a State Public Defender and overseeing the office.<sup>80</sup> The State Public Defender was authorized to represent convicted imprisoned indigent defendants “at any stage of a proceeding before any court” other than in a habeas corpus or contempt proceeding,<sup>81</sup> so the work of the state office was limited to appeals and post-conviction proceedings. Representation in the trial courts remained under the authority of each judge in the county in which their court was located.

Effective January 1, 1983, the state took over funding of the right to counsel in the state trial courts, contemporaneously with the state taking over funding of the state court system.<sup>82</sup> The state appropriated funds to the State Court Administrator to contract for and pay the cost of public representation at the trial level,<sup>83</sup> while the trial court judges had responsibility for authorizing the payments.<sup>84</sup> As explained by the Legislative Fiscal Office, “[t]his arrangement made it difficult for the State Court Administrator to control costs.”<sup>85</sup> Beginning in 1987, authority over most all administration of the right to counsel in the state trial courts was consolidated under the State Court Administrator.<sup>86</sup>

The 2001 Oregon legislature merged all responsibility for providing the right to counsel, in both the state trial and appellate courts, into what is today the Office of Public Defense Services, to take effect on October 1, 2003.<sup>87</sup> The Office of Public

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<sup>77</sup> OR. REV. STAT. § 135.320 (1955).

<sup>78</sup> OR. REV. STAT. § 135.330 (1955).

<sup>79</sup> OR. REV. STAT. §§ 138.710 through 138.790 (1963).

<sup>80</sup> OR. REV. STAT. § 138.730 (1963).

<sup>81</sup> OR. REV. STAT. § 138.770 (1963).

<sup>82</sup> OR. REV. STAT. § 1.001 (1981).

<sup>83</sup> OR. REV. STAT. § 151.150 (1983)

<sup>84</sup> OR. REV. STAT. § 135.055 (1983).

<sup>85</sup> OREGON LEGISLATIVE FISCAL OFFICE, BUDGET INFORMATION REPORT: STATE FUNDING OF TRIAL COURT REPRESENTATION FOR ELIGIBLE PERSONS at 1 (Aug. 2004). The legislature created the State Indigent Defense Board in 1985 to take over all responsibility for administration and oversight of indigent defense services in all state trial courts and municipal courts, OR. REV. STAT. §§ 151.410 through 151.480 (1985), but then abolished the board in 1987. *See* OR. REV. STAT. §§ 151.430 through 151.465 (1987).

<sup>86</sup> OR. REV. STAT. §§ 151.430 through 151.465 (1987).

<sup>87</sup> S.B. 145, 71st Leg., Reg. Sess., 2001 Or. Laws ch. 962 §§ 1-23 (codified as subsequently amended at OR. REV. STAT. §§ 151.211 through 151.225).

Defense Services (OPDS) is overseen by the Public Defense Services Commission (PDSC).<sup>88</sup> The PDSC is a state agency in the judicial branch of government,<sup>89</sup> responsible for establishing and maintaining the public defense system for the entire state courts' system, including setting the compensation of public defense attorneys and adopting standards governing all aspects of the provision of the right to counsel.<sup>90</sup> By July 1, 2003, the PDSC had assumed responsibility for the provision of the right to counsel at trial and appeal in all of the state courts.

## D. THIS EVALUATION

In March 2018, the Public Defense Services Commission asked the Sixth Amendment Center (6AC) to evaluate the provision of the Sixth Amendment right to counsel to adults at the trial level in Oregon's courts where that representation is provided through the Oregon Office of Public Defense Services. The 6AC began conducting background research and collecting data immediately.

At the 6AC's request, a 13-member Oregon Advisory Committee was formed to provide input and feedback as the evaluation progressed.<sup>91</sup> Limitations of time and resources prevent most evaluations from considering every court, public defense system, and service provider in a given state, and so this study looks closely at a representative segment of services throughout Oregon. On May 24, 2018, the Oregon Advisory Committee selected the following counties as a representative sample of Oregon's diversity in population size, geographic location, rural and suburban and urban centers, and types of public defense service providers: Clackamas, Douglas, Harney, Lane, Marion, Multnomah, and Umatilla. Because Grant County is part of the same 24th Judicial District as Harney County, and because Morrow County is part of the same 6th Judicial District as Umatilla County, both Grant and Morrow counties are included in this evaluation.

6AC's work on site in these sample counties began July 30, 2018 and concluded on October 4, 2018.

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<sup>88</sup> OR. REV. STAT. § 151.216(1) (2017).

<sup>89</sup> OR. REV. STAT. § 151.213 (2017).

<sup>90</sup> OR. REV. STAT. § 151.216 (2017).

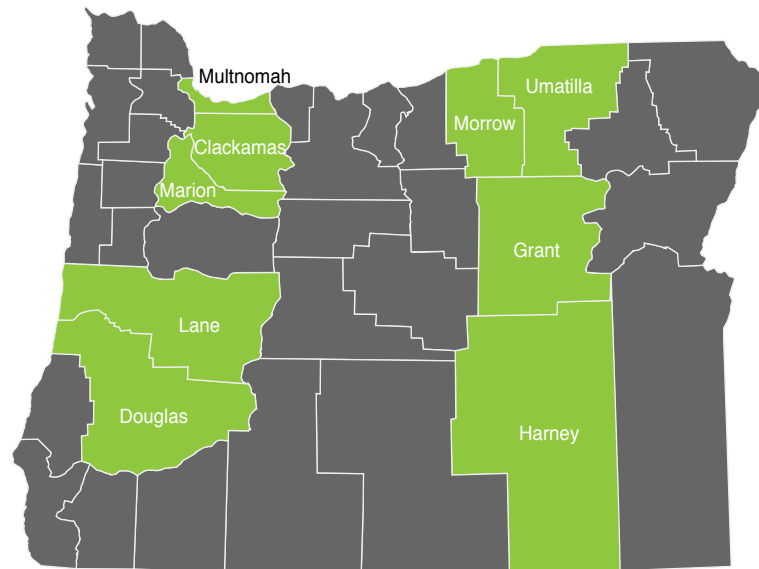
<sup>91</sup> The members of the committee are: Judge Eric Bergstrom, Multnomah Circuit Court; Tim Colahan, Oregon District Attorneys Association; Justice Rebecca Duncan, Oregon Supreme Court; Captain Lee Eby, Clackamas County Sheriff's Department; Helen Hierschbiel / Amber Hollister, Oregon State Bar; Misha Isaak, Office of the Governor; Aaron Knott, Office of the Attorney General; Shaun McCrea, Oregon Criminal Defense Lawyers Association; Representative Mike McLane, House Minority; Senator Floyd Prozanski, Senate Judiciary Committee; Per Remfjord, Oregon Public Defense Services Commission; Mike Schmidt / Ken Sanchagrin, Oregon Criminal Justice Commission; and Representative Jennifer Williamson, House Majority.

The Sixth Amendment Center independently and objectively evaluates public defense systems using Sixth Amendment case law and national standards for right to counsel services as the uniform baseline measure for providing attorneys to indigent people, along with the requirements of local and federal laws.

The 6AC's assessment of public defense services in Oregon has been carried out through three basic components:

- Data collection. Information about how a jurisdiction provides right to counsel services exists in a variety of forms, from statistical information to policies and procedures. 6AC obtained and analyzed relevant hard copy and electronic information at both the local and state levels.
- Court observations. Right to counsel services in each jurisdiction involve interactions among at least three critical processes: (1) the process an individual defendant experiences as their case advances from arrest or citation through disposition; (ii) the process the defense attorney experiences while representing each individual at the various stages of a case; and (iii) the substantive laws and procedural rules that govern the justice system in which public representation is provided. Throughout the sample counties, 6AC conducted courtroom observations in the circuit courts to clarify these processes.
- Interviews. No individual component of the criminal justice system operates in a vacuum. Rather, the policy decisions of one component necessarily affect another. Because of this, 6AC conducted interviews with a broad cross-section of stakeholder groups before, during, and after site visits to the various counties. In addition to speaking with public defense attorneys, 6AC interviewed trial court judges and referees, prosecutors, court clerks and administrators, court services personnel, and law enforcement. We also interviewed state level agency staff.

Counties selected for inclusion in 6AC's statewide study



Two principal U.S. Supreme Court cases, decided on the same day, describe the tests used to determine the constitutional effectiveness of right to counsel services. *United*

*States v. Cronin*<sup>92</sup> and *Strickland v. Washington*<sup>93</sup> together describe a continuum of representation. *Strickland* is used after a criminal case is final to determine retrospectively whether the lawyer provided effective assistance of counsel; it sets

### Understanding *Cronin* through the American Bar Association's *Ten Principles of a Public Defense Delivery System*

Adopted by the ABA House of Delegates in 2002, the ABA *Ten Principles*<sup>a</sup> are self-described as constituting “the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney.” The *Ten Principles* include the markers of a *Cronin* analysis: independence of the defense function (Principle 1); effective representation by counsel at all critical stages (Principles 3 and 7); sufficiency of time and resources (Principles 4, 5, and 8); and qualifications, supervision, and training of attorneys (Principles 6, 9, and 10).

<sup>a</sup>. AMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002), available at [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_tenprinciplesbooklet.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf).

effective representation under independent supervision. The absence of any of these factors can show that a system is presumptively providing ineffective assistance of counsel. This report evaluates the adult trial level public defense systems in Oregon's circuit courts against these criteria.

out the two-pronged test of whether the appointed lawyer's actions were unreasonable and prejudiced the outcome of the case. *Cronin* explains that, if certain systemic factors are present (or necessary factors are absent) at the outset of the case, then a court should presume that ineffective assistance of counsel will occur.

Hallmarks of a structurally sound indigent defense system under *Cronin* include the early appointment of qualified and trained attorneys with sufficient time to provide

<sup>92</sup> 466 U.S. 648 (1984).

<sup>93</sup> 466 U.S. 668 (1984).



# CHAPTER II

## THE STATE OF OREGON'S ROLE IN PROVIDING THE RIGHT TO COUNSEL

The Sixth Amendment right to counsel in Oregon's circuit courts and appellate courts is funded almost entirely<sup>94</sup> through state general appropriation. Superficially, Oregon's statutes give the appearance that the oversight and administration of trial level public defense representation in criminal cases is provided entirely at the state level. As Oregon's system is applied, though, decisions about the selection and compensation of individual attorneys, appointment of attorneys to individual cases, and the caseloads carried by individual attorneys are made predominantly by the individual entities that are awarded contracts to provide trial level representation.

### A. THE PUBLIC DEFENSE SERVICES COMMISSION & THE OFFICE OF PUBLIC DEFENSE SERVICES

The Public Defense Services Commission (PDSC) is a state agency in the judicial branch of government.<sup>95</sup> The seven members of the PDSC are all appointed by the Chief Justice, who serves as a nonvoting, ex officio member.<sup>96</sup> The members are each appointed for a four-year term, and they may be reappointed for as many terms as the Chief Justice chooses.<sup>97</sup> Despite the four-year appointment, a member can be removed and replaced at any time that the Chief Justice orders.<sup>98</sup> From among the members, the Chief Justice chooses who will serve as the chairperson and as the vice chairperson,

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<sup>94</sup> Some funding comes from assessments made on defendants whom courts require to make partial payment for the cost of their public defense. OR. REV. STAT. § 151.225(2) (2017) (“All moneys received by the Judicial Department under ORS 135.050 (8), 151.487 (1), 419A.211, 419B.198 (1), 419C.203 (1) or 419C.535 (2) shall be deposited in the Public Defense Services Account.”).

<sup>95</sup> OR. REV. STAT. § 151.213 (2017).

<sup>96</sup> OR. REV. STAT. § 151.213(2) (2017). The PDSC members are: ex officio Chief Justice Thomas Balmer; Chair Per Ramfjord who is a partner at Stoel Rives LLC; Vice-Chair Senior Judge Elizabeth Welch; Steffan Alexander who is a shareholder at Markowitz Herbold PC; Amy Baggio who is an attorney at Baggio Law; Thomas Christ who is a partner at Cosgrave Vergeer Kester LLP; Michael De Muniz who is an attorney at Sherlag De Muniz LLP; and Janet Stevens who is co-editor at the Bend Bulletin. PUBLIC DEFENSE SERVICES COMMISSION, PDSC MEMBERS, <https://www.oregon.gov/opds/commission/Pages/default.aspx> (last visited Sept. 26, 2018).

<sup>97</sup> OR. REV. STAT. § 151.213(3) (2017).

<sup>98</sup> OR. REV. STAT. § 151.213(3) (2017).

and these positions similarly may be reappointed for as long as the Chief Justice desires.<sup>99</sup>

There are some small statutory constraints on the types of people whom the Chief Justice may appoint as members of the PDSC. Of the seven voting members, at least two must be non-attorneys, one must be a criminal defense attorney, and one must be a former state prosecutor.<sup>100</sup> Voting members of the commission cannot be a sitting judge (except a senior judge is allowed), current prosecuting attorney, current law enforcement employee, nor person primarily engaged in providing public defense services.<sup>101</sup> Beyond these requirements, though, the Chief Justice has complete control over the membership of the PDSC, when each member is appointed, and when each member is removed.

The PDSC oversees the Office of Public Defense Services (OPDS) and appoints its “executive director who serves at the pleasure of the commission.”<sup>102</sup> The executive director of the OPDS is charged by the legislature with recommending to the commission “how to establish and maintain, in a cost-effective manner, the delivery of legal services to persons entitled to, and financially eligible for, appointed counsel at state expense under Oregon statutes, the Oregon Constitution, the United States Constitution and consistent with Oregon and national standards of justice.”<sup>103</sup> Based on that recommendation, the commission is responsible for establishing and maintaining the public defense system statewide for cases that arise in all of the state courts.<sup>104</sup> The OPDS, located in Salem, administers the public defense systems in the state courts,<sup>105</sup> referred to by OPDS as “‘public defense services’ for persons who are ‘financially eligible.’”<sup>106</sup>

The commission is required by state law to “adopt policies, procedures, standards and guidelines” addressing various aspects of providing the right to counsel.<sup>107</sup> OPDS must implement the commission’s decisions and ensure compliance with them.<sup>108</sup> Importantly, the commission’s decisions, as implemented by OPDS, override the authority of the courts (presumably unless a court were to find an action of the commission or the OPDS to be unconstitutional):

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<sup>99</sup> OR. REV. STAT. § 151.213(4) (2017).

<sup>100</sup> OR. REV. STAT. § 151.213(2) (2017).

<sup>101</sup> OR. REV. STAT. § 151.213(2) (2017).

<sup>102</sup> OR. REV. STAT. § 151.216(1)(b) (2017).

<sup>103</sup> OR. REV. STAT. § 151.219(1)(a) (2017).

<sup>104</sup> OR. REV. STAT. § 151.216(1)(a) (2017).

<sup>105</sup> OR. REV. STAT. § 151.219 (2017).

<sup>106</sup> Email from OPDS General Counsel Paul Levy to Sixth Amendment Center (Mar. 18, 2018).

<sup>107</sup> OR. REV. STAT. § 151.216(1)(f) (2017).

<sup>108</sup> OR. REV. STAT. § 151.219(1)(b) (2017).

Policies, procedures, standards and guidelines adopted by the commission supersede any conflicting rules, policies or procedures of the Public Defender Committee, State Court Administrator, circuit courts, the Court of Appeals, the Supreme Court and the Psychiatric Security Review Board related to the exercise of the commission's administrative responsibilities under this section and transferred duties, functions and powers as they occur.<sup>109</sup>

The only express statutory limitations on the commission's authority are that it “may not: (a) Make any decision regarding the handling of any individual case; (b) Have access to any case file; or (c) Interfere with the director or any member of the staff of the director in carrying out professional duties involving the legal representation of public defense clients.”<sup>110</sup>

## B. THE PDSC & OPDS SYSTEM OF PROVIDING STATEWIDE PUBLIC REPRESENTATION IN THE STATE COURTS

PDSC and OPDS are responsible for providing counsel to financially eligible adults and children in adult criminal, juvenile delinquency, dependency, and civil commitment proceedings in the state trial and appellate courts.<sup>111</sup> The totality of this representation is provided through a combination of: state employed attorneys; contracts with individual attorneys, consortia of attorneys, for profit and non-profit law offices, and advocacy organizations; and individual attorneys appointed case-by-case.

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<sup>109</sup> OR. REV. STAT. § 151.216(2) (2017).

<sup>110</sup> OR. REV. STAT. § 151.216(4) (2017).

<sup>111</sup> OR. REV. STAT. § 151.216(1)(a) (2017) (“The Public Defense Services Commission shall: [e] stablish and maintain a public defense system that ensures the provision of public defense services . . .”); OR. REV. STAT. §§ 135.040, 135.045, 135.050 (2017) (criminal cases); *see also* OR. REV. STAT. §§ 33.055, 33.065 (2017) (contempt proceedings); OR. REV. STAT. § 136.611(3)(b) (2017) (material witness proceedings). OR. REV. STAT. §§ 163A.030, 163A.130, 419C.005, 419C.200, 419C.245, 419C.349, 419C.352, 419C.364 (2017) (juvenile delinquency). OR. REV. STAT. §§ 161.346(7)(d), 419B.518, 426.100(3), 426.307(3) (2017) (dependency). OR. REV. STAT. §§ 161.346, 426.100, 426.307 (2017) (civil commitment).

## 1. Appellate representation<sup>112</sup>

PDSC and OPDS provide appellate representation most often through salaried state employed attorneys, then through lists of private attorneys appointed on a case-by-case basis and paid hourly, and in a small number of cases through attorneys paid under contracts.

### *a. OPDS state employee attorneys*

Most appellate representation is provided by approximately 44 attorneys who are salaried state employees in the Appellate Division of the OPDS.<sup>113</sup> The Appellate Division is divided into two sections: the Criminal Appellate Section, and the Juvenile Appellate Section.<sup>114</sup> The individual OPDS attorney who is assigned to a particular case is decided by the OPDS attorney who serves as chief of the relevant section.

OPDS provides all overhead needed by these attorneys, including office space and utilities, equipment and supplies, ongoing training and continuing legal education, and legal research capability.<sup>115</sup> When case-related costs must be incurred in a case handled by an OPDS attorney, such as travel or producing copies or long-distance telephone calls or hiring an interpreter, OPDS pays these costs.<sup>116</sup>

The 2017 annual salaries of the attorneys employed by OPDS in its appellate division ranged from \$71,124 to \$152,244.<sup>117</sup> In addition to salary, OPDS attorneys receive

<sup>112</sup> The appellate representation discussed in this section is the direct appeal from the trial court decision. In direct appeals of criminal and juvenile delinquency cases involving a sentence of loss of liberty, the Sixth Amendment requires that counsel be provided for any defendant who is financially unable to afford an attorney. *Douglas v. California*, 372 U.S. 353 (1963).

Oregon statutes also provide counsel, to individuals who are financially eligible, at stages of their case beyond the direct appeal, known as post-conviction and habeas corpus. OR. REV. STAT. §§ 34.355, 138.590, 138.694 (2017). OPDS provides representation in post-conviction and habeas corpus through its state employed attorneys or through private attorneys appointed on a case-by-case basis or through annual contracts. For 2018 and 2019, OPDS has annual contracts with two contractors, O'Connor Weber LLP and Oregon Post-conviction Consortium, to provide representation throughout the state in post-conviction and/or habeas corpus. *See* OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION, MEMBERSHIP DIRECTORY, OREGON PUBLIC DEFENSE CONTRACTS (Mar. 19, 2018).

<sup>113</sup> *See generally* OREGON OFFICE OF PUBLIC DEFENSE SERVICES, APPELLATE DIVISION, <https://www.oregon.gov/opds/appellate/Pages/default.aspx>.

<sup>114</sup> OREGON OFFICE OF PUBLIC DEFENSE SERVICES, APPELLATE DIVISION MANUAL OF PRACTICE AND PROCEDURE § 1.2.1 (rev'd Feb. 24, 2017); OREGON OFFICE OF PUBLIC DEFENSE SERVICES, APPELLATE DIVISION, <https://www.oregon.gov/opds/appellate/Pages/default.aspx>.

<sup>115</sup> *See, e.g.*, OREGON OFFICE OF PUBLIC DEFENSE SERVICES, APPELLATE DIVISION MANUAL OF PRACTICE AND PROCEDURE §§ 6.9-7.6 (training & supervision), §§ 27.2-27.5 (Westlaw, legal library, Oregon Intranet/Govnet, State Employee Information Center), § 27.6 (equipment), § 28.3 (organizational memberships & dues), §§ 28.4-28.6 (continuing education) (rev'd Feb. 24, 2017).

<sup>116</sup> *See, e.g.*, OREGON OFFICE OF PUBLIC DEFENSE SERVICES, APPELLATE DIVISION MANUAL OF PRACTICE AND PROCEDURE § 27.1 (interpreter & other non-routine costs), § 27.7 (copies) (rev'd Feb. 24, 2017).

<sup>117</sup> Email from OPDS Human Resources Manager Wendy Heckman to Sixth Amendment Center (Jan.

standard state employee benefits including health insurance and retirement,<sup>118</sup> and those who are not managers or supervisors are protected by a collective bargaining agreement.<sup>119</sup>

*b. Private attorney panels*

When conflicts arise or when the workload is of a type or greater than can be handled by these state employed attorneys, OPDS maintains two lists of private attorneys – the Criminal Appellate Panel, and the Juvenile Appellate Panel – who are available to be appointed on a case-by-case basis to handle appellate cases.<sup>120</sup> As of October 2018, there are seven attorneys on the Criminal Appellate Panel list,<sup>121</sup> and there are six attorneys on the Juvenile Appellate Panel list;<sup>122</sup> two attorneys appear on both panels. Historically, an OPDS Appellate Division supervisor selected the individual attorney from the panel who was appointed to each case,<sup>123</sup> but as of 2018 OPDS is in the process of shifting that selection decision to an OPDS employee outside of the Appellate Division.<sup>124</sup>

Criminal appellate panel attorneys are paid a flat fee per case for the direct appeal based on the type of case, transcript length, and type of brief filed, with the per case fees ranging from a low of \$370 to a high of \$9,820.<sup>125</sup> Juvenile appellate panel attorneys are paid a flat fee per case based on the type of case, transcript length, and whether the case involves a full appeal or appeal from a more limited type of decision, with the per case fees ranging from a low of \$2,000 to a high of \$4,500.<sup>126</sup> For discretionary review by the Oregon Supreme Court, both types of panel attorneys

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4, 2019).

<sup>118</sup> OR. REV. STAT. §§ 151.216(1)(e), 151.221 (2017).

<sup>119</sup> Collective Bargaining Agreement between Office of Public Defense Services and Oregon AFCME Council 75 Local 2435 (Nov. 1, 2016 through Oct. 31, 2019).

<sup>120</sup> See OREGON OFFICE OF PUBLIC DEFENSE SERVICES, APPELLATE DIVISION MANUAL OF PRACTICE AND PROCEDURE § 22.2.1 (rev'd Feb. 24, 2017).

<sup>121</sup> Email from OPDS Human Resources Manager Wendy Heckman to Sixth Amendment Center (Oct. 24, 2018).

<sup>122</sup> Email from OPDS Human Resources Manager Wendy Heckman to Sixth Amendment Center (Oct. 24, 2018).

<sup>123</sup> OREGON OFFICE OF PUBLIC DEFENSE SERVICES, APPELLATE DIVISION MANUAL OF PRACTICE AND PROCEDURE § 22.2.1 (rev'd Feb. 24, 2017).

<sup>124</sup> Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018).

<sup>125</sup> OPDS, OREGON CRIMINAL APPELLATE PANEL § III.A.-B. (rev'd Dec. 22, 2016). Privately retained criminal defense attorneys frequently, perhaps predominantly, set a fixed fee to represent an individual privately retained client in a specific case. In that circumstance, both the attorney and the client are able to fully discuss the parameters of the representation required in reaching agreement about the fee, and both the attorney and the client are able to accept or decline the terms of that arrangement. This is not the situation under the representation system devised by PDCS and OPDS, where neither the attorney nor the client are able to walk away from the attorney client relationship and neither have any input into whether the funds provided are adequate for effective representation.

<sup>126</sup> OPDS, APPELLATE PANEL JUVENILE DEPENDENCY APPEALS § III.A.-C. (2014).

are paid \$55/hour with a presumptive 100 hour limit.<sup>127</sup> For both direct appeal and discretionary review, both types of panel attorneys may petition OPDS for additional payment in an exceptional case.<sup>128</sup>

The private attorneys on these panels who accept appellate cases must personally pay for all of their own overhead necessary to work as an attorney.<sup>129</sup> PDSC policy requires these private attorneys to incur certain overhead costs in order to be eligible for the appellate panels; they must “[b]e an active member in good standing with the Oregon State Bar” and must satisfy PDSC’s qualification standards.<sup>130</sup> To be in good standing with the state bar, the attorney must comply with all regulatory requirements, including payment of annual bar license fees and the professional liability assessment, and completion of mandatory continuing legal education.<sup>131</sup> PDSC’s qualification standards require each attorney to “[h]ave an office or other regularly available and accessible private meeting space other than at a courthouse suitable for confidential client conferences” and “[h]ave adequate support staff and regularly monitored email and telephone systems to ensure reasonable and timely personal contact between attorney and client, and between the attorney and others involved with the attorney’s public defense work.”<sup>132</sup> Nonetheless, PDSC policy expressly states that private attorneys who are appointed cannot be reimbursed for their overhead expenses.<sup>133</sup>

<sup>127</sup> OPDS, OREGON CRIMINAL APPELLATE PANEL § III.C. (rev’d Dec. 22, 2016); OPDS, APPELLATE PANEL JUVENILE DEPENDENCY APPEALS § III.D. (2014).

<sup>128</sup> OPDS, OREGON CRIMINAL APPELLATE PANEL § III (rev’d Dec. 22, 2016); OPDS, APPELLATE PANEL JUVENILE DEPENDENCY APPEALS § III (2014).

<sup>129</sup> “[C]ompensation for attorneys providing public defense services is set without regard for the actual overhead expenses of those attorneys.” Email from OPDS General Counsel Paul Levy to Sixth Amendment Center (Feb. 12, 2018).

<sup>130</sup> OPDS, OREGON CRIMINAL APPELLATE PANEL § I (rev’d Dec. 22, 2016); OPDS, APPELLATE PANEL JUVENILE DEPENDENCY APPEALS § I (2014).

<sup>131</sup> OR. REV. STAT. § 9.160 (membership in state bar required to practice law), § 9.191 (payment of membership fees required), § 9.200 (failure to pay membership fees results in suspension from the state bar) (2017); Oregon State Bar Bylaws, art. 6 (membership classification and fees) (as amended through Nov. 2, 2018); Oregon State Bar, Minimum Continuing Legal Education Rules and Regulations, rules 3.2, 7.1, 7.6 (as amended eff. May 10, 2018).

<sup>132</sup> PDSC, QUALIFICATION STANDARDS FOR COURT-APPOINTED COUNSEL TO REPRESENT FINANCIALLY ELIGIBLE PERSONS AT STATE EXPENSE std. III.3.-4. (Dec. 15, 2016).

<sup>133</sup> “Overhead expenses, including services performed by an employee or an independent contractor of provider, are not reimbursable, except in extraordinary circumstances with the preauthorization of OPDS. Overhead expenses, except as otherwise expressly provided in this policy, includes, but are not limited to:

- A. Travel time and expense between home and office;
- B. Paraprofessional Services (law clerk, legal assistant, paralegal, and secretarial services);
- C. Timekeeping and bill preparation;
- D. Rent and utilities;
- E. Office equipment and supplies;
- F. Library materials; and,
- G. Computerized legal research software, installation and monthly access fees.”

PDSC & OPDS, PUBLIC DEFENSE PAYMENT POLICY AND PROCEDURES ¶ 3.4.2 (rev’d Apr. 1, 2018). “OPDS will not compensate counsel . . . for time spent preparing invoices or payment requests, keeping time

When case-related costs must be incurred in a case handled by a private attorney, such as travel or producing copies or long-distance telephone calls or hiring an interpreter, PDSC has a process the attorney must follow. Some expenses are defined by PDSC as “routine expenses” that the attorney is always allowed to incur up to a specified amount,<sup>134</sup> and so long as the attorney carefully follows the rules, then the attorney can be reimbursed after the original brief is filed and also after the appellate judgment.<sup>135</sup> Other expenses are defined by PDSC as “non-routine expenses” and an attorney must get permission from PDSC in advance, through a process known as “preauthorization,” in order to obtain these necessary resources for a client’s case<sup>136</sup> – else the attorney cannot be reimbursed for these costs other than in very limited circumstances.<sup>137</sup>

*c. PDSC contracts*

A small number of appeals in certain case types or certain areas of the state are handled by attorneys under contracts with PDSC that are more generally for the contractor to provide trial representation. (*See* discussion of PDSC contracts for trial representation at 24.) For capital murder appeals: some attorneys at the Metropolitan Public Defender Services Inc. public defender office may handle some appeals as part of the annual contract that PDSC has with Metropolitan Public Defender Services Inc.,<sup>138</sup> and some individual attorneys who hold case-by-case contracts with PDSC handle appeals.<sup>139</sup> For juvenile appeals, some attorneys at the Youth, Rights & Justice public defender office handle some appeals as part of the annual contract that PDSC has with Youth, Rights & Justice.<sup>140</sup> For civil commitment appeals, some attorneys at the Multnomah Defenders, Inc. public defender office handle some appeals as part of the annual contract that PDSC has with Multnomah Defenders, Inc.<sup>141</sup>

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records, attending seminars, or otherwise managing one’s office and career.” PDSC & OPDS, PUBLIC DEFENSE PAYMENT POLICY AND PROCEDURES ¶ 2.3.4 (rev’d Apr. 1, 2018).

<sup>134</sup> PDSC & OPDS, PUBLIC DEFENSE PAYMENT POLICY AND PROCEDURES ¶¶ 3.5.1 - 3.5.12 and Exh. 2 Schedule of Guideline Amounts (rev’d Apr. 1, 2018).

<sup>135</sup> PDSC & OPDS, PUBLIC DEFENSE PAYMENT POLICY AND PROCEDURES ¶¶ 2.6.3, 3.9.1 (rev’d Apr. 1, 2018).

<sup>136</sup> PDSC & OPDS, PUBLIC DEFENSE PAYMENT POLICY AND PROCEDURES ¶¶ 3.6.1 - 3.6.12, 3.13.1 - 3.14.2, and Exh. 2 Schedule of Guideline Amounts (rev’d Apr. 1, 2018).

<sup>137</sup> PDSC & OPDS, PUBLIC DEFENSE PAYMENT POLICY AND PROCEDURES ¶¶ 3.6.1, 3.6.3, 3.7.1 - 3.7.2 (rev’d Apr. 1, 2018).

<sup>138</sup> Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018); see Public Defense Legal Services Contract between PDSC and Metropolitan Public Defender Services, Inc., Specific Terms (Jan. 1, 2018 through Dec. 31, 2019).

<sup>139</sup> Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018); email from OPDS General Counsel Paul Levy to Sixth Amendment Center (June 6, 2018).

<sup>140</sup> Email from OPDS Human Resources Manager Wendy Heckman to Sixth Amendment Center (Oct. 24, 2018); see Public Defense Legal Services Contract between PDSC and Youth, Rights & Justice, Specific Terms (Jan. 1, 2018 through Dec. 31, 2019).

<sup>141</sup> Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018); see Public Defense Legal Services Contract between PDSC and Multnomah Defenders, Inc., Specific Terms (Jan. 1, 2018 through Dec. 31, 2019).

## 2. Trial representation

There are no salaried state-employed attorneys who provide the right to counsel at trial. Instead, PDSC and OPDS provide all trial level representation through private attorneys, predominantly under contracts, and to a much smaller extent appointed on a case-by-case basis and paid hourly.

### *a. PDSC contracts*

By far, most trial level representation in every type of case is provided by attorneys who are under contract, in one form or another, with PDSC.<sup>142</sup> Commission policy states that “[c]ourts shall appoint contract attorneys, when available, prior to appointing private bar attorneys.”<sup>143</sup> All PDSC contracts are either with an individual to be available for case-by-case appointments or with a contractor to receive a potential annual caseload of appointments. A given contractor may be one attorney, but in most instances a particular contractor is made up of multiple individual attorneys. Altogether statewide there are approximately 647 individual attorneys who are participants in one or more annual and/or case-by-case contracts with PDSC to provide some sort of trial level representation during 2018 and 2019.<sup>144</sup> Of those 647 individual attorneys, at least 15 of them participate in more than one PDSC contract for 2018 and 2019.<sup>145</sup>

Every two years (and otherwise as necessary), OPDS advertises *Requests for Proposals*<sup>146</sup> for future contracts.<sup>147</sup> After reviewing the proposals received, the

<sup>142</sup> OR. REV. STAT. § 151.216(1)(f)(H) (2017) (“The Public Defense Services Commission shall . . . [a]dopt policies, procedures, standards and guidelines regarding . . . [t]he contracting of public defense services.”).

<sup>143</sup> PDSC & OPDS, PUBLIC DEFENSE PAYMENT POLICY AND PROCEDURES § 1.2.3 (rev’d Apr. 1, 2018).

<sup>144</sup> The Sixth Amendment Center developed the list identifying the number and names of individual attorneys who participate in trial level representation contracts with PDSC. First, 6AC compiled the names of all attorneys identified in the Oregon Criminal Defense Lawyers Association Membership Directory listing of annual contract providers in each county (and then excluded attorneys under annual contract to provide services other than trial representation) and the list provided by OPDS of attorneys under contract to be appointed on a case-by-case basis in capital murder contracts (again, excluding attorneys under individual contract to provide services other than trial representation). Next, 6AC reviewed the compiled list to identify attorneys whose names appear in more than one contract. Finally, 6AC sent that list to OPDS for confirmation.

<sup>145</sup> Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018) (confirming list of names developed by Sixth Amendment Center of individual attorneys who appear in more than one contract).

<sup>146</sup> See, e.g., Public Defense Services Commission Request for Proposals for Public Defense Legal Services Contracts Beginning January 1, 2018, <https://www.oregon.gov/opds/provider/RFP/RFP%202017.pdf> (last visited Nov. 2, 2018).

<sup>147</sup> OR. REV. STAT. § 151.219(1)(d) (2017) (“The public defense services executive director shall . . . [n]egotiate contracts, as appropriate, for providing legal services to persons financially eligible for appointed counsel at state expense. No contract so negotiated is binding or enforceable until the contract has been reviewed and approved by the commission as provided in ORS 151.216.”).



commission approves two-year contracts with one or more providers in each county and a few statewide,<sup>148</sup> although in special circumstances a contract might be for only one year.

***Individual case-by-case contracts in capital murder cases.*** PDSC has contracts for 2018 and 2019 with 29 individual attorneys to accept capital murder cases from anywhere in the state on a case-by-case basis, payable at \$100/hour.<sup>149</sup> Similarly, PDSC has contracts with 22 mitigation specialists for capital murder cases to work on a case-by-case basis, payable at \$62/hour.<sup>150</sup>

***Annual contracts.*** PDSC has annual contracts for 2018 and 2019 with 63 different contractors, each of which provides trial representation in one or more counties.<sup>151</sup> (See table of PDSC Annual Contractors for Trial Representation in 2018 on page 32.) Each contractor is composed of one or more individual attorneys. The contractors are:

- 10 public defender offices,<sup>152</sup> made up of attorneys employed by the public defender office and who do not take other cases outside of the PDSC contract;
- 36 consortia,<sup>153</sup> made up of private attorneys working out of their individual offices;

<sup>148</sup> OR. REV. STAT. § 151.216(1)(d) (2017) (“The Public Defense Services Commission shall . . . [r]eview and approve any public defense services contract negotiated by the director before the contract can become effective.”).

<sup>149</sup> Email from OPDS General Counsel Paul Levy to Sixth Amendment Center (June 6, 2018).

<sup>150</sup> Email from OPDS General Counsel Paul Levy to Sixth Amendment Center (June 6, 2018).

<sup>151</sup> See OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION, MEMBERSHIP DIRECTORY, OREGON PUBLIC DEFENSE CONTRACTS (Mar. 19, 2018).

Of these 63 annual contractors, two provide some statewide resources as a part of their contract with PDSC. Youth, Rights & Justice operates the Juvenile Law Resource Center, which provides support and training to juvenile defense attorneys statewide and publishes The Juvenile Law Reader. The Veterans’ Resource Center is “designed to provide assistance to criminal defense attorneys statewide regarding legal issues unique to their veteran clients,” and one of the staff attorneys at Public Defender Services of Lane County is a military veteran who provides this service by consulting statewide on cases involving veteran defendants.

For 2018 and 2019, OPDS additionally has annual contracts with three providers for purposes other than trial representation. The Oregon Justice Resource Center - Immigrant Rights Project is a non-profit advocacy group under contract to provide immigration consultations statewide. O’Connor Weber LLP is a private law firm under contract to provide post-conviction appeal representation. Oregon Post-conviction Consortium is a consortium of private attorneys under contract to provide post-conviction and habeas corpus appellate representation.

<sup>152</sup> OPDS defines a public defender office as “a nonprofit organization employing attorneys and other staff established to provide contract services to persons qualifying for court-appointed legal representation.” Public Defense Legal Services Contract, General Terms ¶ 1.4.3 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>153</sup> OPDS defines a consortium as “a group of attorneys or law firms that is formed for the sole purpose of providing contract services to persons qualifying for court-appointed legal representation. In addition to participating jointly to provide contract services, Consortium members retain their separate identities and may engage in non-court-appointed legal representation.” Public Defense Legal Services Contract, General Terms ¶ 1.4.5 (Jan. 1, 2018 to Dec. 31, 2019).

- 12 private for-profit law firms,<sup>154</sup> made up of attorneys employed by the law firm;
- 1 non-profit law firm,<sup>155</sup> made up of attorneys employed by the law firm; and
- 4 individual attorneys.

The types of cases and number of cases potentially handled under an annual contract varies from contractor to contractor, as does the compensation potentially paid. The details of these PDSC annual contracts are extremely complex, and they are explained fully in topical sections throughout this report.

*b. Private attorneys pre-approved by OPDS*

When conflicts arise or when the workload is of a type or greater than can be handled by the attorneys under contract, OPDS maintains two lists of individual attorneys whom it has pre-approved as qualified to be appointed on a case-by-case basis.<sup>156</sup> As of June 26, 2018, there are 435 attorneys on the list that OPDS has pre-approved as qualified for cases other than capital murder.<sup>157</sup> For trial level capital murder cases, as of June 26, 2018, OPDS has pre-approved as qualified 36 attorneys to be appointed as lead counsel and 57 attorneys to be appointed as co-counsel;<sup>158</sup> many of these attorneys also appear on the non-capital murder list. Many of the individual attorneys who are pre-approved to be appointed on a case-by-case basis are also attorneys who participate in one or more individual or annual contracts with PDSC.

For capital murder cases, OPDS designates the specific attorney who is then appointed by the trial judge. For cases other than capital murder, a trial judge or the court personnel most often select from the OPDS pre-approved list the individual attorney who is appointed to each case, however in more serious felonies the court may contact OPDS to make the selection.

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<sup>154</sup> OPDS defines a law firm as “a sole practitioner, partnership, or professional corporation which provides contract services to persons qualifying for court-appointed legal representation and which may also engage in non-court-appointed legal representation.” Public Defense Legal Services Contract, General Terms ¶ 1.4.4 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>155</sup> OPDS defines a law firm as “a sole practitioner, partnership, or professional corporation which provides contract services to persons qualifying for court-appointed legal representation and which may also engage in non-court-appointed legal representation.” Public Defense Legal Services Contract, General Terms ¶ 1.4.4 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>156</sup> Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018).

<sup>157</sup> Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018) (providing list of private attorneys whom OPDS has approved to be appointed in non-capital murder cases).

<sup>158</sup> Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018) (providing list of private attorneys whom OPDS has approved to be appointed in capital murder cases).

Private attorneys who are appointed in a capital murder case are paid \$61/hour as lead counsel or \$46/hour as co-counsel.<sup>159</sup> Private attorneys appointed in any type of case other than a capital murder are paid \$46/hour.<sup>160</sup> In both capital murder and non-capital murder cases, attorneys may petition OPDS for additional payment in an exceptional case.<sup>161</sup>

The private attorneys on these pre-approved lists who accept trial level cases must personally pay for all of their own overhead necessary to work as an attorney.<sup>162</sup> PDSC policy requires these private attorneys to incur certain overhead costs in order to be eligible to be appointed as trial counsel.<sup>163</sup> They must be “active members of the Oregon State Bar,”<sup>164</sup> which means the attorney must comply with all regulatory requirements, including payment of annual bar license fees and the professional liability assessment, and completion of mandatory continuing legal education.<sup>165</sup> PDSC also requires each attorney to “[h]ave an office or other regularly available and accessible private meeting space other than at a courthouse suitable for confidential client conferences” and to “[h]ave adequate support staff and regularly monitored email and telephone systems to ensure reasonable and timely personal contact between attorney and client, and between the attorney and others involved with the attorney’s public defense work.”<sup>166</sup> Nonetheless, PDSC policy expressly states that private attorneys who are appointed cannot be reimbursed for their overhead expenses.<sup>167</sup>

<sup>159</sup> PDSC & OPDS, PUBLIC DEFENSE PAYMENT POLICY AND PROCEDURES ¶ 2.1.2 and Exh. 2 Schedule of Guideline Amounts (Apr. 1, 2018).

<sup>160</sup> PDSC & OPDS, PUBLIC DEFENSE PAYMENT POLICY AND PROCEDURES ¶ 2.1.1 and Exh. 2 Schedule of Guideline Amounts (Apr. 1, 2018); email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018).

<sup>161</sup> PDSC & OPDS, PUBLIC DEFENSE PAYMENT POLICY AND PROCEDURES ¶¶ 2.2.1 - 2.2.4 (Apr. 1, 2018); email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018).

<sup>162</sup> “[C]ompensation for attorneys providing public defense services is set without regard for the actual overhead expenses of those attorneys.” Email from OPDS General Counsel Paul Levy to Sixth Amendment Center (Feb. 12, 2018).

<sup>163</sup> PDSC, QUALIFICATION STANDARDS FOR COURT-APPOINTED COUNSEL TO REPRESENT FINANCIALLY ELIGIBLE PERSONS AT STATE EXPENSE std. III.1., 3.-4. (Dec. 15, 2016).

<sup>164</sup> PDSC, QUALIFICATION STANDARDS FOR COURT-APPOINTED COUNSEL TO REPRESENT FINANCIALLY ELIGIBLE PERSONS AT STATE EXPENSE std. III.1. (Dec. 15, 2016).

<sup>165</sup> OR. REV. STAT. § 9.160 (membership in state bar required to practice law), § 9.191 (payment of membership fees required), § 9.200 (failure to pay membership fees results in suspension from the state bar) (2017); Oregon State Bar Bylaws, art. 6 (membership classification and fees) (as amended through Nov. 2, 2018); Oregon State Bar, Minimum Continuing Legal Education Rules and Regulations, rules 3.2, 7.1, 7.6 (as amended eff. May 10, 2018).

<sup>166</sup> PDSC, QUALIFICATION STANDARDS FOR COURT-APPOINTED COUNSEL TO REPRESENT FINANCIALLY ELIGIBLE PERSONS AT STATE EXPENSE std. III.3.-4. (Dec. 15, 2016).

<sup>167</sup> “Overhead expenses, including services performed by an employee or an independent contractor of provider, are not reimbursable, except in extraordinary circumstances with the preauthorization of OPDS. Overhead expenses, except as otherwise expressly provided in this policy, includes, but are not limited to:

- A. Travel time and expense between home and office;
- B. Paraprofessional Services (law clerk, legal assistant, paralegal, and secretarial services);

When case-related costs must be incurred in a case handled by a private attorney, such as travel or producing copies or long-distance telephone calls or hiring an interpreter, PDSC has a process the attorney must follow. Some expenses are defined by PDSC as “routine expenses” that the attorney is always allowed to incur up to a specified amount,<sup>168</sup> and so long as the attorney carefully follows the rules, then the attorney can be reimbursed following disposition of the case.<sup>169</sup> Other expenses are defined by PDSC as “non-routine expenses” and an attorney must get permission from PDSC in advance, through a process known as “preauthorization,” in order to obtain these necessary resources for a client’s case<sup>170</sup> – else the attorney cannot be reimbursed for these costs other than in very limited circumstances.<sup>171</sup>

## C. STATE FUNDING & THE BUDGET CYCLE PROCESS

The PDSC and OPDS system for providing the right to counsel, when layered onto Oregon’s budget cycle process, impedes provision of effective assistance of counsel in several ways. The State of Oregon operates on a fiscal calendar that runs from July 1 through June 30.<sup>172</sup> The Oregon legislature passes a budget every two years.<sup>173</sup> That budget appropriates funding to the PDSC, which PDSC uses to pay for the administration and support of the public defense system.<sup>174</sup>

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C. Timekeeping and bill preparation;

D. Rent and utilities;

E. Office equipment and supplies;

F. Library materials; and,

G. Computerized legal research software, installation and monthly access fees.”

PDSC & OPDS, PUBLIC DEFENSE PAYMENT POLICY AND PROCEDURES ¶ 3.4.2 (rev’d Apr. 1, 2018). “OPDS will not compensate counsel . . . for time spent preparing invoices or payment requests, keeping time records, attending seminars, or otherwise managing one’s office and career.” PDSC & OPDS, PUBLIC DEFENSE PAYMENT POLICY AND PROCEDURES ¶ 2.3.4 (rev’d Apr. 1, 2018).

<sup>168</sup> PDSC & OPDS, PUBLIC DEFENSE PAYMENT POLICY AND PROCEDURES ¶¶ 3.5.1 - 3.5.12 and Exh. 2 Schedule of Guideline Amounts (rev’d Apr. 1, 2018).

<sup>169</sup> PDSC & OPDS, PUBLIC DEFENSE PAYMENT POLICY AND PROCEDURES ¶¶ 2.6.1, 2.6.2, 2.8.2 (rev’d Apr. 1, 2018). In aggravated murder and murder cases, attorneys may bill monthly. PDSC & OPDS, PUBLIC DEFENSE PAYMENT POLICY AND PROCEDURES ¶ 2.8.1 (rev’d Apr. 1, 2018).

<sup>170</sup> PDSC & OPDS, PUBLIC DEFENSE PAYMENT POLICY AND PROCEDURES ¶¶ 3.6.1 - 3.6.12, 3.13.1 - 3.14.2, and Exh. 2 Schedule of Guideline Amounts (rev’d Apr. 1, 2018).

<sup>171</sup> PDSC & OPDS, PUBLIC DEFENSE PAYMENT POLICY AND PROCEDURES ¶¶ 3.6.1, 3.6.3, 3.7.1 - 3.7.2 (rev’d Apr. 1, 2018).

<sup>172</sup> OR. REV. STAT. § 238.005(11) (2017).

<sup>173</sup> See OR. REV. STAT. §§ 291.210, 291.216 (2017).

<sup>174</sup> OR. REV. STAT. § 151.225 (2017). All funds allocated by the legislature to PDSC are deposited into the Public Defense Services Account at the State Treasury. *Id.* PDSC regularly seeks and obtains from the legislature some additional amount of funding at other times during the two-year budget cycle. However, the need to obtain these funds is a result of problems caused by the ordinary budgeting process described in this section.

**Sources and uses of funds.** Most of the funding for the PDSC comes from the state’s General Fund.<sup>175</sup> The only other source of funding is the Application/Contribution Program, where individuals who apply for and/or receive court-appointed counsel can be required to pay some amount of money to defray the cost of processing their applications and providing counsel.<sup>176</sup>

PDSC uses its budget to pay for three broad categories of costs. The smallest cost to PDSC is for its Contract and Business Services, which is the OPDS state employees who administer the system as a whole.<sup>177</sup> The next larger cost to PDSC is for the Appellate Division, which is the OPDS state employed attorneys who represent people in appellate proceedings.<sup>178</sup> By far the largest of PDSC’s costs is for its Professional Services Account, through which it pays for all of the representation provided throughout the state through contracts and case-by-case appointments.<sup>179</sup>

The budget under which PDSC is operating at the time of this evaluation in 2018 was passed by the legislature on July 5, 2017, and signed by the governor on July 19, 2017. The sources and uses of that budget are:

**Table:** PDSC 2017-2019 Budget

		Contract & Business Services	Appellate Division	Professional Services Account	PDSC Total Budget
Source of Funds	General Fund	\$ 4,423,808	\$ 18,194,890	\$ 276,304,521	\$ 298,923,219
	Other Funds	\$ 709,468		\$ 4,244,845	\$ 4,954,313
	Total	\$ 5,133,276	\$ 18,194,890	\$ 280,549,366	\$ 303,877,532
Positions Allocated		19	58		77

Source: HB 5033 Budget Report and Measure Summary, 79th Or. Leg. Assembly Reg. Sess., 2017 Or. HB 5033, Public Defense Services Comm’n 2017-19 (passed July 5, 2017).

<sup>175</sup> HB 5033A Budget Report and Measure Summary, 79th Or. Leg. Assembly Reg. Sess., 2017 Or. HB 5033A, Public Defense Services Comm’n 2017-19 at page 2 (passed June 28, 2017).

<sup>176</sup> HB 5033A Budget Report and Measure Summary, 79th Or. Leg. Assembly Reg. Sess., 2017 Or. HB 5033A, Public Defense Services Comm’n 2017-19 at page 2 (passed June 28, 2017); see OR. REV. STAT. §§ 135.050, 151.485, 151.487, 151.505, 161.675 (2017). The PDSC is allowed to “accept gifts, grants or contributions from any source, whether public or private” and any such funds are deposited into the Public Defense Services Account to be used by PDSC “for the purposes for which given or granted.” OR. REV. STAT. § 151.216(3) (2017).

<sup>177</sup> HB 5033A Budget Report and Measure Summary, 79th Or. Leg. Assembly Reg. Sess., 2017 Or. HB 5033A, Public Defense Services Comm’n 2017-19 at page 4 (passed June 28, 2017).

<sup>178</sup> HB 5033A Budget Report and Measure Summary, 79th Or. Leg. Assembly Reg. Sess., 2017 Or. HB 5033A, Public Defense Services Comm’n 2017-19 at page 3 (passed June 28, 2017).

<sup>179</sup> HB 5033A Budget Report and Measure Summary, 79th Or. Leg. Assembly Reg. Sess., 2017 Or. HB 5033A, Public Defense Services Comm’n 2017-19 at pages 3-4 (passed June 28, 2017).

***The budget cycle process.*** Before the legislature can decide what amount of funding it will appropriate, PDSC must submit an “Agency Request Budget.”<sup>180</sup> This occurs in two steps during the year preceding legislative passage of the budget. For the budget under which PDSC is operating in 2018, those two steps happened during 2016. First, around mid-July, PDSC submits a preliminary budget request to the Legislative Fiscal Office.<sup>181</sup> Then, around mid-December, PDSC submits a finalized budget request to the legislature.<sup>182</sup>

To prepare its “Agency Request Budget,” PDSC uses the most current information it has about its cost of operations. PDSC’s overhead and employee costs are fairly stable and predictable, and for those items PDSC will normally have data current through the second quarter of the year at the time it prepares its budget request. But the cost of providing representation in the trial courts, which PDSC secures through contracts and case-by-case appointments, is largely unstable and unpredictable. Because of the timing of contractor reports to OPDS, the data that PDSC has about these trial court representation costs at the time it prepares its budget request is typically at best through the first quarter of the year and sometimes only through the end of the preceding year. By far, the largest segment of the PDSC budget is of this unstable and unpredictable variety,<sup>183</sup> making it extremely difficult for PDSC to project its budgetary needs.

Putting all of this together: OPDS used information from the year end 2015 and/or 1st quarter 2016 to prepare its preliminary “Agency Request Budget” that it submitted to the Legislative Fiscal Office in July 2016. PDSC approved the final “Agency Request Budget” in December 2016 and submitted it to the legislature. On July 5, 2017, the Oregon legislature passed the budget bill for the biennium running July 1, 2017 through June 30, 2019. Based on the funding allocated by the legislature to PDSC, OPDS determined what portion of that funding it could spend on contracts for January 1, 2018 through December 31, 2019.

<sup>180</sup> See *Budget process*, OREGON DEPARTMENT OF ADMINISTRATIVE SERVICES, <https://www.oregon.gov/das/Financial/pages/Budgetprocess.aspx> (last visited Nov. 6, 2018).

<sup>181</sup> Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (Oct. 21, 2018).

<sup>182</sup> Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (Oct. 21, 2018). See OR. REV. STAT. § 151.219(1)(c) (2017) (“The public defense services executive director shall: . . . [p]repare and submit to the commission for its approval the biennial budget of the commission and the office of public defense services.”); OR. REV. STAT. § 151.216(1)(c) (2017) (“The Public Defense Services Commission shall: . . . [s]ubmit the budget of the commission and the office of public defense services to the Legislative Assembly after the budget is submitted to the commission by the director and approved by the commission. The Chief Justice of the Supreme Court and the chairperson of the commission shall present the budget to the Legislative Assembly.”).

<sup>183</sup> The Budget Report and Measure Summary for the current 2017-2019 PDSC budget notes: “the Professional Services Account, which is 92.2 percent of the commission’s budget, provides legal representation, primarily for cases in trial courts or juvenile courts, for those who cannot afford to pay for it.” HB 5033A Budget Report and Measure Summary, 79th Or. Leg. Assembly Reg. Sess., 2017 Or. HB 5033A, Public Defense Services Comm’n 2017-19 at page 3 (passed June 28, 2017).

This is typical of the budgeting process PDSC and OPDS go through each biennium. OPDS cannot budget for or be responsive to the actual number and type of cases that attorneys are appointed to handle during the two-year period of the annual contracts. OPDS cannot be responsive to legislative changes that take effect during the two-year period of the annual contracts and that affect the time that attorneys must devote to representing defendants. OPDS cannot be responsive to changes in local practice that take effect during the two-year period of the annual contracts and that affect the time that attorneys must devote to representing defendants. (*See* Chapter IV.)

## D. PROVIDING THE SIXTH AMENDMENT RIGHT TO COUNSEL AT TRIAL

The system that PDSC and OPDS have devised to provide trial level representation looks different in each of Oregon's 36 counties, divided into the 27 judicial districts.

As explained above (*see* discussion of trial level representation at page 24), trial level representation in all cases other than capital murder is provided in the first instance through the annual contracts that PDSC has entered into with various entities made up of one or more attorneys. In most counties there are two or more annual contractors, though in nine counties a single contractor provides these services.<sup>184</sup> When a contractor for a given county has a conflict of interest in a particular case, that case may be assigned to another contractor in that county, to a contractor in a different county, or it may be assigned to a private attorney.

Though the scope of this evaluation is limited principally to the provision of the Sixth Amendment right to counsel to adults in Oregon's circuit courts, the PDSC and OPDS system for providing the right to counsel in adult criminal cases is intertwined with those for providing the right to counsel in other types of trial level cases. Accordingly, this section explains how PDSC and OPDS provide all types of trial representation in the circuit courts, focusing on the PDSC annual contracts.

For 2018 and 2019, PDSC has 63 annual contracts to provide trial level representation in all of Oregon's circuit courts. (*See* table of PDSC Annual Contractors for Trial Representation in 2018 on page 32.)

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<sup>184</sup> *See* OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION, MEMBERSHIP DIRECTORY, OREGON PUBLIC DEFENSE CONTRACTS (Mar. 19, 2018). The nine counties are: Baker, Benton, Klamath, Lake, Lincoln, Tillamook, Union, Wallowa, and Yamhill. A single contractor provides services for both Union & Wallowa counties, which together make up the 10th Judicial District. A single contractor provides services for both the 13th Judicial District of Klamath County and the 26th Judicial District of Lake County.

**Table:** PDSC Annual Contractors for Trial Representation in 2018 & 2019

Contractor Name	Type	# of Attys*	Counties Served
22nd Circuit Defenders, LLC	Consortium	9	Crook & Jefferson
7th District Consortium	Consortium	11	Gilliam, Hood River, Sherman, Wasco, and Wheeler
Arneson & Stewart, PC	Law firm	6	Douglas
Bend Attorney Group	Consortium	12	Deschutes
Benton County Legal Defense Corporation	Consortium	8	Benton
Blue Mountain Defenders	Consortium	8	Morrow & Umatilla
Clackamas Indigent Defense Corporation**	Consortium	29	Clackamas
Clatsop County Defenders Association	Consortium	5	Clatsop
Columbia County Indigent Defense Corporation	Consortium	7	Columbia
Coos County Indigent Defense Consortium	Consortium	6	Coose
Crabtree & Rahmsdorff Defense Services, Inc.	PDO	14	Deschutes
Curry County Public Defense LLC	Consortium	3	Curry
David R. Carlson	Individual	1	Malheur
Douglas J. Rock PC	Individual	1	Malheur
Eagle Cap Defenders	Consortium	4	Baker
Grande Ronde Defenders LLC	Consortium	7	Union & Wallowa
Harris S. Matarazzo	Consortium	2	Marion
Hillsboro Law Group PC	Law firm	6	Washington
Independent Defenders, Inc.	Consortium	4	Clackamas
Intermountain Public Defender, Inc.	PDO	9	Morrow & Umatilla
Jackson Juvenile Consortium, LLC	Consortium	8	Jackson
John B. Lamborn, Attorney at Law PC	Law firm	2	Grant & Harney
Josephine County Defense Lawyers, Inc.	Consortium	10	Josephine
Justice Alliance Center	Consortium	19	Yamhill
Justice Alliance of Columbia County	Consortium	9	Columbia
Juvenile Advocacy Consortium	Consortium	13	Marion
Juvenile Advocates of Clackamas LLC	Consortium	7	Clackamas
Karpstein & Verhulst, PC	Law firm	5	Washington
Klamath Defender Services, Inc.	Consortium	19	Klamath & Lake
Kollie Law Group PC	Law firm	4	Deschutes
Lane County Defense Consortium	Consortium	14	Lane
Lane County Juvenile Lawyers Association	Consortium	14	Lane
Law Office of Robert S. Raschio, PC	Law firm	4	Grant & Harney
Lincoln Defenders & Juvenile Advocates	Consortium	12	Lincoln
Linn Defenders Inc.	Consortium	11	Linn
Linn County Juvenile Defense Corporation)	Consortium	7	Linn
Los Abogados, LLC	Consortium	5	Jackson
Madras Indigent Defense Consortium	Consortium	5	Crook & Jefferson
Marion County Association of Defenders, Limited	Consortium	37	Marion
Mary Ann Murk	Individual	1	Clatsop
Metropolitan Public Defender Services, Inc.	PDO	69***	Multnomah & Washington
Morris, Starns & Sullivan, PC	Law firm	8	Gilliam, Hood River, Sherman, Wasco, and Wheeler
Multnomah Defenders, Inc.	PDO	24	Multnomah
Oregon Defense Attorney Consortium, Inc.	Consortium	14	Washington
Polk County Conflict Consortium, LLC	Consortium	5	Polk
Portland Defense Consortium	Consortium	15	Multnomah
Portland Juvenile Defenders, Inc.	Consortium	14	Multnomah
Public Defender of Marion County	PDO	12	Marion
Public Defender Services of Lane County Inc.	PDO	22	Lane
Richard A. Cremer, PC	Law firm	2	Douglas
Ridehalgh & Associates, LLC	Law firm	5	Washington
Rogue Valley Defenders, Inc (or LLC)	Consortium	8	Jackson
Roseburg Defense Consortium	Consortium	5	Douglas
Sage Legal Center	Non-profit law firm	3	Multnomah
Southern Oregon Public Defender, Inc.	PDO	22***	Jackson & Josephine
Southwestern Oregon Public Defender Services, Inc.	PDO	9	Coos
Stoddard & Denison Law PC	Law firm	3	Malheur
Stuntz Fonda Kiyuna & Horton, LLP	Individual	1	Malheur
Tillamook County Defense Consortium	Consortium	4	Tillamook
Troy & Rosenberg, PC	Law firm	3	Multnomah
Umpqua Valley Public Defender	PDO	12	Douglas
Vidrio, Park & Jarvis, LLC	Law firm	3	Multnomah
Youth, Rights & Justice, Attorneys at Law	PDO	18	Multnomah

\* The number of attorneys shown is taken from the OCDLA Membership Directory, which OPDS says is the best source of information. The actual number of attorneys in a contractor may have changed since publication of the directory.

\*\* Clackamas Indigent Defense Corporation was awarded a one-year contract for 2018.

\*\*\* Not all attorneys provide representation in both counties.



PDSC in most instances enters into annual contracts with *entities* and not with specific attorneys. Only four of the 63 PDSC annual contracts for trial level representation during 2018 and 2019 are with individual attorneys. The other 59 annual contracts are with 10 public defender offices, 36 consortia, 12 private for-profit law firms, and one non-profit law firm.

Each of the PDSC's 63 annual contracts for 2018 and 2019 have two parts. The "General Terms" of all of the 63 annual contracts are exactly the same.<sup>185</sup> Each contract has its own "Specific Terms" that control the services a contractor provides and how the contractor earns the funds that PDSC has potentially allocated to it.

OPDS elicits proposals every two years from entities seeking an annual contract to provide public representation services.<sup>186</sup> The proposal submitted by a new prospective contractor must contain, among other things, a list of its constituent attorneys, the case types that each attorney is intended to handle and the attorney's qualifications to do so, and the percentage of the cases and compensation that each attorney is projected to receive;<sup>187</sup> but there is nothing that binds the entity to follow the projections contained in its proposal if it is awarded a contract. PDSC allows an existing contractor to provide far less information in its proposal,<sup>188</sup> and similarly there is nothing that binds the entity to follow the information it does provide in its proposal. Further, all of the 36 consortia with whom PDSC has annual contracts for 2018 and 2019 are expressly allowed to "subcontract for or delegate any of the services required under [their] contract without obtaining PDSC's prior written consent;"<sup>189</sup> in other words, without notice to or oversight by PDSC/OPDS.

The identity and number of the attorneys who make up a given contractor can and does change over the course of the contract, and those decisions are made by each individual contractor.<sup>190</sup> (*See* discussion of selection of attorneys in Chapter III.A., page 71.) All of the annual contracts provide: "Contractor shall secure, at its own expense in whole or in part from contract funds, all subcontractors, members, personnel or employees necessary to perform services that this contract requires. Contractor shall maintain an appropriate and reasonable number of attorneys and support services to perform

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<sup>185</sup> Public Defense Legal Services Contract, General Terms (Jan. 1, 2018 to Dec. 31, 2019).

<sup>186</sup> *See, e.g.*, Public Defense Services Commission Request for Proposals for Public Defense Legal Services Contracts Beginning January 1, 2018, <https://www.oregon.gov/opds/provider/RFP/RFP%202017.pdf> (last visited Nov. 2, 2018).

<sup>187</sup> *See, e.g.*, Public Defense Services Commission Request for Proposals for Public Defense Legal Services Contracts Beginning January 1, 2018, Part III - Appl. 1 through Appl. 16, <https://www.oregon.gov/opds/provider/RFP/RFP%202017.pdf> (last visited Nov. 2, 2018).

<sup>188</sup> Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018) ("Contractors are no longer required to submit the Certificate of Attorney Qualification and Supplemental Questionnaire when they submit an RFP, unless the contractor is a brand-new entity who we have not contracted in the past.").

<sup>189</sup> Public Defense Legal Services Contract, General Terms ¶ 3.1 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>190</sup> Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018).

its contract obligations.”<sup>191</sup> Contractors are required to notify PDSC of “significant changes . . . in name and number of attorneys providing services”<sup>192</sup> and “substantial changes in the number of persons providing services.”<sup>193</sup> When a new attorney joins a contracting group, the contractor must provide a certification from that new attorney that they have read the contract and understand the contractual obligations.<sup>194</sup> But contractors have up to 30 days following all of these occurrences to send these notices to PDSC.<sup>195</sup> PDSC and OPDS do not have any way of knowing who the attorneys are or how many attorneys are providing the right to counsel on any given day. (*See* discussion of selection of attorneys in Chapter III.A., page 71.)

In the “Specific Terms” of each contract, OPDS describes the dollar amount that the contractor *could potentially* earn over the course of the two-year contract and the workload the contractor *could potentially* be assigned and perform over the course of the two-year contract. In other words, these contracts do not say something as simple as “Public Defender Office X will be appointed to three Class A felonies during 2018 and OPDS will pay \$100 per hour.” Instead, OPDS could potentially pay the contractor up to an annual dollar amount, in exchange for which the contractor could potentially handle a certain “value” of workload, and the value of most of the work performed is based on “credits,” but a credit is not the same thing as a case.<sup>196</sup> Later in this report, we break this down into bite sized pieces (*see* discussion of the “Caseload and Case Value Matrix” in Chapter IV.A., page 117). But none of this complexity comes into play at the outset of an annual contract, so first we address how things begin.

OPDS sends a check to each contractor, at the beginning of each month of the annual contracts, in an amount that is roughly equal to 1/24th of that contractor’s total two-year contract value.<sup>197</sup> For example, if the total value of a two-year contract is \$240,000, OPDS sends the contractor a check for \$10,000 at the beginning of each month of the contract. Each contractor decides for itself how to spend the money that OPDS pays to it. PDSC and OPDS do not require contractors to explain the manner in which the contractor pays its constituent individual attorneys or provides for overhead expenses. Unless something unusual occurs,<sup>198</sup> PDSC and OPDS do not know for

<sup>191</sup> Public Defense Legal Services Contract, General Terms ¶ 7.4.1 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>192</sup> Public Defense Legal Services Contract, General Terms ¶ 7.8 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>193</sup> Public Defense Legal Services Contract, General Terms ¶ 7.8.2.2 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>194</sup> Public Defense Legal Services Contract, General Terms ¶ 7.4.2 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>195</sup> Public Defense Legal Services Contract, General Terms ¶ 7.8.1 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>196</sup> A credit is based on the type of case, but also can be based on certain events or circumstances in that type of case. Credits are defined in detail in Public Defense Legal Services Contract, General Terms ¶¶ 1.4.9 through 1.6.2 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>197</sup> In the sample counties, there are some small variances from this general description. Clackamas Indigent Defense Corporation has only a one-year contract, so its monthly checks are for approximately 1/12th of the contract value. Almost all contractors are paid a few more dollars in January of each year than in the other 11 months that year. Metropolitan Public Defender Services, Inc. is paid less during 2018 than during 2019.

<sup>198</sup> Public Defense Legal Services Contract, General Terms ¶ 3.8.2 (“PDSC may conduct fiscal or

any given contract: how much money is spent on overhead and what is acquired; how much money is paid to a contract administrator and what services are provided in exchange; or how much money is paid to the constituent individual attorneys and what services those attorneys provide in exchange. (*See* discussion of compensation in Chapter IV.C., page 149.)

Each annual contract sets out the categories of cases and case events that the contractor is allowed to be appointed to, and the contract also contains an estimate of the number of each category of case or case event that the contractor might be appointed to. But PDSC and OPDS do not and cannot control the number of people who are arrested or prosecuted in any county, and so PDSC and OPDS cannot guarantee that a contractor actually will be appointed to the number and type of cases described in the contract.<sup>199</sup>

Where there is more than one annual contractor in a jurisdiction, OPDS works with the contractors and the court to set up an agreement about how cases will be assigned among the contractors, with the goal of ensuring that each contractor receives an equitable number of appointments based on all of the contracts.<sup>200</sup> At the request of PDSC or of any contractor, PDSC can conduct a periodic review of the case assignments that all of the contractors in the jurisdiction are receiving.<sup>201</sup> If a periodic review is conducted and if it shows that courts are assigning cases to the contractors in a way that results in a “substantial disparity” from the appointment numbers estimated in the contracts, then “PDSC shall notify the court and Contractors that appointment rates must be adjusted and corrected, to the extent total cases are available.”<sup>202</sup>

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performance audits and reviews to monitor and evaluate the services provided under the contract. PDSC will give reasonable written notice to Contractor before any evaluation. On PDSC’s proper request, Contractor shall provide access to its facilities and make records available to PDSC or PDSC’s designee or agent at all reasonable times, and promptly respond to reasonable requests for information in connection with audit or performance reviews.”), ¶ 7.3.7 (“Contractor shall establish internal controls, such as segregation of duties with respect to financial accounting, to ensure that contract funds are properly receipted, expended, and accounted for.”), ¶ 7.5.2 (“Contractor shall maintain financial records on an accrual basis. Contractor’s records shall show that all disbursements or expenditures of contract funds were ordinary, reasonable and necessary, and related to provided direct services required under the contract or services necessary to performance of the contract.”) (Jan. 1, 2018 to Dec. 31, 2019).

<sup>199</sup> Every contract says: “Fungibility. The parties agree that PDSC is contracting for the provision of legal representation by Contractor, as measured by value, and that the estimated workload, by case type, is the parties’ expectation as to the distribution of the cases which may be available during the contract period. The parties expressly agree that Contractor may substitute one type of case for another, for the purposes of contract performance, with cases being fungible, except as specifically provided to the contrary in this contract.” Public Defense Legal Services Contract, General Terms ¶ 5.7.2 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>200</sup> Email from OPDS General Counsel Paul Levy to Sixth Amendment Center (June 6, 2018).

<sup>201</sup> Public Defense Legal Services Contract, General Terms ¶¶ 5.7, 5.7.1 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>202</sup> Public Defense Legal Services Contract, General Terms ¶ 5.7.1 (Jan. 1, 2018 to Dec. 31, 2019).

The annual contracts require each contractor (with a few exceptions) to file a report with PDSC, “within twenty (20) days of the end of each month,” providing “a reasonably accurate monthly case inventory for the preceding month.”<sup>203</sup> These monthly reports show each case to which a contractor was appointed and the date of the appointment, the type of case and the number of credits the contractor is claiming for that appointment, and the name of the specific attorney that the contractor assigned to handle the case. From these reports, OPDS knows the number of cases of various types that a given contractor has opened each month, but OPDS does not have any method of tracking when each case is finally disposed or how many cases are disposed. As a result, PDSC and OPDS do not have any way of monitoring the actual caseloads handled by each contractor at any given point in time or over the course of a year. (*See* discussion of workloads in Chapter IV.D., page 175.)

While PDSC and OPDS exercise some oversight of the number and type of cases that the courts assign to each contractor, PDSC and OPDS do not require contractors to explain the manner in which the contractor assigns cases to its constituent individual attorneys. Each contractor decides for itself how, when, and how many cases it assigns to its constituent individual attorneys. PDSC and OPDS do not have any way of monitoring or controlling the caseloads being handled by an individual attorney.<sup>204</sup> (*See* discussion of workloads in Chapter IV.B. beginning at page 132 and IV.D. beginning at page 175.)

On the basis of the monthly reports, OPDS begins to reconcile the money that it has already paid to a contractor with the number and type of credits that contractor is actually appointed to and for which it earns the money that OPDS has in essence advanced to it. Over time during a contract, a contractor may handle *fewer* credits than projected under its contract and thereby end up owing money back to OPDS (referred to as being under quota), or a contractor may handle *more* credits than projected under its contract and thereby end up being owed additional money from OPDS (referred to as being over quota). (*See* discussion of compensation in Chapter IV.C., page 149.)

To explain how all of this comes together to provide the right to counsel at trial, we turn to the counties selected by the Oregon Advisory Committee as a representative

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<sup>203</sup> Public Defense Legal Services Contract, General Terms ¶ 7.6.1 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>204</sup> OPDS is beginning to coordinate and reconcile the information it receives in its monthly reports, about cases to which individual attorneys are appointed, with the Oregon e-Court Caseload Information (OECI) court database system. OECI data can show for any individual case the docket number, parties, attorneys representing those parties, and motions filed. However, extracting a single attorney’s caseload data from OECI takes OPDS analysts approximately two hours per attorney. With approximately 647 attorneys providing right to counsel services under OPDS contracts statewide, OPDS would require 1,294 total hours to extract OECI data for just the contract lawyers, before even considering the attorneys appointed on a case-by-case basis. And the result is only a snapshot of the individual lawyer’s caseload on the day the reconciliation is conducted. This does not give OPDS the ability to track caseload on an ongoing basis throughout the year. Moreover, OECI data does not capture out-of-court case-related tasks of appointed counsel that better establish the lawyers’ true workloads.

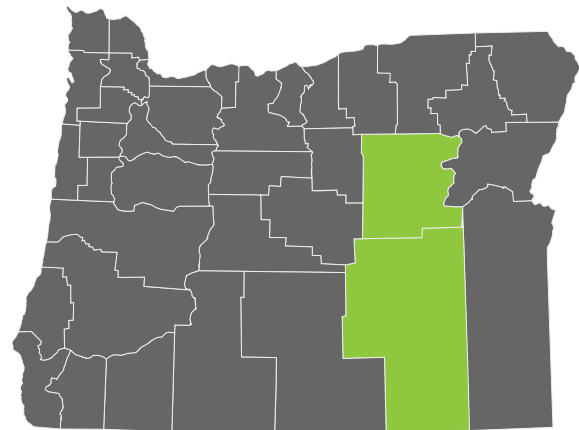
sample of Oregon's diversity in population size, geographic location, rural and suburban and urban centers, and types of public defense service providers. We begin with the counties that are relatively less complex in their court structures and public defense systems and progress to those that are relatively the most complex.

For each of the sample counties, this section describes the trial court structures, and it describes the systems put in place by PDSC and OPDS to provide the right to counsel to financially eligible individuals at trial. It explains *only* the contractual agreements between PDSC and the contractors in each county and any agreements for how to distribute cases among those contractors. (The systems established by each contractor and each of their agreements with their constituent attorneys are discussed in Chapters III and IV.) Within each county, we describe the contractors beginning with those receiving the greatest amount of funding from PDSC down to those who receive the least amount of funding.

### 1. Grant & Harney counties, 24th Judicial District

Grant County and Harney County are both in the eastern part of Oregon, and together they span about three quarters of the distance from the state's southern border with Nevada running northward toward Washington. Grant County is the more northern, with a 2017 estimated population of 7,190 living across its 4,528 square miles.<sup>205</sup> At 10,133 square miles, Harney County is geographically the largest county in the state, with a 2017 estimated population of 7,289 people.<sup>206</sup>

Grant & Harney counties



#### *a. Court locations, case allotments, and scheduling*

Together, Grant and Harney counties make up the 24th Judicial District with only one circuit court judge.<sup>207</sup> This one circuit court judge divides his time between two courthouses: one located at the Grant County seat in Canyon City, and the other located at the Harney County seat in Burns. It is 68 miles each way between the two courthouses, with no cellphone service for most of the drive.

<sup>205</sup> *QuickFacts, Grant County, Oregon*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/grantcountyoregon>.

<sup>206</sup> *QuickFacts, Harney County, Oregon*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/harneycountyoregon>.

<sup>207</sup> OR. REV. STAT. § 3.012(x) (2017).

*b. PDSC annual contractors*

PDSC has two annual contracts to provide the right to counsel at the trial level in the 24th Judicial District Circuit Court.

**John B. Lamborn PC** is a private for-profit law firm of two attorneys.

**Law Office of Robert S. Raschio PC** is a private for-profit law firm of two attorneys.<sup>208</sup>

Both of the PDSC contracts for the 24th Judicial District are “fixed value” contracts. (See discussion of fixed value contracts at page 124.) This means that OPDS pays each contractor the set dollar amount of \$758,966 over two years.<sup>209</sup> In exchange, each contractor will handle up to 660 credits in Harney and Grant counties over the two years of the contract. Both of the contractors are obligated to provide representation in all types of cases – adult criminal, juvenile delinquency, dependency, and civil commitment – in Harney and Grant counties. The number of credits to be handled by each contractor is not broken down by case type, and the contractor does not have to refund any money to OPDS if the number of credits to which it is actually appointed is less than the estimated 660 credits. Among the sample counties, these are the only two contractors with which PDSC has this “fixed value” type of contract.

Both of these contractors are excused by PDSC from the requirement under the General Terms of their contracts to “maintain financial records on an accrual basis” and to show in their financial records “that all disbursements or expenditures of contract funds were ordinary, reasonable and necessary, and related to providing direct services required under the contract or services necessary to performance of the contract.”<sup>210</sup>

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<sup>208</sup> At the time the contract was awarded, OPDS showed the Raschio law firm as having four attorneys. See OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION, MEMBERSHIP DIRECTORY, OREGON PUBLIC DEFENSE CONTRACTS (Mar. 19, 2018). The attorney Robert Raschio also operates a separate law office in Baker County, and in that law office he employs a different associate attorney. Raschio’s Baker County law office is part of the Eagle Cap Defenders consortium, which holds an annual contract in Baker County. The attorney Robert Raschio is the contract administrator for the Eagle Cap Defenders consortium.

<sup>209</sup> Public Defense Legal Services Contract between PDSC and John B. Lamborn, Attorney at Law, PC, Specific Terms (Jan. 1, 2018 through Dec. 31, 2019); Public Defense Legal Services Contract between PDSC and Law Office of Robert S. Raschio, PC, Specific Terms (Jan. 1, 2018 through Dec. 31, 2019). OPDS pays each of the contractors \$31,630 in January 2018 and in January 2019 and \$31,623 in each of the other 22 months.

<sup>210</sup> Public Defense Legal Services Contract between PDSC and John B. Lamborn, Attorney at Law, PC, Specific Terms ¶ 7 (Jan. 1, 2018 through Dec. 31, 2019); Public Defense Legal Services Contract between PDSC and Law Office of Robert S. Raschio, PC, Specific Terms ¶ 7 (Jan. 1, 2018 through Dec. 31, 2019).

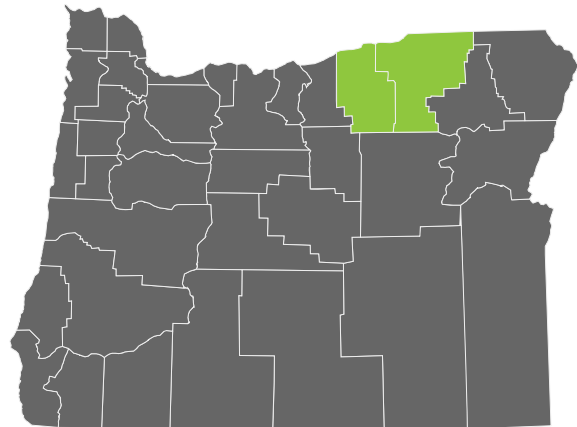
*c. Distribution of cases among PDSC annual contractors*

The two contractors divide the caseload by county. For cases arising out of Grant County, the Raschio law firm is the primary provider, meaning they are appointed first in every case, and the Lamborn law firm is only appointed if the Raschio law firm has a conflict or if more than one attorney is required in a single case. For cases arising out of Harney County, the Lamborn law firm is the primary provider, meaning they are appointed first in every case, and the Raschio law firm is only appointed if the Lamborn law firm has a conflict or if more than one attorney is required in a single case.

2. Umatilla & Morrow counties, 6th Judicial District

Umatilla County and Morrow County sit side-by-side in the eastern part of Oregon at the state's northern border with Washington. Morrow County on the western side has a 2017 estimated population of 11,166 living in about 2,032 square miles.<sup>211</sup> Umatilla to the eastern side is about half again larger and quite a lot more populous, with 76,985 people and 3,215 square miles.<sup>212</sup>

Umatilla & Morrow counties



*a. Court locations, case allotments, and scheduling*

The counties of Morrow and Umatilla together make up the 6th Judicial District, served by five circuit court judges.<sup>213</sup>

The five judges preside at three separate courthouses.<sup>214</sup> On a weekly rotation, one of the five judges sits every Thursday at the courthouse located in the Morrow County seat of Heppner. Otherwise, three of the judges are located at the Umatilla County courthouse in Pendleton, and two of the judges are located at the Umatilla County courthouse in Hermiston. Nearly everyone in the jurisdiction speaks of the “30-mile hallway” connecting the two Umatilla County courthouses as a significant obstacle to providing effective assistance of counsel and to the timely disposition of cases.

<sup>211</sup> *QuickFacts, Morrow County, Oregon*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/morrowcountyoregon>.

<sup>212</sup> *QuickFacts, Umatilla County, Oregon*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/umatillacountyoregon>.

<sup>213</sup> OR. REV. STAT. § 3.012(f) (2017).

<sup>214</sup> By statute, the circuit court is required to sit at four locations “as required by caseload”: in Morrow County at the county seat of Heppner; and in Umatilla County at the county seat of Pendleton, the county’s largest city of Hermiston, and the city of Milton-Freewater. OR. REV. STAT. § 3.016 (2017).

All five of the judges hear adult criminal cases (with one exception)<sup>215</sup> and the judges do not coordinate their schedules in any way. The lack of scheduling coordination among the judges results in prosecutors and defense attorneys being scheduled to appear in multiple courtrooms and in up to three different courthouse locations at the same time.

At the time of this evaluation, the court was attempting to come up with a new plan for allotting Umatilla County cases among the judges. The plan being contemplated is: for two of the five judges (one located in Hermiston and one located in Pendleton) to handle all family and civil cases, and for three of the five judges (one located in Hermiston and two located in Pendleton) to handle all criminal cases. However, the court does not intend to distribute criminal cases among the three judges based on the geography of the case itself, which will mean that many defendants who often lack reliable transportation will have to find a way to travel across the county for court appearances, and there is no public transportation. Prosecutors and defense attorneys will still be scheduled to appear in multiple courtrooms and up to three different courthouse locations at the same time.

The circuit court operates a drug court, which resumed operation in mid-2018 after having been inactive for approximately a year.

*b. PDSC annual contractors*

PDSC has two annual contracts to provide the right to counsel at the trial level in the 6th Judicial District Circuit Court.

**Intermountain Public Defender Inc.** is a public defender office employing nine attorneys. Its contract with PDSC<sup>216</sup> provides a total two-year contract value of \$2,993,152. Of the total contract value, \$2,474,628 is for Intermountain Public Defender Inc. to provide representation in a total of 5,492 adult criminal, juvenile delinquency, dependency, and civil commitment credits in Umatilla and Morrow counties, and the contractor must account for these funds through the case credit billing system. The balance of the contract value is \$30,000 for drug court<sup>217</sup> and \$488,524

<sup>215</sup> At the time of this evaluation, one of the judges assigned to the Umatilla County courthouse at Hermiston was recused from all Umatilla County criminal cases, but not from Morrow County criminal cases.

<sup>216</sup> Public Defense Legal Services Contract between PDSC and Intermountain Public Defender, Inc., Specific Terms (Jan. 1, 2018 through Dec. 31, 2019). OPDS pays Intermountain Public Defender Inc. \$124,722 in January 2018 and in January 2019 and \$124,714 in each of the other 22 months.

<sup>217</sup> The Umatilla County drug court was inoperative for approximately a year, from mid-2017 to mid-2018. The Public Defense Services Commission owed money to Intermountain Public Defender Inc. for case credits earned during the 2016 and 2017 contract cycle. When the commission paid Intermountain Public Defender Inc. for those case credits, it reduced the payment by a prorated amount of the drug court funding allocated to Intermountain Public Defender Inc. for the months during 2018 in which there



for investigation offset, and the contractor does not have to account for the services it provides through these funds.

**Blue Mountain Defenders** is a consortium of eight private attorneys working out of their individual offices. Its contract with PDSC<sup>218</sup> provides a total two-year contract value of \$1,681,784. The entire contract value is for Blue Mountain Defenders to provide representation in a total of 3,288 adult criminal, juvenile delinquency, dependency and civil commitment credits in Umatilla and Morrow counties, and the contractor must account for the funds through the case credit billing system.

*c. Distribution of cases among PDSC annual contractors*

The two contractors divide the caseload by county. For cases arising out of Umatilla County, Intermountain Public Defender is the primary provider for three weeks out of each month, meaning they are appointed first in every case, and Blue Mountain Defenders is only appointed if Intermountain Public Defender has a conflict or if more than one attorney is required in a single case. During the first week of each month, Blue Mountain Defenders is the primary provider in Umatilly County, meaning they are appointed first in every case, and Intermountain Public Defender is only appointed if Blue Mountain Defenders has a conflict or if more than eight attorneys are required in a single case. For cases arising out of Morrow County, Blue Mountain Defenders is the primary provider, meaning they are appointed first in every case, and Intermountain Public Defender is only appointed if Blue Mountain Defenders has a conflict or if more than eight attorneys are required in a single case.

Intermountain Public Defender Inc. represents all financially eligible people while they are participating in the drug court.

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was no operational drug court.

<sup>218</sup> Public Defense Legal Services Contract between PDSC and Blue Mountain Defenders, LLC, Specific Terms (Jan. 1, 2018 through Dec. 31, 2019). OPDS pays Blue Mountain Defenders \$70,078 in January 2018 and in January 2019 and \$70,074 in each of the other 22 months.

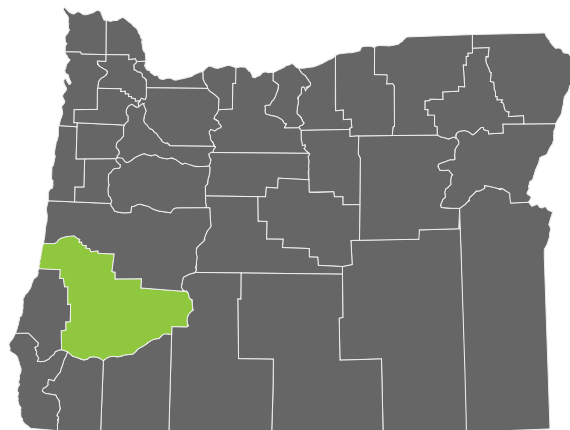
### 3. Douglas County, 16th Judicial District

Located in the southwest of the state with a small coastal area on the Pacific Ocean, in 2017 Douglas County had an estimated population of 109,405 people spread across 5,036 square miles.<sup>219</sup>

#### *a. Court locations, case allotments, and scheduling*

Douglas is the only county in the 16th Judicial District, and its circuit court has five judges,<sup>220</sup> plus one pro tem referee appointed by the presiding judge. The judges all sit at the single courthouse located in the Douglas County seat of Roseburg. The adult criminal docket is spread among all six of the judicial officers.

Douglas County



The circuit court operates three specialty courts: drug court including the residential substance abuse treatment court known as “RSAT,” mental health court, and domestic violence court.

#### *b. PDSC annual contractors*

PDSC has four annual contracts to provide the right to counsel at the trial level in the 16th Judicial District Circuit Court.

**Umpqua Valley Public Defender** is a public defender office employing 12 attorneys. Its contract with PDSC<sup>221</sup> provides a total two-year contract value of \$4,252,124. Of the total contract value, \$3,323,904 is for Umpqua Valley Public Defender to provide representation in a total of 7,456 adult criminal, juvenile delinquency, dependency, and civil commitment credits in Douglas County, and the contractor must account for these funds through the case credit billing system. The balance of the contract value is \$127,554 for adult drug court, \$50,428 for mental health/domestic violence court, and \$750,238 for investigation offset, and the contractor does not have to account for the services it provides through these funds.

<sup>219</sup> *QuickFacts, Douglas County, Oregon, U.S. CENSUS BUREAU*, <https://www.census.gov/quickfacts/douglascountyoregon>.

<sup>220</sup> OR. REV. STAT. § 3.012(p) (2017).

<sup>221</sup> Public Defense Legal Services Contract between PDSC and Umpqua Valley Public Defender, Specific Terms (Jan. 1, 2018 through Dec. 31, 2019). OPDS pays Umpqua Valley Public Defender \$177,181 in January 2018 and in January 2019 and \$177,171 in each of the other 22 months.

Umpqua Valley Public Defender is additionally required under its PDSC contract to “have a staff attorney present at all in-custody and out-of-custody arraignments, and at all first appearances on juvenile delinquency cases” and to “perform conflicts checking and case distribution functions for public defense cases in Douglas County.”<sup>222</sup>

**Roseburg Defense Consortium** is a consortium of five private attorneys working out of their individual offices. Its contract with PDSC<sup>223</sup> provides a total two-year contract value of \$1,174,480. The entire contract value is for Roseburg Defense Consortium to provide representation in a total of 2,456 adult criminal, juvenile delinquency, dependency, and civil commitment credits in Douglas County, and the contractor must account for the funds through the case credit billing system.

**Arneson and Stewart, P.C.** is a private for-profit law firm of six attorneys. Its contract with PDSC<sup>224</sup> provides a total two-year contract value of \$1,113,862. Of the total contract value, \$937,160 is for Arneson and Stewart, P.C. to provide representation in a total of 1,848 adult criminal, juvenile delinquency, dependency, and civil commitment credits in Douglas County, and the contractor must account for these funds through the case credit billing system. The balance of the contract value is \$176,702 for investigation offset, and the contractor does not have to account for the services it provides through these funds, but Arneson and Stewart, P.C. is required to provide investigation out of these funds for all of the cases it handles other than measure 11 cases.<sup>225</sup>

Arneson and Stewart, P.C. is excused by PDSC from the requirement under the General Terms of its contract to “maintain financial records on an accrual basis” and to show in their financial records “that all disbursements or expenditures of contract funds were ordinary, reasonable and necessary, and related to providing direct services required under the contract or services necessary to performance of the contract.”<sup>226</sup>

**Richard A. Cremer, PC** is a private for-profit law firm of two attorneys. Its contract with PDSC<sup>227</sup> provides a total two-year contract value of \$551,320. The entire contract

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<sup>222</sup> Public Defense Legal Services Contract between PDSC and Umpqua Valley Public Defender, Specific Terms ¶ 7 (Jan. 1, 2018 through Dec. 31, 2019).

<sup>223</sup> Public Defense Legal Services Contract between PDSC and Roseburg Defense Consortium, Specific Terms (Jan. 1, 2018 through Dec. 31, 2019). OPDS pays Roseburg Defense Consortium \$48,944 in January 2018 and in January 2019 and \$48,936 in each of the other 22 months.

<sup>224</sup> Public Defense Legal Services Contract between PDSC and Arneson and Stewart, P.C., Specific Terms (Jan. 1, 2018 through Dec. 31, 2019). OPDS pays Arneson and Stewart, P.C. \$46,421 in January 2018 and in January 2019 and \$46,410 in each of the other 22 months.

<sup>225</sup> Public Defense Legal Services Contract between PDSC and Arneson and Stewart, P.C., Specific Terms ¶ 7.3 (Jan. 1, 2018 through Dec. 31, 2019).

<sup>226</sup> Public Defense Legal Services Contract between PDSC and Arneson and Stewart, P.C., Specific Terms ¶ 7.1 (Jan. 1, 2018 through Dec. 31, 2019).

<sup>227</sup> Public Defense Legal Services Contract between PDSC and Richard A. Cremer, PC, Specific Terms (Jan. 1, 2018 through Dec. 31, 2019). OPDS pays Richard A. Cremer, PC \$22,979 in January

value is for Richard A. Cremer, PC to provide representation in a total of 1,100 adult criminal, juvenile delinquency, dependency, and civil commitment credits in Douglas County, and the contractor must account for the funds through the case credit billing system.

Richard A. Cremer, PC is excused by PDSC from the requirement under the General Terms of its contract to “maintain financial records on an accrual basis” and to show in their financial records “that all disbursements or expenditures of contract funds were ordinary, reasonable and necessary, and related to providing direct services required under the contract or services necessary to performance of the contract.”<sup>228</sup>

*c. Distribution of cases among PDSC annual contractors*

The four contractors divide the caseload by case type. Umpqua Valley Public Defender is required by its PDSC contract to perform “case distribution functions for public defense cases in Douglas County” and to “distribute cases based on case type quotas for each contractor, as detailed in each contractor’s case load matrix.”<sup>229</sup>

None of the four Douglas County contractors handle aggravated homicide or Jessica’s Law cases. For these, the court initially appoints Umpqua Valley Public Defender, but then Umpqua Valley Public Defender assigns these cases to one of the attorneys on a list of those whom OPDS has pre-certified as meeting the necessary qualifications.

For adult criminal and juvenile delinquency cases (other than aggravated homicide or Jessica’s Law cases), if any of the four contractors are presently representing a defendant in another pending case, then that contractor will be appointed to represent the same defendant in a new case. Otherwise, Umpqua Valley Public Defender is the primary provider, meaning they are appointed first in every case. If Umpqua Valley Public Defender has a conflict or if more than one attorney is required in a single case, then Arneson and Stewart, P.C. or Richard A. Cremer, PC is appointed according to a precise rotation list provided by OPDS that is broken down by various case types. Roseburg Defense Consortium will only be appointed (where it is not already representing the defendant in another case) if all three of the other contractors have a conflict.

For dependency cases, it is often and perhaps even typically the situation that all of the family members in a single case are financially eligible for appointed counsel, and each of them may be entitled to an attorney separate from the others. This means a single case may involve multiple appointed attorneys. Because the attorneys appointed

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2018 and in January 2019 and \$22,971 in each of the other 22 months.

<sup>228</sup> Public Defense Legal Services Contract between PDSC and Richard A. Cremer, PC, Specific Terms ¶ 7 (Jan. 1, 2018 through Dec. 31, 2019).

<sup>229</sup> Public Defense Legal Services Contract between PDSC and Umpqua Valley Public Defender, Specific Terms ¶ 7 (Jan. 1, 2018 through Dec. 31, 2019).

to each of the parties in a single case cannot be affiliated with each other, only the Roseburg Defense Consortium can provide more than one attorney in a single case – the other three contractors can each provide only one attorney per case. Roseburg Defense Consortium is appointed in almost every case, along with Umpqua Valley Public Defender and Arneson and Stewart, P.C., while Richard A. Cremer, PC is appointed only when necessary to provide an adequate number of attorneys.

Umpqua Valley Public Defender represents all financially eligible people while they are participating in any of the specialty courts.

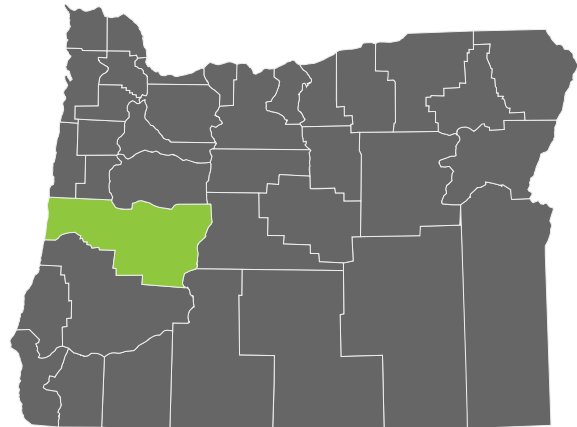
#### 4. Lane County, 2nd Judicial District

Lane County is centrally located on the west coast of Oregon at the Pacific Ocean and then stretching eastward nearly one-third of the distance across the state. In 2017, the county had an estimated population of 374,748 and a land area of 4,553 square miles.<sup>230</sup>

##### *a. Court locations, case allotments, and scheduling*

Lane is the only county in the 2nd Judicial District, and its circuit court has 15 judges.<sup>231</sup> The judges are divided between two courthouses, both located in the county seat of Eugene about a mile and a half apart. Two judges are assigned on a periodic rotation to the juvenile courthouse, where delinquency cases are heard primarily by one judge and dependency cases (other than termination of parental rights) are heard primarily by a second judge. The other 13 judges are assigned to the circuit courthouse, where they hear all types of cases other than delinquency and dependency.

Lane County



The circuit court operates four specialty courts: drug court, mental health court, veterans court, and “RAP” juvenile diversion court.

<sup>230</sup> *QuickFacts, Lane County, Oregon*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/lanecountyoregon>.

<sup>231</sup> OR. REV. STAT. § 3.012(b) (2017).

*b. PDSC annual contractors*

PDSC has three annual contracts to provide the right to counsel at the trial level in the 2nd Judicial District Circuit Court.

**Public Defender Services of Lane County** is a public defender office employing 22 attorneys. In August 2018, there were two vacant full-time positions, 18 full-time attorneys, and two part-time attorneys. Public Defender Services of Lane County's contract with PDSC<sup>232</sup> provides a total two-year contract value of \$7,719,574.

Of the total contract value, \$5,924,504 is for Public Defender Services of Lane County to provide representation in a total of 11,508 adult criminal, juvenile delinquency, dependency, and civil commitment credits in Lane County, and the contractor must account for these funds through the case credit billing system. The contract contains two special provisions about the manner in which Public Defender Services of Lane County can bill case credits in post-dispositional review hearings and in hearings related to probation.<sup>233</sup>

The balance of the contract value is \$368,980 for four specialty courts,<sup>234</sup> \$108,000 for "EDP," \$100,000 for the Veterans' Resource Center, and \$1,218,090 for investigation offset. The contractor does not have to account for the services it provides through these funds.

The contract does not contain any language explaining the duties that Public Defender Services of Lane County is responsible for in the specialty courts, EDP, or veterans' resource center, but the parties to the contract both seem to agree about what that entails. For the four specialty courts, Public Defender Services of Lane County is responsible for representing all persons found to be entitled to appointed counsel and

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<sup>232</sup> Public Defense Legal Services Contract between PDSC and Public Defender Services of Lane County, Specific Terms (Jan. 1, 2018 through Dec. 31, 2019). OPDS pays Public Defender Services of Lane County \$321,659 in January 2018 and in January 2019 and \$321,648 in each of the other 22 months.

<sup>233</sup> For "post-dispositional review hearings": "Post-dispositional review hearings include those cases where a court order is issued as a result of the required consultation and consent of the parties to resolve the matter out of court." Public Defense Legal Services Contract between PDSC and Public Defender Services of Lane County, Specific Terms ¶ 7.1 (Jan. 1, 2018 through Dec. 31, 2019). For a "hearing attended to represent a client regarding an order of probation": "Contractor may claim credit for each hearing attended to represent a client regarding an order of probation (aside from hearings related to allegations of probation). Such credits will be reported using the same codes as those used for probation violation hearings but will count as one credit for each hearing attended regardless of the number of petitions or incident dates." Public Defense Legal Services Contract between PDSC and Public Defender Services of Lane County, Specific Terms ¶ 7.1 (Jan. 1, 2018 through Dec. 31, 2019).

<sup>234</sup> The four specialty courts are each listed as separate line items in the contract: drug court \$173,352; veterans court \$57,780; mental health court \$37,848; and RAP \$100,000. Public Defense Legal Services Contract between PDSC and Public Defender Services of Lane County, Specific Terms (Jan. 1, 2018 through Dec. 31, 2019).

who enter into any of the Lane County specialty courts.<sup>235</sup> OPDS and Public Defender Services of Lane County both say that “EDP” stands for early disposition program,<sup>236</sup> while the contract mentions expedited disposition program,<sup>237</sup> but there is little doubt they are all one and the same. There is nothing in Lane County that is officially titled as “EDP;” Public Defender Services of Lane County explains that they help defendants at initial appearances and arraignments where they have not been appointed and so would not otherwise be paid.<sup>238</sup> The Veterans’ Resource Center is “designed to provide assistance to criminal defense attorneys statewide regarding legal issues unique to their veteran clients.”<sup>239</sup> One of the staff attorneys at Public Defender Services of Lane County is a military veteran who provides this service by consulting statewide on cases involving veteran defendants. The contract does contain some provisions about the circumstances under which Public Defender Services of Lane County can bill OPDS for a case credit rather than providing services as part of one of these line item categories.<sup>240</sup>

**Lane County Juvenile Lawyers Association** is a consortium of 15 private attorneys<sup>241</sup> working out of their individual offices. Its contract with PDSC<sup>242</sup> provides a total two-year contract value of \$6,560,460. The entire contract value is for Lane County

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<sup>235</sup> Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018). There is a lengthy provision in the contract defining when a case falls within the “drug court” line item and when it is instead a case for which Public Defender Services of Lane County can charge a normal case type credit. Public Defense Legal Services Contract between PDSC and Public Defender Services of Lane County, Specific Terms ¶ 7.5 (Jan. 1, 2018 through Dec. 31, 2019).

<sup>236</sup> Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018).

<sup>237</sup> Public Defense Legal Services Contract between PDSC and Public Defender Services of Lane County, Specific Terms ¶ 7.4 (Jan. 1, 2018 through Dec. 31, 2019).

<sup>238</sup> Although not entirely clear, it seems that Public Defender Services of Lane County can charge a normal case type credit for any of these defendants whom it is subsequently appointed to represent. Its contract provides: “An Expedited Disposition Program case (EDP) does not count as prior representation for the purposes of Section 1.5.6 when the client may subsequently apply for counsel through the regular verification process.” Public Defense Legal Services Contract between PDSC and Public Defender Services of Lane County, Specific Terms ¶ 7.4 (Jan. 1, 2018 through Dec. 31, 2019). Section 1.5.6 of the General Terms would otherwise require that a contractor only be allowed to bill for one credit of SCDV, rather than the actual type of case involved, if the contractor had represented the defendant at a court appearance within the past 180 days. Public Defense Legal Services Contract, General Terms ¶ 1.5.6 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>239</sup> Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018).

<sup>240</sup> Public Defense Legal Services Contract between PDSC and Public Defender Services of Lane County, Specific Terms ¶¶ 7.4 (EDP), 7.5 (drug court) (Jan. 1, 2018 through Dec. 31, 2019).

<sup>241</sup> At the time the contract was awarded, OPDS showed the Lane County Juvenile Lawyers Association as having 14 attorneys. *See* OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION, MEMBERSHIP DIRECTORY, OREGON PUBLIC DEFENSE CONTRACTS (Mar. 19, 2018). At the time of the Sixth Amendment Center site visit in August 2018, the consortium had 16 attorneys, but one attorney has since moved out of the country.

<sup>242</sup> Public Defense Legal Services Contract between PDSC and Lane County Juvenile Lawyers Association, Specific Terms (Jan. 1, 2018 through Dec. 31, 2019). OPDS pays Lane County Juvenile Lawyers Association \$273,358 in January 2018 and in January 2019 and \$273,352 in each of the other 22 months.

Juvenile Lawyers Association to provide representation in a total of 15,190 juvenile delinquency and dependency credits in Lane County, and the contractor must account for the funds through the case credit billing system. The contract contains a special provision about the manner in which Lane County Juvenile Lawyers Association can bill case credits in post-dispositional review hearings.<sup>243</sup>

Lane County Juvenile Lawyers Association is also required by the contract “to reduce attorney caseloads by either increasing the number of attorneys providing services under this contract, reducing the portion of non-contract work performed by attorneys working under this contract, accepting fewer case appointments, a combination of those measures, or by other means determined by the contractor.”<sup>244</sup>

**Lane County Defense Consortium** is a consortium of approximately 12 private attorneys<sup>245</sup> working out of their individual offices. Locally, it is referred to as the “adult consortium.” Its contract with PDSC provides a total two-year contract value of \$2,106,032.<sup>246</sup> The entire contract value is for Lane County Defense Consortium to provide representation in a total of 3,400 adult criminal and civil commitment credits in Lane County, and the contractor must account for the funds through the case credit billing system.

*c. Distribution of cases among PDSC annual contractors*

The three contractors divide the caseload by case type.

Adult criminal cases are appointed to either Public Defender Services of Lane County or Lane County Defense Consortium. The contractors are appointed during initial appearances and arraignments. For in-custody initial appearances and arraignments, on average Public Defender Services of Lane County is appointed to represent two out of every three defendants and Lane County Defense Consortium is appointed to represent one out of every three defendants. For out-of-custody arraignments, on average Public

<sup>243</sup> “Post-dispositional review hearings include those cases where a court order is issued as a result of the required consultation and consent of the parties to resolve the matter out of court.” Public Defense Legal Services Contract between PDSC and Lane County Juvenile Lawyers Association, Specific Terms ¶ 7.1 (Jan. 1, 2018 through Dec. 31, 2019).

<sup>244</sup> Public Defense Legal Services Contract between PDSC and Lane County Juvenile Lawyers Association, Specific Terms ¶ 7.2 (Jan. 1, 2018 through Dec. 31, 2019).

<sup>245</sup> At the time the contract was awarded, OPDS showed the Lane County Defense Consortium as having 14 attorneys. *See* OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION, MEMBERSHIP DIRECTORY, OREGON PUBLIC DEFENSE CONTRACTS (Mar. 19, 2018). The consortium administrator provided a list of 13 attorneys, including the contract administrator, providing representation as of July 31, 2018. One of the consortium members who also served as its administrator left the consortium when he was appointed on September 25, 2018 to the Lane County Circuit Court. Jack Moran, *Eugene defense attorney named new state judge*, THE REGISTER-GUARD (Sept. 25, 2018).

<sup>246</sup> Public Defense Legal Services Contract between PDSC and Lane County Defense Consortium, Specific Terms (Jan. 1, 2018 through Dec. 31, 2019). OPDS pays Lane County Defense Consortium \$87,755 in January 2018 and in January 2019 and \$87,751 in each of the other 22 months.



Defender Services of Lane County is appointed to represent all defendants on 19 days out of 20 and Lane County Defense Consortium is appointed to represent all defendants on one day out of 20.

Dependency and juvenile delinquency cases are appointed to either Lane County Juvenile Lawyers Association or Public Defender Services of Lane County. For dependency cases, it is often and perhaps even typically the situation that all of the family members in a single case are financially eligible for appointed counsel, and each of them may be entitled to an attorney separate from the others. This means a single case may involve multiple appointed attorneys. Because the attorneys appointed to each of the parties in a single case cannot be affiliated with each other, only the Lane County Juvenile Lawyers Association can provide more than one attorney in a single case – the Public Defender Services of Lane County public defender office can provide only one attorney per case. Lane County Juvenile Lawyers Association is appointed to two parties for every one appointment to Public Defender Services of Lane County.

Public Defender Services of Lane County represents all financially eligible people while they are participating in any of the specialty courts.

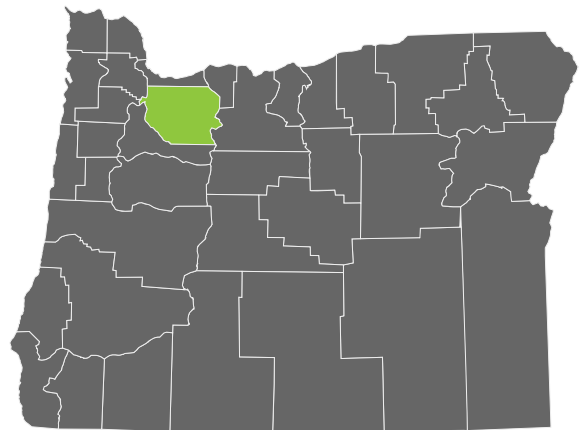
## 5. Clackamas County, 5th Judicial District

Located in the northwest of the state, Clackamas County is situated just south of the state's largest city of Portland and north of the state's capital of Salem. In 2017, the county had an estimated population of 412,672 that continues to grow to fill the county's 1,870 square miles.<sup>247</sup>

### *a. Court locations, case allotments, and scheduling*

Clackamas is the only county in the 5th Judicial District, and its circuit court has 11 judges,<sup>248</sup> plus 13 appointed pro tem referees. All 11 circuit court judges hear all types of cases, although three judges are assigned on a periodic rotation to probate cases, and four judges are assigned (two permanently, and two on staggered two-year rotations) to contested dependency cases. Almost everyone we spoke with in Clackamas County agreed that the circuit court has too few judges to handle the volume of cases before it.

Clackamas County



<sup>247</sup> *QuickFacts, Clackamas County, Oregon*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/clackamascountyoregon>.

<sup>248</sup> OR. REV. STAT. § 3.012(e) (2017).

The judges hear cases at two courthouses, both located in the county seat of Oregon City about ten minutes apart. Judges hear dependency and juvenile delinquency cases at the juvenile courthouse on Mondays, Tuesdays, and Wednesdays. All other cases are heard at the primary downtown courthouse throughout the week, and dependency and juvenile delinquency cases are heard there on Thursdays and Fridays. There is widespread agreement that the downtown courthouse is too small, with no additional courtrooms available to add new judgeships.

To minimize the difficulty of defense attorneys being scheduled in multiple courtrooms for adult criminal cases, since approximately 2014 the court has operated two 8:30 a.m. criminal dockets every week day: the “A Docket” hears cases assigned to defense attorneys whose last name begins with A to J; the “B Docket” hears cases assigned to defense attorneys whose last name begins with K to Z.

The circuit court operates seven specialty courts: adult drug court, DUII court, mental health court, juvenile drug court, family dependency drug court, domestic violence deferred sentencing program, and the Overland Park Community Court.

*b. PDSC annual contractors*

PDSC has three annual contracts to provide the right to counsel at the trial level in the 5th Judicial District Circuit Court.

**Clackamas Indigent Defense Corporation** is a consortium of 29 private attorneys working out of their individual offices, although one attorney is currently not accepting new appointments, one attorney is accepting new appointments only for existing clients, and two attorneys are no longer accepting any new appointments as they prepare to leave the consortium. PDSC awarded only a one-year contract to Clackamas Indigent Defense Corporation for 2018 (rather than the standard two-year contract) because of quality concerns it felt needed to be addressed by the consortium.<sup>249</sup> As of November 2018, PDSC has notified Clackamas Indigent Defense Corporation that it will be awarded a contract for 2019, with increased contract value and case credits, though the precise terms have not yet been decided.<sup>250</sup>

For the one-year 2018 contract,<sup>251</sup> OPDS provides a total contract value of \$3,514,764. Of the total 2018 contract value, \$3,458,457 is for Clackamas Indigent Defense Corporation to provide representation in a total of 7,564 adult criminal and civil

<sup>249</sup> Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018); see OPDS, PEER REVIEW EVALUATION OF CLACKAMAS INDIGENT DEFENSE CORP (Feb. 24, 2016).

<sup>250</sup> Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (Nov. 14, 2018).

<sup>251</sup> Public Defense Legal Services Contract between PDSC and Clackamas Indigent Defense Corporation, Specific Terms (Jan. 1, 2018 through Dec. 31, 2018). OPDS pays Clackamas Indigent Defense Corporation \$292,897 in each month of the contract.

commitment credits in Clackamas County, and the contractor must account for these funds through the case credit billing system. The balance of the 2018 contract value is \$18,769 for drug court, \$18,769 for DUII court, and \$18,769 for mental health court, and the contractor does not have to account for the services it provides through these funds.

Clackamas Indigent Defense Corporation is required by the 2018 contract “to reduce attorney caseloads by either increasing the number of attorneys providing services under this contract, reducing the portion of non-contract work performed by attorneys working under this contract, accepting fewer case appointments, a combination of those measures, or by other means determined by the contractor.”<sup>252</sup>

**Juvenile Advocates of Clackamas, LLC** is a consortium of seven private attorneys working out of six separate law offices; two of the attorneys are associated together in a law firm, while each of the other five attorneys is a solo practitioner. This consortium received its first contract from PDSC in 2016, as an addition to the then-existing contractors in Clackamas County.<sup>253</sup>

Its contract with PDSC<sup>254</sup> for 2018 and 2019 provides a total two-year contract value of \$2,223,854. Of the total contract value, \$2,059,196 is for Juvenile Advocates of Clackamas, LLC to provide representation in a total of 4,444 juvenile delinquency and dependency credits in Clackamas County, and the contractor must account for these funds through the case credit billing system. The balance of the contract value is \$164,658 for dependency offset, and the contractor does not have to account for the services it provides through these funds.

**Independent Defenders Inc.** is a consortium of four private attorneys working out of their individual offices; one of the four attorneys is winding down his practice. Its contract with PDSC<sup>255</sup> provides a total two-year contract value of \$883,780. Of the total contract value, \$831,376 is for Independent Defenders Inc. to provide representation in a total of 2,108 juvenile delinquency, dependency, and civil commitment credits in Clackamas County, and the contractor must account for these funds through the case credit billing system. The balance of the contract value is \$52,404 for juvenile drug court, and the contractor does not have to account for the services it provides through these funds.

<sup>252</sup> Public Defense Legal Services Contract between PDSC and Clackamas Indigent Defense Corporation, Specific Terms ¶ 7 (Jan. 1, 2018 through Dec. 31, 2018).

<sup>253</sup> Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018).

<sup>254</sup> Public Defense Legal Services Contract between PDSC and Juvenile Advocates of Clackamas, LLC, Specific Terms (Jan. 1, 2018 through Dec. 31, 2019). OPDS pays Juvenile Advocates of Clackamas, LLC \$92,667 in January 2018 and in January 2019 and \$92,660 in each of the other 22 months.

<sup>255</sup> Public Defense Legal Services Contract between PDSC and Independent Defenders Inc., Specific Terms (Jan. 1, 2018 through Dec. 31, 2019). OPDS pays Independent Defenders Inc. \$36,826 in January 2018 and in January 2019 and \$36,824 in each of the other 22 months.

*c. Distribution of cases among PDSC annual contractors*

The three contractors divide the caseload by case type. All adult criminal cases are appointed to Clackamas Indigent Defense Corporation. Clackamas Indigent Defense Corporation also represents all financially eligible people while they are participating in the drug court, DUII court, or the mental health court.

Dependency and juvenile delinquency cases are appointed to either Juvenile Advocates of Clackamas, LLC or Independent Defenders Inc. For dependency cases, it is often and perhaps even typically the situation that all of the family members in a single case are financially eligible for appointed counsel, and each of them may be entitled to an attorney separate from the others. This means a single case may involve multiple appointed attorneys. OPDS sets a different schedule for each week of the year (referred to locally as the “pick-up schedule”) showing which of the two consortia should be appointed, and OPDS sends the schedule typically for six months at a time (January through June, and July through December). For example, the pick-up schedule for one two-week period in 2018 was:

	Dependency Cases			Delinquency Cases
	Child	Parent 1	Parent 2	
Week 1	JACL	JACL	JACL	all IDI
Week 2	JACL	IDI	IDI	all JACL

Independent Defenders Inc. represents all financially eligible children while they are participating in the juvenile drug court.

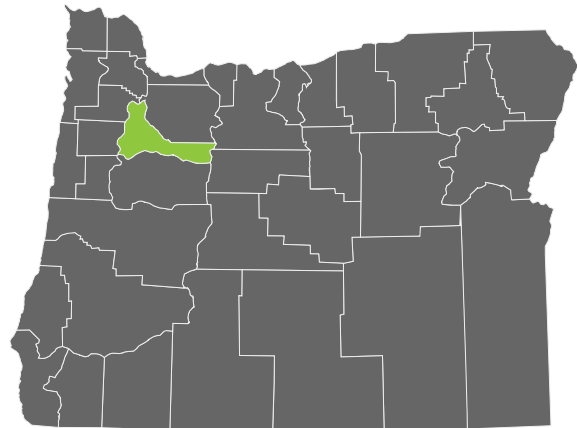
## 6. Marion County, 3rd Judicial District

Located in the northwest of the state, Marion County is home to the state capital of Salem and is separated from the largest city of Portland only by Clackamas County. In 2017, the county had an estimated population of 341,286 filling 1,182 square miles.<sup>256</sup>

### *a. Court locations, case allotments, and scheduling*

Marion is the only county in the 3rd Judicial District, and its circuit court has 14 judges<sup>257</sup> (although one bench was vacant during 2018), plus three appointed pro tem referees. The judges and referees preside at three courthouse locations, all in the county seat of Salem.

Marion County



The Marion County Courthouse, referred to locally as “downtown,” is in the heart of downtown Salem. Twelve judges and one referee sit at the downtown courthouse. All 12 of the downtown judges hear criminal, civil, and domestic cases. Four of the judges handle complex dependency and delinquency cases. Four of the judges handle probate cases as needed. (There is one judge who does both dependency and probate.)

The Marion County Juvenile Court is about 10 minutes away on the eastern side of downtown. One judge and one referee sit at the juvenile courthouse. Dependency and juvenile delinquency cases are predominantly heard at the juvenile courthouse, although complex cases such as termination of parental rights and lengthy trials in dependency are transferred to and heard by four of the judges at the downtown courthouse.

Further east and south is the Marion County Jail and Criminal Court Annex, referred to as “the Annex.” It is about a 15-minute drive between the Annex and the downtown courthouse. One judge and one referee sit at the Annex, where all adult criminal cases begin. If a case does not resolve at the Annex, it is allotted to any one of the 12 downtown judges and transferred to the downtown courthouse.

<sup>256</sup> *QuickFacts, Marion County, Oregon*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/marioncountyoregon>.

<sup>257</sup> OR. REV. STAT. § 3.012(c) (2017).

The circuit court operates five specialty courts: adult drug court, mental health court, veterans treatment court, juvenile drug court, and “FATC” fostering attachment treatment court. At the time of the 6AC’s site visit in September 2018, the court had within the previous two weeks launched a “Resiliency Court” for prostitution and related charges.

*b. PDSC annual contractors*

PDSC has four annual contracts to provide the right to counsel at the trial level in the 3rd Judicial District Circuit Court.

**Marion County Association of Defenders, Limited** is a consortium of 44 private attorneys<sup>258</sup> working out of approximately 40 separate law firms, though ten of the attorneys are not actively accepting appointments. Two of the attorneys also participate in the Juvenile Advocacy Consortium. PDSC’s contract with the Marion County Association of Defenders, Limited<sup>259</sup> provides a total two-year contract value of \$6,460,812. Of the total contract value, \$6,013,636 is for Marion County Association of Defenders, Limited to provide representation in a total of 12,656 adult criminal and civil commitment credits in Marion County, and the contractor must account for these funds through the case credit billing system. The balance of the contract value is \$199,614 for “EDP,” \$126,072 for drug court, \$71,440 for mental health court, and \$50,050 for veterans’ court, and the contractor does not have to account for the services it provides through these funds.

**Juvenile Advocacy Consortium** is a consortium of 12 private attorneys<sup>260</sup> working out of their individual offices (two of these attorneys also participate in the Marion County Association of Defenders, Limited). Its contract with PDSC<sup>261</sup> provides a total two-year contract value of \$5,138,494. Of the total contract value, \$5,056,744 is for Juvenile Advocacy Consortium to provide representation in a total of 11,452 juvenile delinquency and dependency credits in Marion County, and the contractor must account for these funds through the case credit billing system. The balance of the contract value is \$81,750 for juvenile drug court and “FATC” fostering attachment

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<sup>258</sup> At the time the contracts were awarded, OPDS showed the Marion County Association of Defenders, Limited as having 37 attorneys. *See* OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION, MEMBERSHIP DIRECTORY, OREGON PUBLIC DEFENSE CONTRACTS (Mar. 19, 2018).

<sup>259</sup> Public Defense Legal Services Contract between PDSC and Marion County Association of Defenders, Limited, Specific Terms (Jan. 1, 2018 through Dec. 31, 2019). OPDS pays Marion County Association of Defenders, Limited \$269,206 in January 2018 and in January 2019 and \$269,200 in each of the other 22 months.

<sup>260</sup> At the time the contract was awarded, OPDS showed the Juvenile Advocacy Consortium as having 13 attorneys. *See* OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION, MEMBERSHIP DIRECTORY, OREGON PUBLIC DEFENSE CONTRACTS (Mar. 19, 2018).

<sup>261</sup> Public Defense Legal Services Contract between PDSC and Juvenile Advocacy Consortium, Specific Terms (Jan. 1, 2018 through Dec. 31, 2019). OPDS pays Juvenile Advocacy Consortium \$214,114 in January 2018 and in January 2019 and \$214,103 in each of the other 22 months.

treatment court, and the contractor does not have to account for the services it provides through these funds.

Juvenile Advocacy Consortium is required by the contract “to reduce attorney caseloads by either increasing the number of attorneys providing services under this contract, reducing the portion of non-contract work performed by attorneys working under this contract, accepting fewer case appointments, a combination of those measures, or by other means determined by the contractor.”<sup>262</sup>

**Public Defender of Marion County** is a public defender office employing 13 attorneys.<sup>263</sup> Its contract with PDSC<sup>264</sup> provides a total two-year contract value of \$4,121,192. Of the total contract value, \$3,326,632 is for Public Defender of Marion County to provide representation in a total of 5,466 adult criminal and civil commitment credits in Marion County, and the contractor must account for these funds through the case credit billing system. The balance of the contract value is \$28,074 for veteran’s court and \$766,486 for investigation offset, and the contractor does not have to account for the services it provides through these funds.

**Harris S. Matarazzo** is a consortium of two private attorneys working out of their individual offices. Its contract with PDSC<sup>265</sup> provides a total two-year contract value of \$430,344. The entire contract value is for Harris S. Matarazzo to provide representation in a total of 1,032 psychiatric security review board credits (these are proceedings for defendants who were found “guilty except for insanity”),<sup>266</sup> and the contractor must account for the funds through the case credit billing system. The contract contains a special provision about the manner in which Harris S. Matarazzo can bill case credits for administrative hearings.<sup>267</sup>

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<sup>262</sup> Public Defense Legal Services Contract between PDSC and Juvenile Advocacy Consortium, Specific Terms ¶ 7 (Jan. 1, 2018 through Dec. 31, 2019).

<sup>263</sup> At the time the contracts were awarded, OPDS showed the Public Defender of Marion County as having 12 attorneys. *See* OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION, MEMBERSHIP DIRECTORY, OREGON PUBLIC DEFENSE CONTRACTS (Mar. 19, 2018). When 6AC conducted its site visit in September 2018, one of those attorneys was no longer with the office, and one new attorney had joined the office, for a total of 12 attorneys. As of December 2018, one attorney present during the site visit is no longer with the office, and two new attorneys have joined the office, bringing the total number of attorneys to 13.

<sup>264</sup> Public Defense Legal Services Contract between PDSC and Public Defender of Marion County, Specific Terms (Jan. 1, 2018 through Dec. 31, 2019). OPDS pays Public Defender of Marion County \$171,720 in January 2018 and in January 2019 and \$171,716 in each of the other 22 months.

<sup>265</sup> Public Defense Legal Services Contract between PDSC and Harris S. Matarazzo, Specific Terms (Jan. 1, 2018 through Dec. 31, 2019). OPDS pays Harris S. Matarazzo \$17,931 each month.

<sup>266</sup> *See* OR. REV. STAT. §§ 161.315 through 161.351, 161.385 through 161.400 (2017).

<sup>267</sup> “Credit may be claimed for administrative hearings (Conditional Release Review or Modification of Conditional Release) before the Psychiatric Security Review Board and Oregon Health Authority.” Public Defense Legal Services Contract between PDSC and Harris S. Matarazzo, Specific Terms ¶ 7.2 (Jan. 1, 2018 through Dec. 31, 2019).

Harris S. Matarazzo is excused by PDSC from the requirement under the General Terms of its contract to “maintain financial records on an accrual basis” and to show in their financial records “that all disbursements or expenditures of contract funds were ordinary, reasonable and necessary, and related to providing direct services required under the contract or services necessary to performance of the contract.”<sup>268</sup>

*c. Distribution of cases among PDSC annual contractors*

The four contractors divide the caseload by case type. All psychiatric security review board cases are appointed to Harris S. Matarazzo. All civil commitment cases are appointed to Public Defender of Marion County. All dependency and juvenile delinquency cases are appointed to Juvenile Advocacy Consortium, which also represents all financially eligible people while they are participating in the juvenile drug court or the “FATC” fostering attachment treatment court.

Adult criminal cases are appointed to either Marion County Association of Defenders, Limited or Public Defender of Marion County. The contractors are appointed during initial appearances and arraignments. Marion County Association of Defenders, Limited is appointed to represent all defendants who appear at initial appearance or arraignment on Tuesdays through Fridays. Public Defender of Marion County is appointed to represent all defendants who appear at initial appearance or arraignment on Mondays.

Marion County Association of Defenders, Limited and Public Defender of Marion County each continue to represent defendants to whom they were previously appointed while they are participating in the adult drug court, the mental health court, or the veterans’ treatment court.

At the time of this evaluation in September 2018, the court had within the previous two weeks launched a “Resiliency Court” for prostitution and related charges. Both Marion County Association of Defenders, Limited and Public Defender of Marion County are providing attorneys to represent financially eligible people while they are participating in the Resiliency Court.

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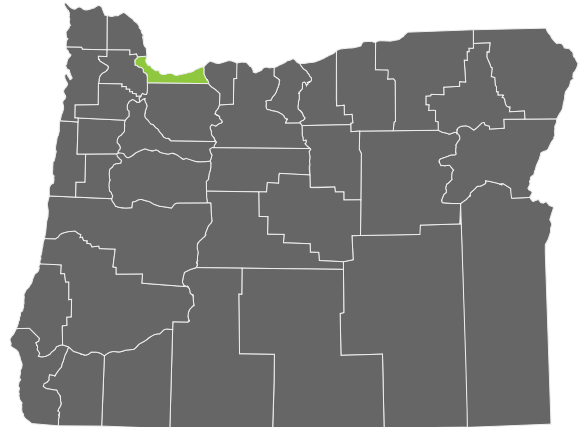
<sup>268</sup> Public Defense Legal Services Contract between PDSC and Harris S. Matarazzo, Specific Terms ¶ 7.1 (Jan. 1, 2018 through Dec. 31, 2019).



## 7. Multnomah County, 4th Judicial District

Multnomah County is by far the most populous of Oregon's counties with an estimated 2017 population of 807,555 people,<sup>269</sup> and it is home to the state's largest city of Portland. Located on the western side of the state in the far north, it borders the state of Washington. Geographically the county is the state's smallest, covering only 431 square miles.<sup>270</sup>

Multnomah County



### *a. Court locations, case allotments, and scheduling*

Multnomah is the only county in the 4th Judicial District, and its circuit court has 38 judges,<sup>271</sup> plus 14 appointed pro tem referees. The presiding judge's primary responsibility is to preside over certain dockets and to assign cases to individual judges for substantive hearings or trial.

Twenty-seven judges, including the chief criminal court judge, and 10 referees are assigned to criminal and general civil cases. Ten judges and four referees are assigned to family and juvenile cases.

The circuit court is required by statute to sit in both Portland and Gresham,<sup>272</sup> and the judges hold court at four courthouse locations.

The Justice Center for criminal cases is in downtown Portland on Lownsdale Square. The Justice Center has four courtrooms hearing felony arraignments and release hearings (JC3), misdemeanor arraignments and release hearings (JC4), preliminary hearings (JC1), and probation violations (JC2).

Across Lownsdale Square is the main courthouse, where all felony and some misdemeanor cases are heard. The presiding judge conducts the "morning call" docket for felony cases, and the chief criminal court judge conducts the "CPC" criminal procedure court docket for misdemeanor cases.

<sup>269</sup> *QuickFacts, Multnomah County, Oregon, U.S. CENSUS BUREAU*, <https://www.census.gov/quickfacts/multnomahcountyoregon>.

<sup>270</sup> *QuickFacts, Multnomah County, Oregon, U.S. CENSUS BUREAU*, <https://www.census.gov/quickfacts/multnomahcountyoregon>.

<sup>271</sup> OR. REV. STAT. § 3.012(d) (2017).

<sup>272</sup> OR. REV. STAT. § 3.014 (2017).

The East County Courthouse is in Gresham, about a half-hour drive to the east from downtown Portland. One judge is assigned to the Gresham courthouse, where misdemeanors and violations occurring east of 122nd Avenue are heard.

The Juvenile Justice Center is about midway between the main courthouse and the Gresham courthouse, about a 20-minute drive from Portland across the Willamette River to the east. The Juvenile Justice Center has six courtrooms: juvenile referees preside in four courtrooms, and family court judges preside in the other two courtrooms (the family court judges rotate, each serving two months per year).

The circuit court operates three specialty courts: the “STOP” adult drug court, the “START” court for property offenders, and the mental health court.

*b. PDSC annual contractors*

PDSC has seven annual contracts to provide the right to counsel at the trial level in the 4th Judicial District Circuit Court.

**Metropolitan Public Defender Services, Inc.** is a public defender office with two office locations: one in Multnomah County, and one in Washington County. As of December 2018, the public defender office has a combined total of 69 attorneys.<sup>273</sup> Based in the Multnomah County office are the executive director, three attorneys handling capital murder cases, and 45 attorneys<sup>274</sup> handling the Multnomah County workload. Based in the Washington County office are 20 attorneys (plus three certified law students) handling the Washington County workload. Nothing prevents Metropolitan Public Defender Services, Inc. from using attorneys based in one county to provide representation in the other.

PDSC’s 2018 and 2019 contract with Metropolitan Public Defender Services, Inc. is dramatically different than all of the other annual contracts throughout the state in several ways. Metropolitan Public Defender Services, Inc. has a single two-year contract with PDSC that covers services the contractor provides in Multnomah County,

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<sup>273</sup> At the time the contract was awarded, OPDS showed Metropolitan Public Defender Services, Inc. as having a total of 69 attorneys: 45 including the executive director in Multnomah County, and 24 in Washington County. See OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION, MEMBERSHIP DIRECTORY, OREGON PUBLIC DEFENSE CONTRACTS (Mar. 19, 2018). Since that time: the three capital team attorneys have moved from the Washington County office to the Multnomah County office; the Multnomah County office has added one attorney position; and the Washington County office has lost one attorney position. There have been a significant number of attorney personnel changes in both offices.

<sup>274</sup> As of December 2018, these 45 attorneys include 12 attorneys in the Community Law Division, which receives funding from multiple sources in addition to PDSC and provides services beyond those required by the PDSC contract.

in Washington County, and for capital murder cases anywhere in the state. Under this single two-year contract,<sup>275</sup> PDSC provides a total two-year contract value of \$23,424,688.

Of the total contract value, \$1,805,800 is for Metropolitan Public Defender Services, Inc. to provide a combined total of 23,500 attorney, mitigation specialist, and investigation hours in capital murder cases “statewide,”<sup>276</sup> (although Metropolitan Public Defender Services, Inc. says they handle cases in several counties but are not available in all counties). The contractor must account for these funds by billing hourly at \$100/hour for attorneys, \$62/hour for mitigation specialists, and \$40/hour for investigation. The contract provides that “[u]p to 90 hours per atty FTE on capital murder cases may be administrative hours and contract administration unrelated to a particular case.”<sup>277</sup> Metropolitan Public Defender Services, Inc. is the only annual contractor in the entire state that takes capital murder trial cases under their annual contract.<sup>278</sup>

The remaining contract value of \$21,618,888 is for non-capital case services Metropolitan Public Defender Services, Inc. provides in Multnomah and Washington counties. The contract breaks down the estimated number of credits, by case type, that the contractor may be assigned in each of the two counties, but that does not prevent the contractor from taking and being paid for more credits in one county and less in the other than are set out in the contract, in order to earn the overall case credit value that it has been allotted by PDSC. Additionally, the contractor is paid a flat rate for each of eight services, but most of these services are provided in only one county or the other.

Of the non-capital case contract value, \$14,941,608 is for Metropolitan Public Defender Services, Inc. to provide representation in a combined total of 26,696 adult criminal, juvenile delinquency, dependency, and civil commitment credits in Multnomah and Washington counties. The contract estimates 14,624 credits in Multnomah County and 12,072 credits in Washington County. The contractor must account for these funds through the case credit billing system.<sup>279</sup>

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<sup>275</sup> Public Defense Legal Services Contract between PDSC and Metropolitan Public Defender Services, Inc., Specific Terms (Jan. 1, 2018 through Dec. 31, 2019). OPDS pays Metropolitan Public Defender Services, Inc.: for 2018, \$973,711 in January and then \$973,703 in each of the other 11 months; for 2019, \$978,361 in January and then \$978,353 in each of the other 11 months.

<sup>276</sup> Public Defense Legal Services Contract between PDSC and Metropolitan Public Defender Services, Inc., Specific Terms ¶ 5 (Jan. 1, 2018 through Dec. 31, 2019).

<sup>277</sup> Public Defense Legal Services Contract between PDSC and Metropolitan Public Defender Services, Inc., Specific Terms ¶ 6.1 (Jan. 1, 2018 through Dec. 31, 2019).

<sup>278</sup> Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018).

<sup>279</sup> Metropolitan Public Defender Services, Inc. is paid the same value per credit type in Multnomah & Washington counties, which makes their billing for case credits with OPDS somewhat simpler. However, this also means that Metropolitan Public Defender Services, Inc. is paid a lower value than other providers in Washington County for C felony and for misdemeanor credits. In Washington

The balance of the non-capital case contract value is a total of \$6,677,280. This is \$463,884 for arraignment staffing in Multnomah County,<sup>280</sup> \$1,404,308 for Multnomah County specialty courts,<sup>281</sup> \$714,408 for representing one-half of the financially eligible people who enter the “ECR” early case resolution program in Washington County,<sup>282</sup> \$150,000 for immigration consultation,<sup>283</sup> \$3,789,720 for investigation offset, and \$154,960 for dependency offset. The contractor does not have to account for the services it provides through these funds. The contract does not identify the particular county in which a certain service is provided and does not contain any language explaining the duties that Metropolitan Public Defender Services, Inc. is responsible for in connection with these line items, but the parties to the contract both seem to agree about what that entails.

Unlike other annual contractors in the sample counties, Metropolitan Public Defender Services, Inc. is expressly allowed by its contract with PDSC to accept funds from people or entities other than PDSC for services it provides “involving expungement, settlement day, and community court.”<sup>284</sup>

The PDSC contract with Metropolitan Public Defender Services, Inc. contains two provisions regarding renegotiation or termination of the contract that exist in only one other annual contract<sup>285</sup> in the sample counties. Amending section 5.4 of the General Terms, “PDSC and Contractor shall [*may*] renegotiate this contract if

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County, the case rate paid to all other providers for C felony and misdemeanor credits was increased to recognize that less complex cases were being diverted to the Early Case Resolution docket, making the remaining cases more difficult. Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018).

<sup>280</sup> Metropolitan Public Defender Services, Inc. is responsible “for providing an attorney and staff to cover all public defense arraignments in Multnomah County Court.” Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018).

<sup>281</sup> The four specialty courts are listed as three separate line items in the contract: drug court/mental health court \$196,576; STOP court \$384,792; and community court \$822,940. Public Defense Legal Services Contract between PDSC and Metropolitan Public Defender Services, Inc., Specific Terms (Jan. 1, 2018 through Dec. 31, 2019). Metropolitan Public Defender Services, Inc. is responsible “for representing their clients who enter the Multnomah County Community Court” and “for representing all clients who enter the Multnomah County Drug Court and Mental Health Court [and] the Multnomah County STOP Court.” Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018).

<sup>282</sup> “Oregon Defense Attorney Consortium represents the other half of those clients at ECR.” Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018).

<sup>283</sup> This “compensates the contractor for providing in-house immigration consultation services for all [of the contractor’s] cases which require review by an immigration attorney.” Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018).

<sup>284</sup> Public Defense Legal Services Contract between PDSC and Metropolitan Public Defender Services, Inc., Specific Terms ¶ 7.2 (Jan. 1, 2018 through Dec. 31, 2019) (amending the General Terms ¶ 7.9).

<sup>285</sup> The other annual contract in the sample counties containing these provisions is with Multnomah Defenders, Inc.

there is a significant change in workload or cost of doing business contemplated under this contract due to amendments to or court interpretations of federal or state laws. In addition, PDSC may modify, suspend, or terminate this contract as needed to comply with amendments to or court interpretations of federal or state statutes that make some or all contract services ineligible for state funding.”<sup>286</sup> Amending section 9.2 of the General Terms, “[u]nless PDSC agrees in writing, if either party suspends or terminates the contract, or the contract expires, Contractor to the extent fiscally possible shall complete timely and adequate legal services on all existing contract appointments on cases assigned before the effective date of suspension or termination.”<sup>287</sup>

**Multnomah Defenders, Inc.** is a public defender office employing 25 attorneys.<sup>288</sup> Its contract with PDSC<sup>289</sup> provides a total two-year contract value of \$9,402,670.

Of the total contract value, \$7,313,596 is for Multnomah Defenders, Inc. to provide representation in a total of 13,964 adult criminal, juvenile delinquency (only measure 11 and probation violation), dependency, civil commitment, and civil commitment appeal credits in Multnomah County, and the contractor must account for these funds through the case credit billing system. Multnomah Defenders, Inc. is the only annual contractor in the entire state that takes civil commitment appeals under their annual contract.<sup>290</sup>

The balance of the contract value is \$822,940 for community court, \$1,199,680 for investigation offset, and \$66,454 for dependency offset, and the contractor does not have to account for the services it provides through these funds. Multnomah Defenders, Inc. is expressly required under its PDSC contract to “staff the arraignment, community court, diversion and early disposition dockets in the Gresham branch of Multnomah County Circuit Court, and accept appointment to all non-conflict cases arising out of this location.”<sup>291</sup>

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<sup>286</sup> Public Defense Legal Services Contract between PDSC and Metropolitan Public Defender Services, Inc., Specific Terms ¶ 7.1 (Jan. 1, 2018 through Dec. 31, 2019) (alterations in original).

<sup>287</sup> Public Defense Legal Services Contract between PDSC and Metropolitan Public Defender Services, Inc., Specific Terms ¶ 7.3 (Jan. 1, 2018 through Dec. 31, 2019) (alterations in original).

<sup>288</sup> At the time the contract was awarded, OPDS showed Multnomah Defenders, Inc. as having 24 attorneys. *See* OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION, MEMBERSHIP DIRECTORY, OREGON PUBLIC DEFENSE CONTRACTS (Mar. 19, 2018). Since that time, three attorneys have left the office and four different attorneys have joined the office, bringing the total number of attorneys to 25.

<sup>289</sup> Public Defense Legal Services Contract between PDSC and Multnomah Defenders, Inc., Specific Terms (Jan. 1, 2018 through Dec. 31, 2019). OPDS pays Multnomah Defenders, Inc. \$391,788 in January 2018 and in January 2019 and \$391,777 in each of the other 22 months.

<sup>290</sup> Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018).

<sup>291</sup> Public Defense Legal Services Contract between PDSC and Multnomah Defenders, Inc., Specific Terms ¶ 7.3 (Jan. 1, 2018 through Dec. 31, 2019).

The PDSC contract with Multnomah Defenders, Inc. contains two provisions regarding renegotiation or termination of the contract that exist in only one other annual contract<sup>292</sup> in the sample counties. Amending section 5.4 of the General Terms, “PDSC and Contractor shall [*may*] renegotiate this contract if there is a significant change in workload or cost of doing business contemplated under this contract due to amendments to or court interpretations of federal or state laws. In addition, PDSC may modify, suspend, or terminate this contract as needed to comply with amendments to or court interpretations of federal or state statutes that make some or all contract services ineligible for state funding.”<sup>293</sup> Amending section 9.2 of the General Terms, “[u]nless PDSC agrees in writing, if either party suspends or terminates the contract, or the contract expires, Contractor to the extent fiscally possible shall complete timely and adequate legal services on all existing contract appointments on cases assigned before the effective date of suspension or termination.”<sup>294</sup>

**Portland Defense Consortium** is a consortium of six separate law firms, that collectively have a total of 12 private attorneys.<sup>295</sup> Its contract with PDSC<sup>296</sup> provides a total two-year contract value of \$4,968,360. Of the total contract value, \$4,548,360 is for Portland Defense Consortium to provide representation in a total of 5,180 adult criminal and civil commitment credits in Multnomah County, and the contractor must account for these funds through the case credit billing system. The balance of the contract value is \$420,000 for “PV Staffing/EDPM,” and the contractor does not have to account for the services it provides through these funds, but the contract defines this as “all work required of contractor to represent individuals on probation matters handled through the Justice Center (JC2) docket,”<sup>297</sup> and OPDS explains that “EDPM” is the early disposition program for misdemeanors.<sup>298</sup>

Unique among the contractors in the sample counties, the Portland Defense Consortium contract with PDSC contains a provision expressly allowing the contractor to renegotiate the terms of its contract “[i]f there is a significant well-

<sup>292</sup> The other annual contract in the sample counties containing these provisions is with Metropolitan Public Defender Services, Inc.

<sup>293</sup> Public Defense Legal Services Contract between PDSC and Multnomah Defenders, Inc., Specific Terms ¶ 7.1 (Jan. 1, 2018 through Dec. 31, 2019) (alterations in original).

<sup>294</sup> Public Defense Legal Services Contract between PDSC and Multnomah Defenders, Inc., Specific Terms ¶ 7.2 (Jan. 1, 2018 through Dec. 31, 2019) (alterations in original).

<sup>295</sup> At the time the contract was awarded, OPDS showed the Portland Defense Consortium as having 15 attorneys. *See* OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION, MEMBERSHIP DIRECTORY, OREGON PUBLIC DEFENSE CONTRACTS (Mar. 19, 2018). At that time, those 15 attorneys worked out of eight separate law firms. Since then, three attorneys have left the consortium, and two of the remaining attorneys have joined together in practice.

<sup>296</sup> Public Defense Legal Services Contract between PDSC and Portland Defense Consortium, Specific Terms (Jan. 1, 2018 through Dec. 31, 2019). OPDS pays Portland Defense Consortium \$207,015 in each month of the contract.

<sup>297</sup> Public Defense Legal Services Contract between PDSC and Portland Defense Consortium, Specific Terms ¶ 7.1 (Jan. 1, 2018 through Dec. 31, 2019).

<sup>298</sup> Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018).

documented change in Contractor's workload in Multnomah County as a result of the implementation of SB 505.<sup>299</sup> SB 505 refers to a law taking effect in certain counties in Oregon as of March 1, 2018 (and in all counties as of July 1, 2019) that requires grand jury proceedings to be recorded.<sup>300</sup> Many criminal justice actors throughout the state express the view that this law will result in more preliminary hearings being held.

**Youth, Rights & Justice** is a public defender office employing 18 attorneys. Its contract with PDSC<sup>301</sup> provides a total two-year contract value of \$4,841,624; however, Youth, Rights & Justice owes a refund to OPDS of \$24,000 as a result of having been appointed to *fewer* credits than projected under its previous contract(s), and so OPDS will actually pay Youth, Rights & Justice only \$4,817,624 over the 2018 and 2019 contract cycle.<sup>302</sup>

Of the total contract value, \$3,378,080 is for Youth, Rights & Justice to provide representation in a total of 5,988 juvenile delinquency, dependency, and juvenile delinquency/dependency appeal credits in Multnomah County, and the contractor must account for these funds through the case credit billing system. The contract contains two special provisions about the manner in which Youth, Rights & Justice can bill credits in juvenile psychiatric review board proceedings (these are proceedings for juveniles who were found "responsible except for insanity"<sup>303</sup>) and for representation of children who are runaways from another jurisdiction.<sup>304</sup> Youth, Rights & Justice is the only annual contractor in the entire state that takes juvenile appeals under their annual contract,<sup>305</sup> and the contractor can be appointed to an appeal of a juvenile court proceeding arising out of a court anywhere in Oregon.<sup>306</sup>

<sup>299</sup> Public Defense Legal Services Contract between PDSC and Portland Defense Consortium, Specific Terms ¶ 7.2 (Jan. 1, 2018 through Dec. 31, 2019).

<sup>300</sup> See OR. REV. STAT. §§ 135.250, 132.260, 132.270 (2017).

<sup>301</sup> Public Defense Legal Services Contract between PDSC and Youth, Rights & Justice, Specific Terms (Jan. 1, 2018 through Dec. 31, 2019).

<sup>302</sup> Public Defense Legal Services Contract between PDSC and Youth, Rights & Justice, Specific Terms ¶ 4 (Jan. 1, 2018 through Dec. 31, 2019). OPDS pays Youth, Rights & Justice \$200,738 in January 2018 and in January 2019 and \$200,734 in each of the other 22 months.

<sup>303</sup> See OR. REV. STAT. §§ 161.385 through 161.400, 419C.411, 419C.520 through 419C.544 (2017).

<sup>304</sup> Public Defense Legal Services Contract between PDSC and Youth, Rights & Justice, Specific Terms ¶ 7.1 ("Contractor may credit one (1) JUDO credit if appointed by the court to represent a child who is a runaway from another jurisdiction and there is no accompanying petition. Contractor's monthly report will note that the case is a runaway matter."), ¶ 7.4 ("JPSRB is defined as any appointment to represent a youth on a Psychiatric Security Review Board matter, which shall include the initial hearing. JPSRB review hearings include hearings before the Juvenile Psychiatric Review Board subsequent to the initial hearing, or any interdisciplinary team meeting at the state hospital or secure treatment facility where the conditional release of a youth or person under JPSRB jurisdiction is considered. Contractor will provide the date(s) and location(s) of the interdisciplinary meeting when credit is claimed for this activity.") (Jan. 1, 2018 through Dec. 31, 2019).

<sup>305</sup> Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018); email from OPDS Human Resources Manager Wendy Heckman to Sixth Amendment Center (Oct. 24, 2018).

<sup>306</sup> Public Defense Legal Services Contract between PDSC and Youth, Rights & Justice, Specific

The balance of the contract value is \$500,000 for the Juvenile Law Resource Center, \$771,134 for investigation offset, and \$192,410 for dependency offset, and the contractor does not have to account for the services it provides through these funds. Youth, Rights & Justice operates the Juvenile Law Resource Center, which provides support and training to juvenile defense attorneys statewide<sup>307</sup> and publishes *The Juvenile Law Reader*.<sup>308</sup>

**Portland Juvenile Defenders, Inc.** is a consortium of 15 private attorneys<sup>309</sup> working through five separate law firms. One law firm owner has an associate and additionally subcontracts to three more attorneys (for a total of five attorneys). A second law firm owner subcontracts to one additional attorney (for a total of two attorneys). A third law firm owner subcontracts to one additional attorney (for a total of two attorneys). A fourth law firm owner subcontracts to one additional attorney (for a total of two attorneys). The final law firm has two owners and they employ two associates (for a total of four attorneys). This consortium received its first contract from PDSC in 2016.<sup>310</sup>

Its contract with PDSC<sup>311</sup> for 2018 and 2019 provides a total two-year contract value of \$4,027,764. Of the total contract value, \$3,760,880 is for Portland Juvenile Defenders, Inc. to provide representation in a total of 7,816 juvenile delinquency and dependency credits in Multnomah County, and the contractor must account for these funds through the case credit billing system. The balance of the contract value is \$266,884 for dependency offset, and the contractor does not have to account for the services it provides through these funds.

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Terms ¶ 7.1 (Jan. 1, 2018 through Dec. 31, 2019) (“Appeals are defined under this Agreement as representation of clients on appeals from any Oregon juvenile court proceeding. One appeal credit includes work at the Court of Appeals level through briefing, argument and decision, and filing or responding to a Petition for Review by the Supreme Court. If the Supreme Court accepts review, Contractor may claim one additional appeal credit.”).

<sup>307</sup> Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018).

<sup>308</sup> Public Defense Legal Services Contract between PDSC and Youth, Rights & Justice, Specific Terms ¶ 7.3 (Jan. 1, 2018 through Dec. 31, 2019) (“Funding for the Juvenile Law Resource Center includes attorney and staff time and routine overhead. Contractor may bill separately for travel associated with training sessions and printing expenses related to training and publications. This funding also includes electronically publishing and distributing to its readership at least four (4) issues of *The Juvenile Law Reader*. Each issue will be a minimum of 12 pages.”).

<sup>309</sup> At the time the contract was awarded, OPDS showed Portland Juvenile Defenders, Inc. as having 14 attorneys. *See* OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION, MEMBERSHIP DIRECTORY, OREGON PUBLIC DEFENSE CONTRACTS (Mar. 19, 2018).

<sup>310</sup> Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018). At that time, Portland Juvenile Defenders, Inc. replaced the Multnomah Juvenile Defense Consortium as an annual contractor with PDSC in Multnomah County. *Id.*

<sup>311</sup> Public Defense Legal Services Contract between PDSC and Portland Juvenile Defenders, Inc., Specific Terms (Jan. 1, 2018 through Dec. 31, 2019). OPDS pays Portland Juvenile Defenders, Inc. \$167,829 in January 2018 and in January 2019 and \$167,823 in each of the other 22 months.



Portland Juvenile Defenders, Inc. is required by the contract “to reduce attorney caseloads by either increasing the number of attorneys providing services under this contract, reducing the portion of non-contract work performed by attorneys working under this contract, accepting fewer case appointments, a combination of those measures, or by other means determined by the contractor.”<sup>312</sup>

**Troy & Rosenberg, PC** is a private for-profit law firm of three attorneys, plus as of October 1, 2018, the law firm also subcontracts some cases to a fourth attorney who works outside of the law firm. Its contract with PDSC<sup>313</sup> provides a total two-year contract value of \$1,079,846. Of the total contract value, \$997,528 is for Troy & Rosenberg, PC to provide representation in a total of 2,080 juvenile delinquency and dependency credits in Multnomah County, and the contractor must account for these funds through the case credit billing system. The balance of the contract value is \$82,318 for dependency offset, and the contractor does not have to account for the services it provides through these funds.

Troy & Rosenberg, PC is excused by PDSC from the requirement under the General Terms of its contract to “maintain financial records on an accrual basis” and to show in their financial records “that all disbursements or expenditures of contract funds were ordinary, reasonable and necessary, and related to providing direct services required under the contract or services necessary to performance of the contract.”<sup>314</sup>

**Sage Legal Center** is a non-profit law firm of two or three attorneys,<sup>315</sup> specializing in cases under the Indian Child Welfare Act.<sup>316</sup> Among the 63 annual contractors for trial services in 2018 and 2019, Sage Legal Center is the only non-profit law firm classified by OPDS as a law firm rather than as a public defender office, which means it is

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<sup>312</sup> Public Defense Legal Services Contract between PDSC and Portland Juvenile Defenders, Inc., Specific Terms ¶ 7 (Jan. 1, 2018 through Dec. 31, 2019).

<sup>313</sup> Public Defense Legal Services Contract between PDSC and Troy & Rosenberg, PC, Specific Terms (Jan. 1, 2018 through Dec. 31, 2019). OPDS pays Troy & Rosenberg, PC \$45,000 in January 2018 and in January 2019, and \$44,993 in each of the other 22 months.

<sup>314</sup> Public Defense Legal Services Contract between PDSC and Troy & Rosenberg, PC, Specific Terms ¶ 7 (Jan. 1, 2018 through Dec. 31, 2019).

<sup>315</sup> At the time the contract was awarded, OPDS showed Sage Legal Center as having three attorneys. See OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION, MEMBERSHIP DIRECTORY, OREGON PUBLIC DEFENSE CONTRACTS (Mar. 19, 2018).

<sup>316</sup> Email from OPDS General Counsel Paul Levy to Sixth Amendment Center (May 31, 2018).

allowed to engage in legal representation outside of its contract with PDSC.<sup>317</sup> The law firm received its first contract from PDSC beginning in January 2015.<sup>318</sup>

Its contract with PDSC<sup>319</sup> for 2018 and 2019 provides a total two-year contract value of \$850,946. Of the total contract value, \$786,076 is for Sage Legal Center to provide representation in a total of 1,324 dependency credits in Multnomah County, and the contractor must account for these funds through the case credit billing system. The balance of the contract value is \$64,870 for dependency offset, and the contractor does not have to account for the services it provides through these funds.

Sage Legal Center is required by the contract “to reduce attorney caseloads by either increasing the number of attorneys providing services under this contract, reducing the portion of non-contract work performed by attorneys working under this contract, accepting fewer case appointments, a combination of those measures, or by other means determined by the contractor.”<sup>320</sup> Sage Legal Center is excused by PDSC from the requirement under the General Terms of its contract to “maintain financial records on an accrual basis” and to show in their financial records “that all disbursements or expenditures of contract funds were ordinary, reasonable and necessary, and related to providing direct services required under the contract or services necessary to performance of the contract.”<sup>321</sup>

*c. Distribution of cases among PDSC annual contractors*

The seven contractors divide the caseload by case type.

Adult criminal cases are divided among Metropolitan Public Defender Services, Inc., Multnomah Defenders, Inc., and Portland Defense Consortium. Metropolitan Public Defender Services, Inc. is required by its contract to staff all criminal case arraignments in Multnomah County; except Multnomah Defenders, Inc.

<sup>317</sup> OPDS defines a law firm as “a sole practitioner, partnership, or professional corporation which provides contract services to persons qualifying for court-appointed legal representation and which may also engage in non-court-appointed legal representation.” Public Defense Legal Services Contract, General Terms ¶ 1.4.4 (Jan. 1, 2018 to Dec. 31, 2019). A public defender office is defined by OPDS as “a nonprofit organization employing attorneys and other staff established to provide contract services to persons qualifying for court-appointed legal representation.” Public Defense Legal Services Contract, General Terms ¶ 1.4.3 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>318</sup> Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018). At that time, Sage Legal Center replaced the Native American Program - Legal Aid Services of Oregon as an annual contractor with PDSC in Multnomah County. *Id.*

<sup>319</sup> Public Defense Legal Services Contract between PDSC and Sage Legal Center, Specific Terms (Jan. 1, 2018 through Dec. 31, 2019). OPDS pays Sage Legal Center \$35,457 in January 2018 and in January 2019 and \$35,456 in each of the other 22 months.

<sup>320</sup> Public Defense Legal Services Contract between PDSC and Sage Legal Center, Specific Terms ¶ 7.2 (Jan. 1, 2018 through Dec. 31, 2019).

<sup>321</sup> Public Defense Legal Services Contract between PDSC and Sage Legal Center, Specific Terms ¶ 7.1 (Jan. 1, 2018 through Dec. 31, 2019).

is required to staff all criminal case proceedings at the Gresham courthouse. Portland Defense Consortium's contract requires that it be assigned to all probation violation proceedings (on the JC2 docket) and to the early disposition program for misdemeanors.

For felony cases, Metropolitan Public Defender Services, Inc. appears at felony arraignments (on the JC3 docket). Based on a grid provided by OPDS and divided into various levels of felony cases, it assigns criminal cases to either itself, Multnomah Defenders, Inc., or Portland Defense Consortium.

For misdemeanor cases arising east of 122nd Avenue, by contract, Multnomah Defenders, Inc. is assigned to all misdemeanor cases and proceedings held in the Gresham courthouse. For misdemeanor cases arising west of 122nd Avenue (on the JC4 docket): Multnomah Defenders, Inc. appears at arraignments on Mondays, Thursday, and Fridays and is assigned to all cases (barring a conflict); Metropolitan Public Defender Services, Inc. appears at arraignments on Tuesdays and Wednesdays and is assigned to all cases (barring a conflict); and on all five days, conflict cases are appointed by the judge to private attorneys from a list provided by OPDS.

For low-level misdemeanor cases diverted to Community Court (602 docket at the main courthouse) for arraignment: Multnomah Defenders, Inc. appears in Community Court on Mondays and Tuesdays and is assigned to all cases (barring a conflict); and Metropolitan Public Defender Services, Inc. appears in Community Court on Wednesdays and Thursdays and is assigned to all cases (barring a conflict). Metropolitan Public Defender Services, Inc. and Multnomah Defenders, Inc. each continue to represent, during their participation in Community Court, all financially eligible clients to whom they were previously appointed.

Metropolitan Public Defender Services, Inc. represents all financially eligible people while they are participating in the "STOP" adult drug court, the mental health court, and the "START" court.

Juvenile delinquency cases are handled by five contractors: Youth, Rights & Justice; Portland Juvenile Defenders, Inc.; Metropolitan Public Defender Services, Inc.; Troy & Rosenberg, PC; and a small number of juvenile measure 11 and juvenile probation cases are handled by Multnomah Defenders, Inc.

Dependency cases are handled by six contractors: Portland Juvenile Defenders, Inc.; Youth, Rights & Justice; Troy & Rosenberg, PC; Metropolitan Public Defender Services, Inc.; Multnomah Defenders, Inc.; and Sage Legal Center. Sage Legal Center is most often appointed to cases under the Indian Child Welfare Act. For dependency cases, it is often and perhaps even typically the situation that all of the family members in a single case are financially eligible for appointed counsel, and each of them may be

entitled to an attorney separate from the others. This means a single case may involve multiple appointed attorneys. Because the attorneys appointed to each of the parties in a single case cannot be affiliated with each other, only the Portland Juvenile Defenders, Inc. consortium can provide more than one attorney in a single case – all of the other five contractors can each provide only one attorney per case.

# CHAPTER III

## SELECTION, QUALIFICATIONS, TRAINING, AND SUPERVISION OF ATTORNEYS WHO PROVIDE PUBLIC DEFENSE SERVICES

Every state in the nation has created some sort of system for providing an attorney to represent an indigent defendant who is charged with a crime and facing the possible loss of their liberty. Attorneys provide representation to indigent people within the structures of these systems. In *United States v. Cronic*,<sup>322</sup> the U.S. Supreme Court explains that deficiencies in these systems can make any lawyer – even the best attorney – perform in a non-adversarial way that results in a “constructive”<sup>323</sup> denial of the right to counsel.

The *Cronic* Court explains further that, when a lawyer provides representation within an indigent defense system that constructively denies the right to counsel, the lawyer is presumptively ineffective.<sup>324</sup> The government bears the burden of overcoming that presumption. The government may argue that the defense lawyer in a specific case will not be ineffective despite the structural impediments in the system, but it is the government’s burden to prove this. As the Seventh Circuit Court of Appeals noted over 30 years ago in *Wahlberg v. Israel*,<sup>325</sup> “if the state is not a passive spectator of an inept defense, but a cause of the inept defense, the burden of showing prejudice [under *Strickland*] is lifted. It is not right that the state should be able to say, ‘sure we impeded your defense – now prove it made a difference.’”<sup>326</sup>

In *Cronic*,<sup>327</sup> the U.S. Supreme Court pointed to the case of the so-called “Scottsboro Boys” – *Powell v. Alabama*<sup>328</sup> – as representative of the constructive denial of the right to counsel.<sup>329</sup> The trial judge overseeing the Scottsboro Boys’ Alabama trial appointed

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<sup>322</sup> 466 U.S. 648 (1984).

<sup>323</sup> *Strickland v. Washington*, 466 U.S. 668, 683 (1984) (“The Court has considered Sixth Amendment claims based on actual or constructive denial of the assistance of counsel altogether, as well as claims based on state interference with the ability of counsel to render effective assistance to the accused.”) (citing *United States v. Cronic*, 466 U.S. 648 (1984)).

<sup>324</sup> *United States v. Cronic*, 466 U.S. 648, 657-62 (1984).

<sup>325</sup> 766 F.2d 1071 (7th Cir. 1985).

<sup>326</sup> *Wahlberg v. Israel*, 766 F.2d 1071, 1076 (7th Cir. 1985).

<sup>327</sup> 466 U.S. 648 (1984).

<sup>328</sup> 287 U.S. 45 (1932).

<sup>329</sup> *United States v. Cronic*, 466 U.S. 648, 659-60 (1984) (“[I]f counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. . . . Circumstances of that magnitude may be present on some occasions when, although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual

a real estate lawyer from Chattanooga, who was not licensed in Alabama and was admittedly unfamiliar with the state’s rules of criminal procedure.<sup>330</sup> The *Powell* Court concluded that defendants require the “guiding hand” of counsel;<sup>331</sup> that is, the attorneys a state provides to represent financially eligible defendants must be qualified and trained to help those defendants advocate for their stated legal interests.

This chapter and Chapter IV explain the details of the systems put in place by PDSC and OPDS, and the attorneys within those systems, that provide the right to counsel at trial to adults charged with crimes in Oregon’s circuit courts. As explained in Chapter II, other than in capital murder cases, almost all trial level representation is provided through the annual contracts that PDSC has entered into with various entities made up of one or more attorneys. Accordingly, this discussion focuses on those contractors, and in particular looks closely at the 16 annual contractors who provide adult criminal representation in the sample counties in 2018 and 2019. They are:

Contractor	County	Type
Clackamas Indigent Defense Corporation *	Clackamas	consortium
Umpqua Valley Public Defender	Douglas	PD office
Roseburg Defense Consortium	Douglas	consortium
Arneson and Stewart PC	Douglas	law firm
Richard A. Cremer, PC	Douglas	law firm
John B. Lamborn PC	Grant & Harney	law firm
Law Office of Robert S. Raschio PC	Grant & Harney	law firm
Public Defender Services of Lane County	Lane	PD office
Lane County Defense Consortium	Lane	consortium
Marion County Association of Defenders, Limited	Marion	consortium
Public Defender of Marion County	Marion	PD office
Metropolitan Public Defender Services, Inc.	Multnomah	PD office
Multnomah Defenders, Inc.	Multnomah	PD office
Portland Defense Consortium	Multnomah	consortium
Intermountain Public Defender Inc.	Umatilla & Morrow	PD office
Blue Mountain Defenders	Umatilla & Morrow	consortium

\* one-year contract only for 2018

conduct of the trial. *Powell v. Alabama*, 287 U.S. 45 (1932), was such a case.”).

<sup>330</sup> A retired local attorney who had not practiced in years was also appointed to assist in the representation of all nine co-defendants.

<sup>331</sup> *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). (“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.”).

Most of the attorneys who participate in these annual contracts are also required by their PDSC annual contracts to provide representation in juvenile delinquency, dependency, and/or civil commitment cases, and often are required to provide additional legal services. Where these other practice areas have effects on the lawyers' ability to provide effective representation in adult criminal cases, we address them briefly throughout the remainder of this report, but we acknowledge there are many aspects of providing the right to counsel in these other types of cases that are not explored by this evaluation and report.

Before proceeding, we are especially grateful to the many lawyers, judges, and justice system personnel, and particularly the attorneys working in the other nine annual contractors in the sample counties, whose sole areas of work are juvenile delinquency, dependency, and/or civil commitment. They generously gave us their time to enable us to more fully understand Oregon's system of providing public counsel. Wherever possible, their input is included in this report.

## A. SELECTING THE ATTORNEYS AVAILABLE TO PROVIDE PUBLIC REPRESENTATION

The first thing that must occur in creating a system to provide effective assistance of counsel is to select the attorneys who are available to provide that representation. National standards, as compiled in the *ABA Ten Principles*, require that, "[w]here the caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar."<sup>332</sup> The commentary clarifies, stating:

The private bar participation may include part-time defenders, a controlled assigned counsel plan, or contracts for services. The appointment process should never be *ad hoc*, but should be according to a coordinated plan directed by a full-time administrator who is also an attorney familiar with the varied requirements of practice in the jurisdiction. Since the responsibility to provide defense services rests with the state, there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.<sup>333</sup>

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<sup>332</sup> AMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 2 (Feb 2002).

<sup>333</sup> AMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, commentary to Principle 2 (Feb 2002).

The Oregon legislature has instructed the Public Defense Services Commission to “[e]stablish and maintain” the public defense system,<sup>334</sup> including through the personnel employed by the OPDS<sup>335</sup> and through contracts to provide public defense services.<sup>336</sup> The legislature makes the executive director of OPDS responsible for recommending to the PDSC how to operate the system<sup>337</sup> and specifically instructs the OPDS executive director to “[e]mploy personnel or contract for services as necessary.”<sup>338</sup> Under this legislative scheme, PDSC and OPDS choose whether the attorneys who provide representation at trial will be employees of OPDS or whether PDSC will contract with them, and they have chosen to contract rather than employ the attorneys.

### 1. PDSC & OPDS selection of contractors

As explained in Chapter II, under the system established and maintained by PDSC and OPDS, in 2018 there are only two ways that any attorney can be a public defense attorney representing adults in trial level criminal cases in Oregon. They can get their name onto the OPDS approved list of attorneys,<sup>339</sup> who are appointed on a case-by-case basis and (for all but lead counsel in capital cases) are paid \$46 per hour<sup>340</sup> out of which they must pay for all of their overhead costs.<sup>341</sup> Alternatively, they must obtain an annual contract, either by successfully applying individually or by participating in some type of contractor group.

Of the 63 annual contracts that PDSC awarded for trial level services in 2018 and 2019,<sup>342</sup> only four of those contracts went to individual attorneys.<sup>343</sup> (See table of PDSC Annual Contractors for Trial Representation in 2018 & 2019 on page 32.) Three of these are to three separate attorneys in Malheur County, where the only other annual contractor is a private law firm of three attorneys,<sup>344</sup> creating a combined total of six attorneys under annual contract to provide all representation in the county. The

<sup>334</sup> OR. REV. STAT. § 151.216(1)(a) (2017).

<sup>335</sup> OR. REV. STAT. § 151.216(1)(e) (2017).

<sup>336</sup> OR. REV. STAT. § 151.216(1)(e) (2017).

<sup>337</sup> OR. REV. STAT. § 151.219(1)(a) (2017).

<sup>338</sup> OR. REV. STAT. § 151.219(1)(e) (2017).

<sup>339</sup> Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018).

<sup>340</sup> PDSC & OPDS, PUBLIC DEFENSE PAYMENT POLICY AND PROCEDURES ¶¶ 2.1.1, 2.1.2, and Exh. 2 Schedule of Guideline Amounts (Apr. 1, 2018); email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018).

<sup>341</sup> PDSC & OPDS, PUBLIC DEFENSE PAYMENT POLICY AND PROCEDURES ¶¶ 2.3.4, 3.4.2 (rev’d Apr. 1, 2018).

<sup>342</sup> Out of a total of 118 proposals that OPDS received during the RFP process for the 2018 & 2019 contracts, there were only four proposals for any contract (whether individual death penalty contract or annual non-death penalty contract) that were unsuccessful. Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (Nov. 26, 2018) (list of proposals for 2018 & 2019 contracts on file with Sixth Amendment Center).

<sup>343</sup> See OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION, MEMBERSHIP DIRECTORY, OREGON PUBLIC DEFENSE CONTRACTS (Mar. 19, 2018).

<sup>344</sup> See OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION, MEMBERSHIP DIRECTORY, OREGON PUBLIC DEFENSE CONTRACTS (Mar. 19, 2018).



fourth is to an attorney in Clatsop County, where the only other annual contractor is a consortium of five attorneys,<sup>345</sup> creating a combined total of six attorneys under annual contract to provide all representation in the county. The chance of an individual attorney being awarded an annual contract by PDSC is slim unless that attorney provides a unique expertise or works in a county where there is a very small number of attorneys.<sup>346</sup>

There may be any number of reasons why PDSC prefers not to enter into annual contracts with individual attorneys. (*See* “A quick note on the question of employees and independent contractors” at page 75.) OPDS explained the primary reason, though, as early as 2004:

Given the potential influence [of PDSC and OPDS] stemming from the power to evaluate and select attorneys individually, and the one-on-one relationship and direct lines of communications between the attorney and OPDS inherent in this contractual arrangement, the Commission can ensure meaningful administrative oversight and quality control over individual attorneys under contract. Those advantages obviously diminish as the number of attorneys under contract with PDSC increases.

This type of provider . . . offers none of the administrative advantages of economies of scale, centralized administration or ability to handle conflicts of interest associated with other types of organizations.<sup>347</sup>

In other words, it would be a large administrative task for OPDS to directly manage the approximately 647 attorneys<sup>348</sup> who provide trial level representation in 2018 and 2019.

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<sup>345</sup> *See* OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION, MEMBERSHIP DIRECTORY, OREGON PUBLIC DEFENSE CONTRACTS (Mar. 19, 2018).

<sup>346</sup> *See, e.g.*, OPDS’s Report to the Public Defense Services Commission: The Results of OPDS’s Investigations in Service Delivery Region 4 (Benton, Lane, Lincoln & Linn Counties), Part I: Lane County p. 8 (Feb. 2004) (“Individual attorneys efficiently provide a variety of quality public defense services under contract with PDSC, including in specialty areas of practice like aggravated murder cases and in geographic areas of the state with limited supplies of qualified attorneys.”).

<sup>347</sup> OPDS’s Report to the Public Defense Services Commission: The Results of OPDS’s Investigations in Service Delivery Region 4 (Benton, Lane, Lincoln & Linn Counties), Part I: Lane County pp. 8-9 (Feb. 2004).

<sup>348</sup> The Sixth Amendment Center developed the list identifying the number and names of individual attorneys who participate in trial level representation contracts with PDSC. First, 6AC compiled the names of all attorneys identified in the Oregon Criminal Defense Lawyers Association Membership Directory listing of annual contract providers in each county (and then excluded attorneys under annual contract to provide services other than trial representation) and the list provided by OPDS of attorneys under contract to be appointed on a case-by-case basis in capital murder contracts (again, excluding attorneys under individual contract to provide services other than trial representation). Next, 6AC reviewed the compiled list to identify attorneys whose names appear in more than one contract. Finally, 6AC sent that list to OPDS for confirmation.

Instead, PDSC and OPDS transfer both the responsibility for the selection and management of individual attorneys and the risks<sup>349</sup> of those decisions onto the entities with which PDSC enters into annual contracts. Aside from the four individual attorney contracts, the other 59 annual contracts that PDSC awarded for trial level services in 2018 and 2019 are to 10 public defender offices, 12 private for-profit law firms, 36 consortia, and one non-profit law firm.<sup>350</sup>

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<sup>349</sup> Risks include litigation relating to state and federal employment law, wage law, non-discrimination law, malpractice, and claims of ineffective assistance of counsel. The General Terms of the annual contracts all provide: “Contractor shall protect, indemnify, defend and hold harmless PDSC and the State of Oregon from all liability, obligations, damages, losses, claims, suits, or actions of whatever nature that result from or arise out of Contractor’s activities.” Public Defense Legal Services Contract, General Terms ¶ 7.3.1 (Jan. 1, 2018 to Dec. 31, 2019). In addition, although PDSC does not require contractors and attorneys to report on many measures of the effectiveness of representation provided, PDSC does require contractors to maintain insurance policies protecting PDSC and “shall provide PDSC a copy of the certificate of insurance listing the coverage and additional insured information.” Public Defense Legal Services Contract, General Terms ¶ 7.3.5 (Jan. 1, 2018 to Dec. 31, 2019); *see id.* at ¶¶ 7.3.5.1 through 7.3.5.4.

<sup>350</sup> *See* OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION, MEMBERSHIP DIRECTORY, OREGON PUBLIC DEFENSE CONTRACTS (Mar. 19, 2018).

## A QUICK NOTE ON THE QUESTION OF EMPLOYEES AND INDEPENDENT CONTRACTORS

The State of Oregon attempts to fulfill its Fourteenth Amendment obligation to provide the Sixth Amendment right to counsel in trial courts primarily through an array of contracts let by the Public Defense Services Commission to public defender offices, private law firms, consortia of individual attorneys and law firms, non-profit organizations, and occasionally individual lawyers. Through these contracts, PDSC and OPDS devolve onto the contractors the decisions about the identity of the individual attorneys who provide the right to counsel, how those individual attorneys are appointed to the cases of specific defendants, and how and how much the individual attorneys are paid for their work.

As explained throughout this report, PDSC and OPDS do not have any way of knowing who the attorneys are or how many attorneys are providing the right to counsel on any given day. PDSC and OPDS do not require the contracting entities to explain how much money is spent on overhead and what is acquired, how much money is paid to a contract administrator and what services are provided in exchange, or how much money is paid to the constituent individual attorneys and what services those attorneys provide in exchange. PDSC and OPDS do not require contractors to explain the manner in which they assign cases to their constituent attorneys, and they have no way of monitoring or controlling the workloads being handled by the individual attorneys. PDSC and OPDS's decision to affirmatively avoid securing this most basic information seems to arise from an effort to ensure that the individual lawyers who provide the right to counsel not be considered as employees of OPDS under state and/or federal law.

The General Terms of each PDSC annual contract state: "For purposes of this contract, Contractor is an independent contractor and has so certified under Oregon laws. Neither Contractor nor any of its subcontractors, employees, officers, agents, members, and representatives, is an employee of the State of Oregon or a state aided institution or agency, by reason of this contract alone."<sup>351</sup> Under the laws of many states and the federal government, courts most often look beyond the "independent contractor" label and apply various multi-factor tests, examining the actual working relationship of contracting parties, to decide whether a person labeled as an independent contractor should in fact properly be classified as an employee. While the tests used in various jurisdictions have different language and weigh differing factors, in the end they all focus on whether the government exercises so much direction and control over an independent contractor that they are, in reality, no different from any other government employee. This question of contractor or employee arose in King County, Washington and resulted in a decision that has circulated widely among state and county administrators and lawmakers throughout the country.

<sup>351</sup> Public Defense Legal Services Contract, General Terms ¶ 7.3.2 (Jan. 1, 2018 to Dec. 31, 2019).

As related in *Dolan v. King County*,<sup>352</sup> for decades King County, Washington contracted with four separate non-profit public defender offices to provide Sixth Amendment right to counsel services. The plaintiffs in *Dolan* were attorneys employed by those public defender offices. The plaintiffs alleged that, despite the county purporting to contract with the offices, over time the county had exerted more and more influence over the four offices to the point where they were independent in name only. For example, in the mid-1980s, the county wanted there to be a public defender agency with staff composed predominantly of racial minorities.<sup>353</sup> In response to the county's wishes, the Northwest Defenders Association (NDA) was established in 1987.<sup>354</sup> In 2002, NDA went into receivership and, as a result, "the county required changes in the composition of the board of directors, bylaws, corporate articles, employee policies, financial practices, and contract with the county for all of its public defender organizations."<sup>355</sup> The county was given authority to "terminate the contract without cause," "review client files," and restrict all public defender organizations' "ability to turn down individual cases."<sup>356</sup> These changes, taken together with a budgeting process that mirrored that of all county departments, made the employees of the four public defender offices, in the minds of the plaintiffs, de facto county employees entitled to equal pay and benefits.<sup>357</sup>

The county took a different view, arguing that because "defenders are free to defend clients without interference and may hire and fire without interference," they are not akin to county employees. The Washington Supreme Court disagreed, stating: "Under its reasoning, the county could turn its sheriff's department into a nonprofit corporation and because the sheriff generally has authority to hire and fire and carry out police work, the sheriff's department would become an independent contractor. The county is wrong."<sup>358</sup>

Ultimately, the Washington Supreme Court held that "the county has exerted such a right of control over the defender organizations as to make them agencies of the county," and the "employees of the defender organizations are employees of the county" entitled to be enrolled in the government's retirement system.<sup>359</sup> The Washington Supreme Court was careful to explain:

An independent contractor, whether for profit or nonprofit, does not lose its independence simply because it is providing a public service at the request of the government. Further, government can and should exact high standards of performance from its independent contractors. Prudent financial controls and careful oversight of contract compliance does not render a contractor an agency of the government. The

<sup>352</sup> 258 P.3d 20 (Wash. 2011).

<sup>353</sup> 258 P.3d at 23.

<sup>354</sup> 258 P.3d at 23.

<sup>355</sup> 258 P.3d at 24.

<sup>356</sup> 258 P.3d at 24.

<sup>357</sup> 258 P.3d at 26.

<sup>358</sup> 258 P.3d at 30.

<sup>359</sup> 258 P.3d at 32.

retention of the right to inspect and supervise to insure the proper completion of the contract does not vitiate the independent contractor relationship.<sup>360</sup>

As reflected in *Dolan*, gathering information about how a public service is performed is different than controlling the process or work being performed. PDSC and OPDS have a fiduciary duty to taxpayers and a constitutional duty to financially eligible defendants to exercise oversight of the system they have established to provide the Sixth Amendment right to counsel.

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<sup>360</sup> 258 P.3d at 30 (internal quotation marks omitted).

*a. A brief history of PDSC trial services contractors*

When PDSC was established in 2001 and took over responsibility for public defense services in 2003, Oregon had already been providing attorneys to represent financially eligible people for decades. (*See* brief history of public defense services in Oregon at Chapter I.C. page 13.) As a result, there were many attorneys, law firms, consortia, and public defender offices that had been providing representation under the auspices of the trial court judges and the State Court Administrator until 1987 and then under the State Court Administrator from 1987 to 2003.

At its outset, PDSC continued to use these pre-existing systems for providing the right to counsel. Most of the PDSC annual contractors who provide representation in 2018 and 2019 are either the same contractors or direct descendants of these earlier contractors. For adult trial level representation in the sample counties, 14 out of the 16 annual contractors are examples of this: the Clackamas Indigent Defense Corporation consortium;<sup>361</sup> all four of the annual contractors in Douglas County;<sup>362</sup> both of the annual contractors serving Grant and Harney counties;<sup>363</sup> the Public Defender Services of Lane County public defender office;<sup>364</sup> the Marion County Association of Defenders, Limited consortium;<sup>365</sup> all three of the adult criminal defense annual contractors in Multnomah County;<sup>366</sup> and both of the annual contractors serving Umatilla and Morrow counties.<sup>367</sup>

<sup>361</sup> Public Defense Services Commission – Clackamas County Service Delivery Plan pp. 5 - 7 (Oct. 2010); Public Defense Legal Services Contract between PDSC and Clackamas Indigent Defense Corporation (Jan. 1, 2018 through Dec. 31, 2018).

<sup>362</sup> Public Defense Services Commission Service Delivery Plan for Douglas County Final Report p. 17 (Aug. 2012); Public Defense Legal Services Contract between PDSC and Umpqua Valley Public Defender (Jan. 1, 2018 through Dec. 31, 2019); Public Defense Legal Services Contract between PDSC and Arneson and Stewart, P.C. (Jan. 1, 2018 through Dec. 31, 2019); Public Defense Legal Services Contract between PDSC and Richard A. Cremer, PC (Jan. 1, 2018 through Dec. 31, 2019); Public Defense Legal Services Contract between PDSC and Roseburg Defense Consortium (Jan. 1, 2018 through Dec. 31, 2019).

<sup>363</sup> Public Defense Services Commission Service Delivery Plan for Judicial District No. 24 pp. 11, 14 (Nov. 2008); Public Defense Legal Services Contract between PDSC and John B. Lamborn PC (Jan. 1, 2018 through Dec. 31, 2019); Public Defense Legal Services Contract between PDSC and Law Office of Robert S. Raschio PC (Jan. 1, 2018 through Dec. 31, 2019).

<sup>364</sup> OPDS's Report to the Public Defense Services Commission: The Results of OPDS's Investigations in Service Delivery Region 4 (Benton, Lane, Lincoln & Linn Counties), Part I: Lane County pp. 10 - 11 (Feb. 2004); Public Defense Legal Services Contract between PDSC and Public Defender Services of Lane County (Jan. 1, 2018 through Dec. 31, 2019).

<sup>365</sup> OPDS's Report to the Public Defense Services Commission on Service Delivery in Marion County pp. 11, 22 (Nov. 2005); Public Defense Legal Services Contract between PDSC and Marion County Association of Defenders, Limited (Jan. 1, 2018 through Dec. 31, 2019).

<sup>366</sup> OPDS's Report to the Public Defense Services Commission on Service Delivery in Multnomah County p. 13 (Apr. 2005); Public Defense Legal Services Contract between PDSC and Metropolitan Public Defender Services, Inc. (Jan. 1, 2018 through Dec. 31, 2019); Public Defense Legal Services Contract between PDSC and Multnomah Defenders, Inc. (Jan. 1, 2018 through Dec. 31, 2019); Public Defense Legal Services Contract between PDSC and Portland Defense Consortium (Jan. 1, 2018 through Dec. 31, 2019).

<sup>367</sup> Public Defense Services Commission Service Delivery Plan for Judicial District No. 6 Umatilla

*b. Determining the appropriate contractors in each jurisdiction*

Beginning in December 2003 as part of the PDSC's strategic plan, OPDS commenced conducting "service delivery reviews" to determine "whether the right structures were in place" in each jurisdiction.<sup>368</sup> As OPDS explained in one of its earliest reports in 2004:

PDSC intends, first, to review the service delivery system in each county and develop its Service Delivery Plan with local conditions, resources, history and practices in mind. . . . [I]n the event PDSC concludes that a change in a county or region is necessary to advance the mission of Oregon public defense, it will weigh the advantages and disadvantages and the strengths and weaknesses of [the existing types of] organizations in the course of considering potential changes in a local service delivery system.<sup>369</sup>

Unfortunately, with limited OPDS staff and due to the amount of time involved in fully reviewing each jurisdiction, it has taken 15 years for OPDS to conduct a service delivery review in each of 32 out of the 36 counties.<sup>370</sup> OPDS issued its report for the last of these 32 counties in March of 2018.<sup>371</sup>

PDSC used the information gained through the service delivery reviews to begin developing a service delivery plan for each jurisdiction; that is, to determine the appropriate mix and identity of contractors.<sup>372</sup> Some of the PDSC annual contractors who provide representation in 2018 and 2019 were established directly at the instigation of OPDS as part of these service delivery plans. For adult trial level representation in the sample counties, two out of the 16 annual contractors are

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and Morrow Counties pp. 16, 18 (May 2008); Public Defense Legal Services Contract between PDSC and Intermountain Public Defender Inc. (Jan. 1, 2018 through Dec. 31, 2019); Public Defense Legal Services Contract between PDSC and Blue Mountain Defenders (Jan. 1, 2018 through Dec. 31, 2019).

<sup>368</sup> Email from OPDS General Counsel Paul Levy to Sixth Amendment Center (Mar. 18, 2018); *see generally Reports & Publications, Service Delivery Reports*, PUBLIC DEFENSE SERVICES COMMISSION, <https://www.oregon.gov/opds/commission/Pages/reports.aspx>.

<sup>369</sup> OPDS's Report to the Public Defense Services Commission: The Results of OPDS's Investigations in Service Delivery Region 4 (Benton, Lane, Lincoln & Linn Counties), Part I: Lane County p. 5 (Feb. 2004).

<sup>370</sup> As of December 2018, OPDS has not yet been able to conduct a service delivery review for Columbia, Crook, Jefferson, and Lake counties, but the contractors that provided services in each of these four counties were the subject of confidential qualitative evaluations conducted by OPDS between 2004 and 2009. Email from OPDS Data & Research Analyst Rachel Woods to Sixth Amendment Center (Nov. 27, 2018).

<sup>371</sup> Public Defense Services Commission Tillamook County Service Delivery Report (Mar. 2018).

<sup>372</sup> *See generally Reports & Publications, Service Delivery Reports*, PUBLIC DEFENSE SERVICES COMMISSION, <https://www.oregon.gov/opds/commission/Pages/reports.aspx>.

examples of this: the Public Defender of Marion County public defender office;<sup>373</sup> and the Lane County Defense Consortium.<sup>374</sup>

*c. Providing an adequate number of independent attorneys*

PDSC and OPDS must provide enough attorneys in each jurisdiction to ensure that every financially eligible person is appointed an attorney who is representing only the legal interests of that individual defendant. This is because each and every defendant has a right to effective representation that is free from conflicts of interest.<sup>375</sup> (*See* “The challenge of providing an adequate number of attorneys in dependency cases” at pages 83 - 84.)

As recognized by the *Oregon Rules of Professional Conduct*, a conflict of interest can arise in basically three ways: between two clients represented by a single lawyer at the same time; between a lawyer’s current client and a lawyer’s former client or a third person with whom the lawyer has a relationship; and between the lawyer’s personal interests and the interests of the lawyer’s client.<sup>376</sup> Generally, unless a “client gives informed consent, confirmed in writing,” a lawyer cannot represent a client if the lawyer has a conflict of interest.<sup>377</sup>

In a public defense system, one of the most frequently arising conflicts of interest occurs when two people are involved in the same case and they each have interests that are or may be adverse to the other person’s interests. For example, if two or more people are accused of committing a burglary together, they are known as codefendants and are presumed to have adverse legal interests. The Oregon State Bar has determined that one lawyer should not represent multiple codefendants in a single criminal case.<sup>378</sup>

<sup>373</sup> Public Defense Services Commission, Marion County Service Delivery Review Final Report pp. 8, 13 (June 2015); Public Defense Legal Services Contract between PDSC and Public Defender of Marion County (Jan. 1, 2018 through Dec. 31, 2019).

<sup>374</sup> OPDS’s Report to the Public Defense Services Commission: The Results of OPDS’s Investigations in Service Delivery Region 4 (Benton, Lane, Lincoln & Linn Counties), Part I: Lane County p. 11 (Feb. 2004); Office of Public Defense Services, Lane County Service Delivery Review pp. 1, 2, 9 (Dec. 2009); Office of Public Defense Services, Lane County Service Delivery Review Update p. 1 (Jan. 2011); Public Defense Legal Services Contract between PDSC and Lane County Defense Consortium (Jan. 1, 2018 through Dec. 31, 2019).

<sup>375</sup> *See, e.g.,* Wood v. Georgia, 450 U.S. 261, 271 (1981) (“Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest.”); Cuyler v. Sullivan, 446 US 335, 346 (1980) (“Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial.”); Glasser v. United States, 315 U.S. 60, 70 (1942) (“[A] ssistance of counsel’ guaranteed by the Sixth Amendment contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests.”).

<sup>376</sup> OR. R. PROF. CONDUCT 1.7, 1.8, 1.9, 1.10.

<sup>377</sup> OR. R. PROF. CONDUCT 1.7.

<sup>378</sup> Oregon State Bar, Formal Opinion No. 2005-82 (rev’d 2016).



Under the *Oregon Rules of Professional Conduct*, if one lawyer in a law firm is disqualified from representing a client due to a conflict of interest, then all of the lawyers in that same law firm are also disqualified from representing that client.<sup>379</sup> As the Oregon State Bar has observed: “Oregon RPC 1.0(d) defines *law firm* to include a public defender’s organization.”<sup>380</sup> For this reason, all of the lawyers working in a single public defender office can only represent one defendant in a multi-defendant case.<sup>381</sup> Similarly, all of the lawyers working in a single private law firm can only represent one defendant in a multi-defendant case.

Of necessity then, for each jurisdiction, there must always be some number of attorneys who do not work together in a single law firm or in a single public defender office.<sup>382</sup> For the most part, PDSC provides these attorneys by contracting with at least one consortium in each county, although among the sample counties in Harney & Grant counties PDSC has instead chosen to contract with two law firms (each of whom can provide one attorney in a case) and then rely on case-by-case appointment of individual attorneys when more than two attorneys are required.

*d. Contractors determine the individual attorneys who provide adult criminal public defense representation*

PDSC makes decisions about the type and identity of the contractors it selects to provide representation in each county. But it does not make decisions about the individual attorneys within the contracting group. Instead, as explained in Chapter II, each contractor decides for itself the attorneys who will participate in the contract.

PDSC and OPDS’ delegation to contractors of this responsibility interjects at least one and sometimes two or three additional layers of bureaucracy and opaqueness into the recruiting, selection, and termination of the individual attorneys who provide the right to counsel. A given contractor may have its own board of directors, then a director or administrator, then a collective bargaining agreement, or any combination of these, all of which may affect the manner in which it selects and retains its constituent attorneys. Public defender offices, private for-profit law firms, and consortia all operate differently, with differing methods of oversight and differing incentives driving their

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<sup>379</sup> OR. R. PROF. CONDUCT 1.10(a).

<sup>380</sup> Oregon State Bar, Formal Opinion No. 2005-174 (rev’d 2016).

<sup>381</sup> Oregon State Bar, Formal Opinion No. 2005-174 (rev’d 2016).

<sup>382</sup> There are many ways that conflicts of interest can arise in a public defense system. Dependency cases, in particular, often require a number of attorneys who are not affiliated with each other. PDSC and OPDS have explored methods of addressing conflicts of interest since their earliest days. SEE, E.G., OPDS’s Report to the Public Defense Services Commission on Service Delivery in Multnomah County pp. 16 - 18 (Apr. 2005); Ann Christian, Preliminary Review of Conflict of Interest in Public Defense Cases (Nov. 12, 2004).

decisions.<sup>383</sup> Similarly, the attorneys who choose to work in these different types of contractor organizations are seeking varying degrees of stability, experience, compensation, and control over their professional lives.

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<sup>383</sup> PDSC and OPDS have been and are aware of the advantages, disadvantages, and differing incentives involved in each of the contractor types, as discussed throughout most of their service delivery reports. See, e.g., OPDS's Report to the Public Defense Services Commission: The Results of OPDS's Investigations in Service Delivery Region 4 pp. 3 - 9 (Mar. 2004).

## THE CHALLENGE OF PROVIDING AN ADEQUATE NUMBER OF ATTORNEYS IN DEPENDENCY CASES

A dependency case involves allegations that a child has been neglected or abused, either physically, mentally, or emotionally.<sup>384</sup> That abuse or neglect may be alleged to have been perpetrated by anyone, but at issue before the court is always the question of whether the adults in the home where the child lives are able to and are protecting the child from neglect and abuse.<sup>385</sup>

Under Oregon's statutes, the parent or legal guardian of a child in a dependency case is entitled to appointed counsel whenever the court finds them to be financially eligible.<sup>386</sup> The court may appoint counsel to represent the child in a dependency case where the child is found to be financially eligible, and in certain situations must do so.<sup>387</sup> The Public Defense Services Commission and the Office of Public Defense Services are responsible for providing the attorneys that the courts appoint.<sup>388</sup>

PDSC and OPDS provide attorneys in dependency cases at the trial court level almost exclusively through annual contracts, and the annual contracts are almost entirely with the same entities that provide representation in all other types of cases at the trial court level.<sup>389</sup> (See discussion at Chapter II, pages 31 through 68 and table of PDSC Annual Contractors for Trial Representation in 2018 on page 32.) For 2018 and 2019 in the sample counties, the 19 annual contractors who provide dependency representation are:

Contractor	County	Type
Juvenile Advocates of Clackamas, LLC	Clackamas	consortium
Independent Defenders Inc.	Clackamas	consortium
Umpqua Valley Public Defender	Douglas	PD office
Roseburg Defense Consortium	Douglas	consortium
Arneson and Stewart PC	Douglas	law firm
Richard A. Cremer, PC	Douglas	law firm
John B. Lamborn PC	Grant & Harney	law firm
Law Office of Robert S. Raschio PC	Grant & Harney	law firm
Public Defender Services of Lane County	Lane	PD office
Lane County Juvenile Lawyers Association	Lane	consortium
Juvenile Advocacy Consortium	Marion	consortium
Metropolitan Public Defender Services, Inc.	Multnomah	PD office

<sup>384</sup> See generally OR. REV. STAT. §§ 419B.005 through 419B.953 (2017).

<sup>385</sup> See, e.g., OR. REV. STAT. §§ 419B.090, 419B.100 (2017).

<sup>386</sup> OR. REV. STAT. § 419B.205 (2017).

<sup>387</sup> OR. REV. STAT. § 419B.195 (2017).

<sup>388</sup> See, e.g., OR. REV. STAT. §§ 135.050, 151.216 (1)(a),(f), 151.219 (2017).

<sup>389</sup> See OREGON TASK FORCE ON DEPENDENCY REPRESENTATION, REPORT p. 19 (July 2016).

Multnomah Defenders, Inc.	Multnomah	PD office
Youth, Rights & Justice	Multnomah	PD office
Portland Juvenile Defenders, Inc.	Multnomah	consortium
Troy & Rosenberg, PC	Multnomah	law firm
Sage Legal Center	Multnomah	non-profit
Intermountain Public Defender Inc.	Umatilla & Morrow	PD office
Blue Mountain Defenders	Umatilla & Morrow	consortium

Among these 19 annual contractors, the Sage Legal Center non-profit in Multnomah County is the only one that is under contract with PDSC to provide exclusively dependency representation.

For dependency cases, it is often and perhaps even typically the situation that all of the family members in a single case are financially eligible for appointed counsel. Each party may be entitled to an attorney separate from the others because they have different and conflicting legal interests. (See discussion of conflicts of interest at Chapter III, pages 80 - 81.) This means a single case may involve multiple appointed attorneys, and the attorneys appointed to each of the parties in a single case cannot be affiliated with each other in a public defender office or a law firm.<sup>390</sup>

For example, in a not unusual dependency case situation, as many as five unconflicted attorneys may be required. Imagine a home where a mother has two children, who each have different fathers, and a report of alleged abuse or neglect is made concerning either or both of the children. The mother may be entitled to an appointed attorney. Each of the two children may be entitled to separate appointed attorneys. The father of the first child may be entitled to an appointed attorney, and the father of the second child may be entitled to an appointed attorney. If any public defender offices are under contract with PDSC in that county, each public defender office can provide one attorney. If any law firms are under contract with PDSC in that county, each law firm can provide one attorney. All other necessary attorneys will have to be provided by any consortia under contract with PDSC in that county, or the court will have to appoint individual attorneys on a case-by-case basis who are paid \$46 per hour out of which they must pay for all of their overhead costs.

<sup>390</sup> See generally OR. R. PROF. CONDUCT 1.10(a); Oregon State Bar, Formal Opinion No. 2005-174 (rev'd 2016); OREGON TASK FORCE ON DEPENDENCY REPRESENTATION, REPORT (July 2016); OREGON STATE BAR, SPECIFIC STANDARDS FOR REPRESENTATION IN JUVENILE DEPENDENCY CASES (June 23, 2017); OPDS's Report to the Public Defense Services Commission on Service Delivery in Multnomah County pp. 16 - 18 (Apr. 2005); Ann Christian, Preliminary Review of Conflict of Interest in Public Defense Cases (Nov. 12, 2004).

## 2. Public defender office contractors' governance and selection of attorneys

The six public defender offices with which PDSC has annual contracts for 2018 and 2019 to provide adult criminal representation in the sample counties are:

Contractor	County	Type
Umpqua Valley Public Defender	Douglas	PD office
Public Defender Services of Lane County	Lane	PD office
Public Defender of Marion County	Marion	PD office
Metropolitan Public Defender Services, Inc.	Multnomah	PD office
Multnomah Defenders, Inc.	Multnomah	PD office
Intermountain Public Defender Inc.	Umatilla & Morrow	PD office

Each of these public defender offices is governed by a board of directors, made up of members who are not employees of the office. Each office has an executive director chosen by the board of directors. Within each office, the executive director typically makes decisions about hiring personnel, with or without input from the board of directors. As will be explained at pages 149 - 159, the public defender offices provide office space, equipment & supplies, and all overhead necessary for the practice of law, and also provide support staff including investigators.

The PDSC annual contracts prohibit the attorneys in a public defender office from practicing law outside of their appointed cases.<sup>391</sup> The attorneys in these offices do not have to generate their own clients, because cases are assigned to them by the office. The attorneys are most often paid salaries at a pre-determined level and receive standard benefits, often governed by a collective bargaining agreement. Because there is not much room for advancement in most of the public defender offices in the sample counties, there tends to be a high rate of turnover among the attorneys, who launch into private practice after gaining experience and training.

### *a. Douglas County – Umpqua Valley Public Defender*

Umpqua Valley Public Defender is a public defender office employing 12 attorneys. This public defender office has been providing the right to counsel in Douglas County since approximately 1972.<sup>392</sup>

Umpqua Valley Public Defender has a five-member board of directors, none of whom are employees of the office. As of August 23, 2018, the members of the board are one attorney who serves as the chair, an additional attorney, a minister, a local business

<sup>391</sup> Public Defense Legal Services Contract, General Terms ¶ 1.4.3 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>392</sup> Public Defense Services Commission, Service Delivery Plan for Douglas County Final Report p. 17 (Aug. 2012).

owner, and a local bank manager.<sup>393</sup> The board is intended to select its own members, but as a practical matter it falls to the office's director to make recommendations that the board then approves. The board is very hands off, meeting only a few times a year.

The board of directors selects the Umpqua Valley Public Defender director, who is currently Dan Bouck, but there is no formal process by which the board makes its selection. Since Umpqua Valley Public Defender was established, Bouck is only its second director. The office's first director selected Bouck to take over and trained him, so at that first director's retirement the board approved his recommendation of Bouck to be his replacement.

Umpqua Valley Public Defender has a high and fast rate of turnover among its attorneys. As one attorney explained: "We're replacing attorneys every four to six months, which is disturbing." A staff member said: "In my seven years here, we've had 30 new attorneys come in." Or as another staff member put it, only two of the current attorneys were there when she was hired over five years ago, and all other attorney positions had rotated twice in that time.

The office's leadership finds it difficult to keep millennial age attorneys in the office. They have tried being less strict about dress code and has considered offering things like a health club membership and bicycle parking to attract and retain staff, because "we can't compete in compensation" with what private law firms can pay. One attorney explained: "They come here, get experience, and then move to the bigger cities."

In the end, in the words of another attorney: "Once you've done five to ten years of trial practice, you move on to private practice, because there isn't a ton of potential growth for high level attorneys staying in the public defender system."

#### *b. Lane County – Public Defender Services of Lane County*

Public Defender Services of Lane County is a public defender office employing 22 attorneys. In August 2018, there were two vacant full-time positions, 18 full-time attorneys paid annual salaries, and two part-time attorneys paid hourly (one working 10 hours per week, and the other 20 hours per week). This public defender office has been providing the right to counsel in Lane County since long before PDSC and OPDS were established.<sup>394</sup>

<sup>393</sup> At the time the contract was awarded, OPDS showed Umpqua Valley Public Defender as having a five-member board of directors: Ron Aitken, attorney; Jim Forrester, attorney; Rich Mouser, business owner; Jeff Pugh, attorney; and Kermit Reich, engineer. *See* OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION, MEMBERSHIP DIRECTORY, OREGON PUBLIC DEFENSE CONTRACTS (Mar. 19, 2018). One board member Kermit Reich has been replaced since that time by a local bank manager.

<sup>394</sup> OPDS's Report to the Public Defense Services Commission: The Results of OPDS's Investigations in Service Delivery Region 4 (Benton, Lane, Lincoln & Linn Counties), Part I: Lane County pp. 10 - 11 (Feb. 2004).

Public Defender Services of Lane County has a seven-member board of directors, none of whom are employees of the office.<sup>395</sup> Six of the seven members of the board are attorneys, and include one head of a nonprofit organization, a former law school dean, and a former federal public defender. Members of the board serve staggered terms in multi-year increments, and the board selects its own members, most of whom are chosen because of their ties to the community. All nominations for members of the board must be approved by the Lane County Bar Association.

The board of directors meets quarterly, and individual members of the board are available for consultation with the office's director more frequently as needed. The board provides direction on "big picture issues" and is always consulted on personnel decisions. Helpfully, one board member is a retired human resources attorney, and when necessary the board retains the services of an outside attorney for further advice on human resources concerns.

The Public Defender Services of Lane County board of directors appoints the director of the office. During the board's most recent search for a director, it began by publicizing a detailed job posting, in response to which a fair number of people applied. A search committee of the board reviewed all applications received and followed up on references and recommendations, conducting a full background check of the applicants that it interviewed. Brook Reinhard was appointed director of the public defender office in August 2016.

One judge observed that, for years, public defender office attorneys have either burned out and left the office, or stayed beyond when they can be effective. In the view of this judge, the public defender office leadership needs to be proactive about culling bad lawyers.

Several judges are hopeful that the new director of the office is bringing improvement. As one judge put it, "Brook is hiring true believers." This in contrast with earlier leadership, who when faced with budget shortfalls, fired a number of attorneys at the mid-range of experience while retaining older attorneys who were nearing retirement.

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<sup>395</sup> As of December 2018, the members of the board are the same as shown by OPDS at the time the contract was awarded, although their professions are described slightly differently: Jacy Arnold, attorney; John C. Fisher, attorney; Bryan Lessley, private attorney; Margaret Paris, former dean of the University of Oregon Law School; Paul Solomon, executive director of the nonprofit Sponsors; Gregory Veralrud, attorney; and Terri Wood, attorney. *See* OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION, MEMBERSHIP DIRECTORY, OREGON PUBLIC DEFENSE CONTRACTS (Mar. 19, 2018). One current member's term expires at the end of 2018, and as of this writing the board had not yet selected a replacement.

*c. Marion County – Public Defender of Marion County*

Public Defender of Marion County is a public defender office employing 13 attorneys.<sup>396</sup> This public defender office opened for business in July 2007, and it was established largely at the instigation of PDSC and OPDS.<sup>397</sup> There was no public defender office in Marion County prior to the creation of the Public Defender of Marion County.

As of December 2018, Public Defender of Marion County has an eight-member board of directors, none of whom are employees of the office.<sup>398</sup> Three members are appointed, one each, by the Oregon Supreme Court, the Marion County Board of Commissioners, and the Oregon State Bar.

The Public Defender of Marion County board of directors selects the executive director of the office. In 2014, Tom Sermak who had founded the office retired as its executive director. The board advertised the open position statewide to recruit candidates. After conducting two rounds of interviews, the board hired Jessica Kampfe in 2015 as executive director of the Public Defender of Marion County.

The office chronically suffers a high turnover of staff attorneys. As the executive director explains, “I’m lucky to keep people here five years,” which she believes is mostly due to the low salaries the office pays. Many current and former staff attorneys

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<sup>396</sup> At the time the contracts were awarded, OPDS showed the Public Defender of Marion County as having 12 attorneys. *See* OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION, MEMBERSHIP DIRECTORY, OREGON PUBLIC DEFENSE CONTRACTS (Mar. 19, 2018). When 6AC conducted its site visit in September 2018, one of those attorneys was no longer with the office, and one new attorney had joined the office, for a total of 12 attorneys. As of December 2018, one attorney present during the site visit is no longer with the office, and two new attorneys have joined the office, bringing the total number of attorneys to 13.

<sup>397</sup> Public Defense Services Commission, Marion County Service Delivery Review Final Report p. 13 (June 2015) (“In 2005, . . . the PDSC conducted a service delivery review of public defense in Marion County. Its 236-page report . . . concluded . . . that a new public defender office should be established with quality assurance and management structures that would ‘serve as models for other public defense providers across the state.’”); Public Defense Services Commission, Marion County Service Delivery Review Final Report p. 8 (June 2015) (“Thereafter, a steering committee . . . worked with OPDS to plan for the new office and recruit a board of directors, which held its first meeting in September 2006. The board met regularly to . . . recruit an executive director. Tom Sermak . . . was selected . . . [and] began working with the Board on April 2, 2007 . . . for the office, which opened in July 2007.”).

<sup>398</sup> At the time the contract was awarded, OPDS showed Public Defender of Marion County as having a seven-member board of directors: Jeff Carter, attorney; Teresa Cox, consultant; Kristi Minto, CPA; Randy Snow, attorney; Jason Thompson, attorney; Ernesto Toskovic, senior vice president of Key Bank; and Teresa M. Wade, attorney. *See* OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION, MEMBERSHIP DIRECTORY, OREGON PUBLIC DEFENSE CONTRACTS (Mar. 19, 2018). Since that time, Teresa Cox has left the board, and Jack Goldberg and Shaney Starr have joined the board.



commute from Portland, which also contributes to turnover because they get tired of making the drive and the cost of living in Portland is higher than that in Marion County.

*d. Multnomah County – Metropolitan Public Defender Services, Inc.*

Metropolitan Public Defender Services, Inc. is a public defender office with two office locations: one in Multnomah County, and one in Washington County. As of December 2018, the public defender office has a combined total of 69 attorneys.<sup>399</sup> Based in the Multnomah County office are the executive director, three attorneys handling capital murder cases, and 45 attorneys<sup>400</sup> handling the Multnomah County workload. This public defender office has been providing the right to counsel in Multnomah County since long before PDSC and OPDS were established.<sup>401</sup>

Metropolitan Public Defender Services, Inc. has a seven-member board of directors, none of whom are employees of the office and all selected according to the organization's bylaws. Four members are appointed, one each, by the Multnomah County Board of Commissioners, the Washington County Board of Commissioners, the Oregon State Bar, and the chief justice of the Oregon Supreme Court. Those four members then jointly select three additional members.

The Metropolitan Public Defender Services, Inc. board of directors selects the executive director of the combined Multnomah County and Washington County offices. In the most recent search for an executive director,<sup>402</sup> the board advertised the availability of the position nationally and locally. Some number of applicants

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<sup>399</sup> At the time the contract was awarded, OPDS showed Metropolitan Public Defender Services, Inc. as having a total of 69 attorneys: 45 including the executive director in Multnomah County, and 24 in Washington County. See OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION, MEMBERSHIP DIRECTORY, OREGON PUBLIC DEFENSE CONTRACTS (Mar. 19, 2018). Since that time: the three capital team attorneys have moved from the Washington County office to the Multnomah County office; the Multnomah County office has added one attorney position; and the Washington County office has lost one attorney position. There have been a significant number of attorney personnel changes in both offices. Based in the Washington County office as of December 2018 are 20 attorneys (plus three certified law students) handling the Washington County workload. Nothing prevents Metropolitan Public Defender Services, Inc. from moving attorneys from one office location to the other, or from using attorneys based in one county to provide representation in the other.

<sup>400</sup> As of December 2018, these 45 attorneys include 12 attorneys in the Community Law Division, which receives funding from multiple sources in addition to PDSC and provides services beyond those required by the PDSC contract.

<sup>401</sup> OPDS's Report to the Public Defense Services Commission on Service Delivery in Multnomah County p. 13 (Apr. 2005).

<sup>402</sup> The current OPDS executive director Lane Borg was previously the executive director of Metropolitan Public Defender Services, Inc. When Borg left to join OPDS, retired circuit court judge Edward Jones took over as interim director of the Metropolitan Public Defender Services, Inc. Jones had been executive director of the Multnomah Defenders Inc. public defender office prior to becoming a circuit court judge.

were interviewed in a narrowing process. First, a three-member panel of the board of directors interviewed selected applicants. Then, a smaller number returned for a second panel interview and were also interviewed by a union representative team. Two candidates returned for a full day of interviews with office staff, spending half a day in Multnomah County and half a day in Washington County. Finally, following a two-hour interview with the full board of directors, Carl Macpherson was hired as the executive director of Metropolitan Public Defender Services, Inc., and he began work on August 27, 2018. Multnomah County director Kathleen Dunn oversees the Multnomah County office.

Metropolitan Public Defender Services, Inc. is a union office with a collective bargaining agreement in place. Negotiations between the employee union and management recently reached a stand-still and the battle scars have not yet healed. “Our bargaining team couldn’t come to an agreement with the management team, so we were working without a contract for eight months,” one attorney explained. The collective bargaining agreement was finally ratified in August 2018. It contains elaborate provisions governing discipline and termination.<sup>403</sup>

Metropolitan Public Defender Services, Inc. is capable of attracting and hiring candidates from top-tier law schools, and it holds a hiring pool in reserve, but it cannot retain those attorneys. Attorneys say this is largely due to low compensation and the amount of law school debt attorneys carry; public defenders are “terrified” they will not be able to pay down their law school debt. A number of attorneys and supervisors lamented the lack of diversity in the office, which they attribute to the same monetary factors. One attorney explained that lawyers of color seeking to work in criminal law in Multnomah County almost always go to the District Attorney’s office, where they are paid considerably more.

The office’s director reports that most attorneys stay with the office for about four years. After that time, they have become qualified to handle rapes and murders, and they leave the office because they can earn more in private practice. “A big problem is going to turn into a bigger problem” if the level of pay for public defense lawyers is not improved, said one attorney. “Younger attorneys are too good, and the money and opportunity to go elsewhere is too enticing.”

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<sup>403</sup> Collective Bargaining Agreement Between: Metropolitan Public Defender Service, Inc. and AFSCME Public Defenders Local 3668, arts. 28, 33, 34 (Aug. 31, 2018).

*e. Multnomah County – Multnomah Defenders, Inc.*

Multnomah Defenders, Inc. is a public defender office employing 25 attorneys.<sup>404</sup> This public defender office has been providing the right to counsel in Multnomah County since long before PDSC and OPDS were established.<sup>405</sup>

Multnomah Defenders, Inc. has a five-member board of directors, none of whom are employees of the office. At present, all five members are attorneys.<sup>406</sup> Prospective board members are identified by the director of Multnomah Defenders, Inc., who submits their names to a group of appointing authorities for consideration and appointment. The appointing authorities are the chief justice of the Oregon Supreme Court, the president of OCDLA, the president of the Multnomah County Bar Association, the executive director of the ACLU of Oregon, and the president of the Oregon State Bar.

The Multnomah Defenders, Inc. board of directors recruits, interviews, and selects the director of the office. Keith Rogers was appointed as director of the office in 2008.

Multnomah Defenders, Inc. is a union office with a collective bargaining agreement in place.<sup>407</sup> The collective bargaining agreement contains elaborate provisions governing discipline and termination.<sup>408</sup> The public defender office attorneys can only be terminated for just cause.<sup>409</sup>

Three felony qualified attorneys left the office in 2018. Two cited excessive workload as the primary reason for their departure. The other, who was the misdemeanor supervisor, left to join the District Attorney's office.

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<sup>404</sup> At the time the contract was awarded, OPDS showed Multnomah Defenders, Inc. as having 24 attorneys. *See* OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION, MEMBERSHIP DIRECTORY, OREGON PUBLIC DEFENSE CONTRACTS (Mar. 19, 2018). Since that time, three attorneys have left the office and four different attorneys have joined the office, bringing the total number of attorneys to 25.

<sup>405</sup> OPDS's Report to the Public Defense Services Commission on Service Delivery in Multnomah County p. 13 (Apr. 2005).

<sup>406</sup> At the time the contract was awarded and now, the members of the board of directors are: Katherine O. Berger, attorney; David Celuch, attorney; Tiffany Harris, attorney; Lisa J. Ludwig, attorney; and Michael E. Rose, attorney. *See* Oregon Criminal Defense Lawyers Association, Membership Directory, Oregon Public Defense Contracts (Mar. 19, 2018).

<sup>407</sup> Collective Bargaining Agreement, By and Between Multnomah Defenders Inc. and Multnomah Defenders Inc., Local 2805 AFSCME Counsel 75, AFL-CIO, art. 8.3 (eff. through Jan. 31, 2020).

<sup>408</sup> Collective Bargaining Agreement, By and Between Multnomah Defenders Inc. and Multnomah Defenders Inc., Local 2805 AFSCME Counsel 75, AFL-CIO, art. 8 (eff. through Jan. 31, 2020).

<sup>409</sup> Collective Bargaining Agreement, By and Between Multnomah Defenders Inc. and Multnomah Defenders Inc., Local 2805 AFSCME Counsel 75, AFL-CIO, art. 8.3 (eff. through Jan. 31, 2020).

*f. Umatilla & Morrow counties – Intermountain Public Defender Inc.*

Intermountain Public Defender Inc. is a public defender office employing nine attorneys. This office has been providing the right to counsel in Umatilla and Morrow counties since 1994, long before PDSC and OPDS were established.<sup>410</sup>

Intermountain Public Defender Inc. has a four-member board of directors, none of whom are employees of the office.<sup>411</sup> The board meets quarterly, and the board chairperson conducts an annual audit.

The Intermountain Public Defender Inc. board of directors selects the office's executive director, who is currently L. Kent Fisher. Mr. Fisher applied and the board interviewed him, before choosing him for the position.

As with other public defender offices, Intermountain Public Defender Inc. finds it difficult to attract and retain staff, largely due to the low salaries it can offer attorneys.

### 3. Private law firm contractors' governance and selection of attorneys

The four private for-profit law firms with which PDSC has annual contracts for 2018 and 2019 to provide adult criminal representation in the sample counties are:

Contractor	County	Type
Arneson and Stewart PC	Douglas	law firm
Richard A. Cremer, PC	Douglas	law firm
John B. Lamborn PC	Grant & Harney	law firm
Law Office of Robert S. Raschio PC	Grant & Harney	law firm

None of the private for-profit law firms with which PDSC contracts for adult representation have a board of directors. Instead, private for-profit law firms are governed by the owner(s) of the law firm, who maintain the ability to accept private cases while earning some amount of relatively steady compensation through their PDSC annual contracts and at a greater amount than the alternative \$46/hour case-by-case assignment rate. The PDSC annual contracts expressly allow private law firms to maintain a private law practice, in addition to their appointed cases.<sup>412</sup> The law

<sup>410</sup> Public Defense Services Commission Service Delivery Plan for Judicial District No. 6 Umatilla and Morrow Counties pp. 16 - 18 (May 2008).

<sup>411</sup> At the time the contract was awarded, OPDS showed Intermountain Public Defender Inc. as having a five-member board of directors: Harry Bose, accountant; Douglas Fischer, retired attorney; L. Kent Fisher, attorney; Maureen McCormach, attorney; and Andy Millar, attorney. *See* OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION, MEMBERSHIP DIRECTORY, OREGON PUBLIC DEFENSE CONTRACTS (Mar. 19, 2018). Kent Fisher is the executive director of the Intermountain Public Defender Inc. office and is not a member of the board of directors.

<sup>412</sup> Public Defense Legal Services Contract, General Terms ¶ 1.4.4 (Jan. 1, 2018 to Dec. 31, 2019).

firm owners entirely control all funds earned by the law firm, including funds earned through the PDSC contract (*see* discussion of compensation at pages 159 to 161), and they decide how many associates to employ and which of them to assign to both the private and public cases that the law firm handles.

Associate attorneys who work in private for-profit law firms are typically paid a salary with benefits to handle whatever cases, private or public, are assigned to them by the law firm owners. These associates do not have to generate their own cases, do not have to pay for their own overhead, and they typically are able to learn from more experienced attorneys.

*a. Douglas County – Arneson and Stewart, P.C.*

Arneson and Stewart, P.C. is a private for-profit law firm of six attorneys: two partners, and four associates. Jim Arneson and Gina Stewart are the law firm owners. Mr. Arneson has been a long-standing PDSC contractor in Douglas County.<sup>413</sup> As managing partner, Arneson administers the PDSC contract, and Stewart assists with that administration, together selecting the attorneys whom they hire as associates.

Arneson and Stewart has frequent turnover of its associates, noting that young attorneys rarely stay more than a few years in a place like Douglas County, and the law firm has to compete with the local public defender office for new hires. Because the public defender office pays a higher starting salary and can offer loan forgiveness, while the law firm cannot, it is difficult to compete.

The firm spends a lot of time recruiting candidates, searching throughout the state. For a small law office, “the amount of time [spent] recruiting is a real burden.” And once new attorneys get trained and become capable of handling serious felonies and termination of parental rights cases, they leave for higher-paying jobs.

*b. Douglas County – Richard A. Cremer, PC*

Richard A. Cremer, PC is a private for-profit law firm of two attorneys: the law firm owner Richard Cremer, and one associate. Mr. Cremer has been a long-standing PDSC contractor in Douglas County.<sup>414</sup> As owner of the law firm, Richard Cremer administers the PDSC contract and selects the attorneys whom he hires as associates.

Although requested by 6AC, Mr. Cremer did not provide any information about his recruiting, hiring, and retention practices. It is likely that this is simply not a matter of concern, since his associate has been practicing with him since approximately 1999.

<sup>413</sup> Public Defense Services Commission Service Delivery Plan for Douglas County Final Report p. 17 (Aug. 2012).

<sup>414</sup> Public Defense Services Commission Service Delivery Plan for Douglas County Final Report p. 17 (Aug. 2012);

*c. Grant & Harney counties – John B. Lamborn PC*

John B. Lamborn PC is a private for-profit law firm of two attorneys: the law firm owner John Lamborn, and one associate. Mr. Lamborn has been a long-standing PDSC contractor in Harney and Grant counties,<sup>415</sup> having joined a law firm that provided the right to counsel in the mid-1990s. As owner of the law firm, John Lamborn administers the PDSC contract and selects the attorneys whom he hires as associates.

Lamborn finds it difficult to attract new associates, even though his law firm is the only one in Harney County. This is because he has to compete with the courthouse and county in hiring attorneys, and they are all pulling from the same small pool of attorneys who want to work in Harney County. Just a few years ago, Lamborn lost a longtime associate who left the law firm to start a family. Though she did not leave for financial reasons, Lamborn nevertheless felt that he had underpaid her for many years. He fears he will continue to lose associates if he cannot offer them a competitive salary and benefits package. Not long ago, he lost a secretary who went to a more financially secure job with the county government.

In 2017, when seeking to hire an associate, Lamborn advertised with the Oregon Bar Association. He was mainly seeking someone familiar with the county and court system. He had two possible candidates, but one turned down the job to stay at the Innocence Project. His current associate, whom he hired as a result of that search, is a Harney County native and had worked for two years for another PDSC contract law firm in adjacent Grant County.

*d. Grant & Harney counties – Law Office of Robert S. Raschio PC*

The Law Office of Robert S. Raschio PC is a private for-profit law firm of two attorneys:<sup>416</sup> the law firm owner Robert Raschio, and one associate. Mr. Raschio has been a long-standing PDSC contractor in Harney and Grant counties, having worked for various law firms that held PDSC contracts in both those counties and others since

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<sup>415</sup> Public Defense Services Commission Service Delivery Plan for Judicial District No. 24 pp. 11, 14 (Nov. 2008).

<sup>416</sup> At the time the contract was awarded, OPDS showed the Raschio law firm as having four attorneys. *See* OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION, MEMBERSHIP DIRECTORY, OREGON PUBLIC DEFENSE CONTRACTS (Mar. 19, 2018). The attorney Robert Raschio also operates a separate law office in Baker County, and in that law office he employs a different associate attorney. Raschio's Baker County law office is part of the Eagle Cap Defenders consortium, which holds an annual contract in Baker County. The attorney Robert Raschio is the contract administrator for the Eagle Cap Defenders consortium.

2001.<sup>417</sup> As owner of the law firm, Robert Raschio administers the PDSC contract and selects the attorneys whom he hires as associates.

Over 16 years, Raschio has recruited five young lawyers out to eastern Oregon. While the lawyers have remained in the region, they have not stayed at Raschio's firms. One associate, after training in Raschio's office, left to join the attorney general office earning \$110,000 per year. This is far above what Raschio could offer.

Raschio explained that he has rarely had to formally discipline people who work for him.

#### 4. Consortium contractors' governance and selection of attorneys

The six consortia with which PDSC has annual contracts for 2018 and 2019 to provide adult criminal representation in the sample counties are:

Contractor	County	Type
Clackamas Indigent Defense Corporation *	Clackamas	consortium
Roseburg Defense Consortium	Douglas	consortium
Lane County Defense Consortium	Lane	consortium
Marion County Association of Defenders, Limited	Marion	consortium
Portland Defense Consortium	Multnomah	consortium
Blue Mountain Defenders	Umatilla & Morrow	consortium

\* one-year contract only for 2018

The consortia are the most complicated of the entities with which PDSC contracts. Four of the consortia each have a board of directors made up of some members from outside of the organization and some members from within, while the other two consortia do not have a board of directors. All six consortia each pay a consortium member to serve as the contract administrator, though they pay widely differing sums for this service. (*See* discussion of compensation at pages 161 to 169.)

<sup>417</sup> The Law Office of Robert S. Raschio PC was established in Grant County and received its first PDSC contract for the 2014 and 2015 contract cycle; but the law firm's owner Robert Raschio was an associate with the Law Office of Markku Sario from 2001 to 2002 and then joined the Mallon and Lamborn law office where he remained until July 2006 – working under the annual contracts that each of the law firms held with the PDSC for Grant & Harney counties during those years. Public Defense Services Commission Service Delivery Plan for Judicial District No. 24 pp. 11, 14 (Nov. 2008). From July 2006 through the end of 2013, Raschio worked at Morris, Smith, Starns, Raschio & Sullivan, PC, which held a PDSC annual contract for the 7th Judicial District. OPDS's Final Report on Service Delivery in Judicial District No. 7 & PDSC's Service Delivery Plan for the District (Hood River, Wasco, Gilliam, Sherman & Wheeler Counties) pp. 14-15 (May 2006). After PDSC awarded an annual contract to Raschio on October 25, 2013 for Grant & Harney counties for 2014 and 2015, he opened his current law office and has continued to hold an annual contract since that time. Public Defense Legal Services Contract between PDSC and Law Office of Robert S. Raschio PC (Jan. 1, 2018 through Dec. 31, 2019).

Some of the consortia have written subcontracts governing the relationship between the consortium and its constituent members, while others do not. The make-up of these consortia also varies from one to the next. In some, all of the constituent attorneys are independent of each other and practice in separate private law offices. In others, though there may be a relatively larger number of individual attorneys, because of law firm relationships and subcontracting relationships, the consortium can provide only a smaller number of independent attorneys. One of the consortia is made up of law firms, rather than individual attorneys.

In most consortia, the members are recruited through professional relationships with other members, rather than through any application process. The one truism in all consortia is that the participating attorneys are expressly allowed to maintain a private law practice, in addition to their appointed cases.<sup>418</sup>

*a. Clackamas County – Clackamas Indigent Defense Corporation*

Clackamas Indigent Defense Corporation is a consortium of 29 private attorneys working out of their individual offices, although one attorney is currently not accepting new appointments, one attorney is accepting new appointments only for existing clients, and two attorneys are no longer accepting any new appointments as they prepare to leave the consortium. This consortium has been providing the right to counsel in Clackamas County since before 1990.<sup>419</sup>

Clackamas Indigent Defense Corporation has a 10-member board of directors. Eight of the directors are consortium attorneys,<sup>420</sup> who are elected to three-year staggered terms by vote of all consortium attorneys. Two of the directors are “community” positions, currently a former judge and one vacant position, who are selected and appointed by the elected members of the board. Any vacancy on the board can be filled by a majority vote of the remaining directors. The board elects its own president. The current board president is actively involved in the administration of the consortium, largely relating to efforts to institutionalize reforms of the consortium during 2017 and 2018.

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<sup>418</sup> Public Defense Legal Services Contract, General Terms ¶ 1.4.5 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>419</sup> Public Defense Services Commission – Clackamas County Service Delivery Plan pp. 5 – 7, 13 (Oct. 2010).

<sup>420</sup> At the time the contract was awarded, OPDS showed Clackamas Indigent Defense Corporation as having a 10-member board of directors: Ray Bagley, retired judge; Drew Baumchen, attorney; Susan Denham, attorney; Andy Elliott, attorney; Ron Gray, attorney; Shannon Kmetc, attorney; Art Knauss, attorney; Wendy Leik, attorney; Ruben Medina, attorney; and Shannon Wilson, attorney. *See* OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION, MEMBERSHIP DIRECTORY, OREGON PUBLIC DEFENSE CONTRACTS (Mar. 19, 2018). One board member Ron Gray, who was a consortium attorney, has left the board since that time. This position is presently vacant and will be filled by a community member rather than a consortium attorney.



The Clackamas Indigent Defense Corporation board of directors selects the consortium administrator. Bruce Tarbox became the consortium administrator on January 1, 2018, replacing Ron Gray who was the founding administrator of the consortium. Tarbox was chosen by the board without any formal interview process. Going forward, the board plans to create an internal search committee and conduct formal interviews to choose future consortium administrators.

Clackamas Indigent Defense Corporation offers attorneys five different subcontract arrangements:

- *Apprentice 1*: a six-month subcontract for an attorney to be assigned one misdemeanor case per week in exchange for a set salary. Adding an attorney under this type of subcontract does not require approval of the board of directors.
- *Apprentice 2*: an attorney is assigned to misdemeanors and minor felonies, with a “hard caseload cap,” in exchange for a set salary. Adding an attorney under this type of subcontract requires approval of the board of directors.
- *Entry 1*: an attorney is assigned to up to a full caseload, but of only certain types of cases. This subcontract requires approval of the board of directors.
- *Entry 2*: an attorney is assigned to up to a full caseload, but of only certain types of cases. This subcontract requires approval of the board of directors.
- *Full Contract*. Attorneys who are full-fledged consortium members practice “soup to nuts,” covering all case types on separate rotations. This subcontract requires approval of the board of directors.

Clackamas Indigent Defense Corporation recruits attorneys through professional relationships, rather than by advertising when there are open positions. Beginning with the 2018 contract term, Clackamas Indigent Defense Corporation instituted a new policy requiring all lawyers to reapply annually with the board of directors to remain as a member of the consortium. That application requirement “forces a review process” that helps the board determine whether the lawyer is meeting the terms of their subcontract. For example, one board member explained that the board will not renew a subcontract where the board concludes a given attorney “looks burnt-out and we’re getting a lot of client complaints.” Indeed, as attorneys reapplied at the end of 2017, three “underperforming attorneys were not offered new contracts” for 2018: “two we decided would not be renewed; one voluntarily left.”

*b. Douglas County – Roseburg Defense Consortium*

Roseburg Defense Consortium is a consortium of five private attorneys working out of their individual offices. This consortium was established in 2013 and received its first PDSC contract for the 2014 and 2015 contract cycle, but at least three of its five current member attorneys, including its administrator, were participants in the

M.A.S.H. consortium that provided contract representation in Douglas County from approximately 1994 until its dissolution in 2012.<sup>421</sup>

Roseburg Defense Consortium does not have a board of directors. It does have a written operating agreement signed by all constituent attorneys.<sup>422</sup>

Consortium attorney Jason Mahan is the contract administrator, having created the consortium in 2013. There is no plan or contingency for selecting a new administrator should Mahan step down for any reason.

All five of the Roseburg Defense Consortium attorneys joined at the inception of the consortium. They have not felt the need to hire additional members or replace any of the existing members. Because the consortium is small, all of the member attorneys meet together regularly and jointly make decisions. Consortium administrator Jason Mahan stresses that the group collectively polices each other. “If need be, we can vote an attorney out of the consortium,” and that is reflected in the written operating agreement.<sup>423</sup>

*c. Lane County – Lane County Defense Consortium*

Lane County Defense Consortium is a consortium of approximately 12 private attorneys<sup>424</sup> working out of their individual offices. Locally, it is referred to as the “adult consortium.” This consortium began providing public defense representation in Lane County on February 1, 2010, and it was established largely at the instigation of PDSC and OPDS to replace what was perceived as a failed system of appointing attorneys from a panel list.<sup>425</sup>

<sup>421</sup> See Public Defense Services Commission Service Delivery Plan for Douglas County Final Report pp. 12, 24, 26 (Aug. 2012) (noting: “There was a change in contract providers with the start of 2012. One consortium provider no longer has a contract with OPDS;” “Commission members discussed the lack of a consortium . . . and the possibility of establishing one. . . . [One commissioner] noted that if any changes were made, he would want to see the local providers very involved in the process. . . .”; and “The elimination of a consortium provider at the start of 2012 was a necessary change”).

<sup>422</sup> See sample “Operating Agreement of Roseburg Defense Consortium” (on file with Sixth Amendment Center).

<sup>423</sup> See sample “Operating Agreement of Roseburg Defense Consortium” art. 7 (on file with Sixth Amendment Center).

<sup>424</sup> At the time the contract was awarded, OPDS showed the Lane County Defense Consortium as having 14 attorneys. See OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION, MEMBERSHIP DIRECTORY, OREGON PUBLIC DEFENSE CONTRACTS (Mar. 19, 2018). The consortium administrator provided a list of 13 attorneys, including the contract administrator, providing representation as of July 31, 2018. One of the consortium members who also served as its administrator left the consortium when he was appointed on September 25, 2018 to the Lane County Circuit Court. Jack Moran, Eugene defense attorney named new state judge, *The Register-Guard* (Sept. 25, 2018).

<sup>425</sup> OPDS’s Report to the Public Defense Services Commission: The Results of OPDS’s Investigations in Service Delivery Region 4 (Benton, Lane, Lincoln & Linn Counties), Part I: Lane County p. 11 (Feb. 2004) (“Most of OPDS’s discussions . . . centered on . . . the process for appointing public defense

As of August 2018, the consortium reported that it is overseen by a five-member board of directors, including four attorneys and one accountant.<sup>426</sup> One of the attorneys who serves on the board of directors is also a member of the consortium. When the consortium was originally established, the first board members were chosen by the incorporating attorney. Since that time, one position is filled by the Lane County Bar Association, and all other vacancies are filled by election of the existing board members. The accountant member of the board conducts annual audits of the consortium. The board of directors meets quarterly.

When the Lane County Defense Consortium was established in 2010, Brad Cascagnette was its founding consortium administrator, and he held that position until he was appointed on September 25, 2018 to the Lane County Circuit Court.<sup>427</sup> During Cascagnette's tenure as the consortium administrator, the Lane County Defense Consortium board of directors deferred to him in most matters.

Although the likelihood of Cascagnette being appointed to a judgeship was well-known in the community, the consortium's board of directors did not have a succession plan in place to select a new administrator. The board of directors posted online notices of the position opening, solicited applications through the OCDLA's listserv, and accepted online applications from attorneys. The board sought comments and concerns from the existing consortium attorneys about the two applications it received.

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attorneys in cases that the Public Defender's Office cannot handle . . . Apparently, those attorneys are ordinarily appointed from a list administered by court staff to whom the Circuit Court has delegated its authority to appoint public defense attorneys . . . However, it is not uncommon for lawyers to be appointed directly by judges as well."); Office of Public Defense Services, Lane County Service Delivery Review pp. 1, 2, 9 (Dec. 2009) ("The [Lane County Public Defense] Panel is a product of the Public Defense Services Commission's 2004 service delivery review . . . The Commission . . . adopt[ed] a revised list system. . . . The Commission implemented the new system by directing the establishment of [the Lane County Public Defense Panel] that, in conjunction with OPDS, would develop written policies and procedures for the administration of a private bar list . . . OPDS took the lead in recruiting and selecting an administrator. . . . OPDS recommends that the Commission authorize a change in the service delivery plan for Lane County approving the offer of a contract for a portion of the conflict caseload with a group of attorneys seeking to organize a small consortium of experienced lawyers. After three and a half year's [sic] experience with the [Lane County Public Defense Panel], OPDS believes that the current structure does not best address the needs of public defense clients in the county."); Office of Public Defense Services, Lane County Service Delivery Review Update p. 1 (Jan. 2011) ("OPDS entered into a preliminary agreement with the Lane County Defense Consortium . . . and the consortium began accepting cases on February 1, 2010.").

<sup>426</sup> At the time the contract was awarded, OPDS showed Lane County Defense Consortium as having a four-member board of directors: Rebecca Davis, attorney; Don Diment, attorney; Daniel Koenig, attorney; and Kevin Merwin, attorney. See OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION, MEMBERSHIP DIRECTORY, OREGON PUBLIC DEFENSE CONTRACTS (Mar. 19, 2018). Since that time, Don Diment and Daniel Koenig have left the board, replaced by attorney Rosalind Lee and retired judge Doug Mitchell, and one position is vacant.

<sup>427</sup> Jack Moran, *Eugene defense attorney named new state judge*, THE REGISTER-GUARD (Sept. 25, 2018).

On November 29, 2018, the board chose James Gardner to be the new consortium administrator without formally interviewing him for the position. At that time, Gardner was not an attorney participating in the consortium.

The Lane County Defense Consortium does not have any written documents governing its operations. Consortium attorneys say they are not asked for input about the recruitment, selection, discipline, or retention of consortium members. One consortium attorney described consortium operations as a “strange game of shadows” being played. No attorney has ever been removed from the consortium for poor performance.

*d. Marion County – Marion County Association of Defenders, Limited*

Marion County Association of Defenders, Limited is a consortium of 44 private attorneys<sup>428</sup> working out of approximately 40 separate law firms, though ten of the attorneys are not actively accepting appointments. Two of the attorneys also participate in the Juvenile Advocacy Consortium. This consortium was formed in 1993, and until 2007 it was the sole provider of public defense services in criminal cases in Marion County.<sup>429</sup>

Marion County Association of Defenders, Limited has a nine-member board of directors. Three board members are appointed by outside organizations: one by the president of the Marion County Bar Association; one by the presiding judge of the Marion County Circuit Court; and one by Willamette University College of Law. Six board members are themselves consortium attorneys, elected by majority vote of all consortium attorneys. All board members serve a three-year term, though the terms are staggered with one appointed member and two elected members changing each year.

The Marion County Association of Defenders, Limited board of directors selects the consortium administrator. Jon Weiner was chosen as consortium administrator in 2014, after he was recommended to the board by his predecessor and served for a time as the interim administrator. Weiner is only the third person ever to have served as the consortium’s administrator.

Each attorney in the consortium signs a written subcontract with the consortium.<sup>430</sup> The subcontracts are reviewable biennially, at the same time the consortium reapplies to PDSC for a contract. During these reviews, the consortium board of directors discusses whether to retain members who might have created quality concerns over the

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<sup>428</sup> At the time the contracts were awarded, OPDS showed the Marion County Association of Defenders, Limited as having 37 attorneys. *See* OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION, MEMBERSHIP DIRECTORY, OREGON PUBLIC DEFENSE CONTRACTS (Mar. 19, 2018).

<sup>429</sup> Public Defense Services Commission, Marion County Service Delivery Review Final Report pp. 7-8, 13 (June 2015).

<sup>430</sup> *See* sample “MCAD Independent Contractor Attorney Agreement” (on file with Sixth Amendment Center).

previous biennium. The board sometimes chooses to no longer contract with individual attorneys who are underperforming.

From about 2009 to 2013, the consortium did not recruit new members. Today though, the consortium is “regularly short on attorneys” and at the time of this evaluation had been actively recruiting for new attorneys for the past several months. To recruit attorneys, the consortium regularly runs an advertisement in the Oregon State Bar’s job posting bulletin and has also posted an advertisement on Indeed.com. According to board members, applicants are almost always local attorneys.

The board of directors considers all prospective applicants. An ad hoc committee of three board members and the consortium administrator does some culling based on resumes and cover letters, then interviews the remaining prospective candidates. The committee makes selection recommendations to the full board. In the most recent round of selection, the board let contracts to three new people. About half of the new consortium members brought on in the past few years have been significantly younger than the average age of all consortium attorneys, lowering the median age of the group considerably.

A small group of the consortium’s board of directors, in consultation with the consortium administrator, responds to any complaints about consortium attorneys. The board will not remove an attorney from cases, but might slow down their appointments if the board has concerns over an attorney’s performance.

*e. Multnomah County – Portland Defense Consortium*

Portland Defense Consortium is a consortium of six separate law firms, that collectively have a total of 12 private attorneys.<sup>431</sup> This consortium has been providing the right to counsel in Multnomah County since before PDSC and OPDS were established.<sup>432</sup>

Portland Defense Consortium has a seven-member board of directors who are all attorneys and serve one-year terms.<sup>433</sup> Five of the directors are themselves consortium

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<sup>431</sup> At the time the contract was awarded, OPDS showed the Portland Defense Consortium as having 15 attorneys. *See Oregon Criminal Defense Lawyers Association, Membership Directory, Oregon Public Defense Contracts* (Mar. 19, 2018). At that time, those 15 attorneys worked out of eight separate law firms. Since then, three attorneys have left the consortium, and two of the remaining attorneys have joined together in practice.

<sup>432</sup> OPDS’s Report to the Public Defense Services Commission on Service Delivery in Multnomah County p. 13 (Apr. 2005).

<sup>433</sup> At the time the contract was awarded, OPDS showed the Portland Defense Consortium as having a nine-member board of directors: Joe Calhoun, attorney; Lynn Dickison, attorney; Thomas Hanrahan, attorney; Andrew Kohlmetz, attorney; Gayle Kvernland, attorney; Bruce Liebowitz, attorney; Jon Martz, attorney; Robert Swider, attorney; and Ernest Warren, Jr., attorney. *See Oregon Criminal Defense Lawyers Association, Membership Directory, Oregon Public Defense Contracts* (Mar. 19, 2018). Since

attorneys: the two solo practitioners in the consortium jointly appoint one board member, and each of the four law firms appoint a board member. Two of the directors are not consortium attorneys, and they are elected by majority vote of the rest of the board. The presence of three directors constitutes a quorum.

In approximately 2003, the Portland Defense Consortium board of directors selected Bruce Liebowitz as the consortium administrator.

There are no written agreements governing the consortium, beyond the original bylaws that have not been updated since the consortium was formed.

*f. Umatilla & Morrow counties – Blue Mountain Defenders*

Blue Mountain Defenders is a consortium of eight private attorneys working out of their individual offices. This consortium was established in 2005, and it “succeed[ed] to the caseload previously assigned” in Umatilla and Morrow counties by PDSC and OPDS to a defunct consortium.<sup>434</sup>

Blue Mountain Defenders does not have a board of directors, nor are there any subcontracts or written agreements between the consortium and its constituent attorneys. Consortium attorney Dan Stephens has been the consortium administrator for about four years.

Blue Mountain Defenders has trouble attracting young attorneys to join the consortium, because the consortium model does not provide a mechanism to train them. If a consortium attorney hires an associate attorney, that associate is conflicted out of the more senior attorney’s cases and cannot be paid for second-chairing those cases. In the past, some younger attorneys participated in the consortium and gained experience by starting with misdemeanor cases, but according to the administrator, the current low flat rate compensation for misdemeanors discourages that.

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that time, the number of board members has changed, as a reflection of the change in the number and makeup of the consortium attorneys. The two outside members are still Andrew Kohlmetz and Robert Swider; the inside members are Joe Calhoun, Gayle Kvernland, Bruce Liebowitz, Jon Martz, and Nedu Nweze.

<sup>434</sup> Public Defense Services Commission Service Delivery Plan for Judicial District No. 6 Umatilla and Morrow Counties p. 18 (May 2008).

## B. QUALIFICATIONS OF ATTORNEYS TO HANDLE THE SPECIFIC CASES TO WHICH THEY ARE ASSIGNED, AND ONGOING TRAINING AND SUPERVISION OF ATTORNEYS

Although attorneys graduate from law school with a strong understanding of the principles of law, legal theory, and generally how to think like a lawyer, no graduate enters the legal profession automatically knowing how to be an intellectual property lawyer, a consumer protection lawyer, or an attorney specializing in estates and trusts, mergers and acquisitions, or bankruptcy.<sup>435</sup> Specialties must be developed. Just as you would not go to a dermatologist for heart surgery, a real estate or divorce lawyer cannot be expected to handle a complex criminal case competently. As the American Bar Association explained more than 20 years ago, “[c]riminal law is a complex and difficult legal area, and the skills necessary for provision of a full range of services must be carefully developed. Moreover, the consequences of mistakes in defense representation may be substantial, including wrongful conviction and death or the loss of liberty.”<sup>436</sup>

For these reasons, national standards require that each attorney must have the qualifications, training, and experience necessary for each specific case to which they are appointed.<sup>437</sup> Attorneys must know what legal tasks need to be considered in each and every case they handle, and then how to do them. As national standards explain, an attorney’s ability to provide effective representation depends on his familiarity with the “substantive criminal law and the law of criminal procedure and its application in the particular jurisdiction.”<sup>438</sup> Rule 1.1 of the *Oregon Rules of Professional Conduct*

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<sup>435</sup> Christopher Sabis and Daniel Webert, *Understanding the Knowledge Requirement of Attorney Competence: A Roadmap for Novice Attorneys*, 15 GEO. J. LEGAL ETHICS 915, 915 (2001-2002) (“The American Bar Association (ABA) Model Rules of Professional Conduct (Model Rules) provide that an attorney must possess and demonstrate a certain requisite level of legal knowledge in order to be considered competent to handle a given matter. The standards are intended to protect the public as well as the image of the profession. Failure to adhere to them can result in sanctions and even disbarment. However, because legal education has long been criticized as being out of touch with the realities of legal practice and because novice attorneys often lack substantive experience, meeting the knowledge requirements of attorney competence may be particularly difficult for a lawyer who recently graduated from law school or who enters practice as a solo practitioner.”).

<sup>436</sup> AMERICAN BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, Standard 5-1.5 and commentary (3d ed. 1992).

<sup>437</sup> See, e.g., AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 6 (Feb. 2002) (“Defense counsel’s ability, training, and experience match the complexity of the case.”). The ABA explains further in commentary that: “Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation.” AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, commentary to Principle 6 (Feb. 2002).

<sup>438</sup> NATIONAL LEGAL AID & DEFENDER ASSOCIATION, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE

requires all lawyers to be “competent” in carrying out their duties to clients,<sup>439</sup> and there are no exceptions to this rule. Failure to adhere to the state’s *Rules of Professional Conduct* may result in disciplinary action against the attorney, up to and including the loss of the attorney’s license to practice law.<sup>440</sup>

The Oregon State Bar, of which all persons must be a member in order to practice law in the state,<sup>441</sup> recognizes that ongoing training is necessary for attorneys to maintain their familiarity with criminal law and procedure and their competence to provide effective representation. “It is of primary importance to the members of the bar and to the public that attorneys continue their legal education after admission to the bar. Continuing legal education assists Oregon lawyers in maintaining and improving their competence and skills and in meeting their obligations to the profession.”<sup>442</sup> Similarly, all national standards, including those of the National Advisory Commission on Criminal Justice Standards and Goals,<sup>443</sup> require that the indigent defense system provide attorneys with access to a “systematic and comprehensive” training program,<sup>444</sup> at which attorney attendance is compulsory, in order to maintain competence from year to year.<sup>445</sup>

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REPRESENTATION, Guideline 1.2(a) (1995).

<sup>439</sup> OR. R. PROF. CONDUCT 1.1 (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”); OR. REV. STAT. § 9.490(1) (2017) (the *Rules of Professional Conduct* are “binding upon all members of the bar”).

<sup>440</sup> OR. R. PROF. CONDUCT 8.4(a) (“It is professional misconduct for a lawyer to: (1) violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; . . .”); OR. REV. STAT. § 9.527(7) (2017) (“The Supreme Court may disbar, suspend or reprimand a member of the bar whenever . . . [t]he member has violated any of the provisions of the rules of professional conduct”).

<sup>441</sup> OR. REV. STAT. § 9.160(1) (2017) (except under special circumstances, “a person may not practice law in this state . . . unless the person is an active member of the Oregon State Bar”).

<sup>442</sup> OR. STATE BAR, MINIMUM CONTINUING LEGAL EDUCATION RULES AND REGULATIONS, Purpose (as amended through May 10, 2018).

<sup>443</sup> Building upon the work and findings of the 1967 President’s Commission on Law Enforcement and Administration of Justice, the Administrator of the U.S. Department of Justice Law Enforcement Assistance Administration appointed the National Advisory Commission on Criminal Justice Standards and Goals in 1971, with DOJ/LEAA grant funding to develop standards for crime reduction and prevention at the state and local levels. The NAC crafted standards for all criminal justice functions, including law enforcement, corrections, the courts, and the prosecution. Chapter 13 of the NAC’s report sets the standards for the defense function. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, ch.13 (The Defense) (1973).

<sup>444</sup> NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, ch. 13 (The Defense), Standard 13.16 (1973) (“The training of public defenders and assigned counsel panel members should be systematic and comprehensive.”).

<sup>445</sup> See AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 9 (Feb. 2002) (“Defense counsel is provided with and required to attend continuing legal education”). The commentary explains, “Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors.” AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, commentary to Principle 9 (Feb. 2002).



Training must be tailored to the types and levels of cases for which the attorney seeks public appointment. If, for example, the lawyer has not received training on the latest forensic sciences and case law related to drugs, then the government should ensure that lawyer is not assigned to drug-related cases. If a public defense provider does not have the “knowledge and experience to offer quality representation to a defendant in a particular matter,” then the attorney is obligated to move to withdraw from the case, or better yet to refuse the appointment at the outset.<sup>446</sup> Ongoing training, therefore, is an active part of the job of being a public defense provider. Finally, public defense attorneys must be supervised and regularly evaluated.<sup>447</sup>

The Oregon legislature has instructed the Public Defense Services Commission to “[a]dopt policies, procedures, standards and guidelines regarding . . . [p]rofessional qualifications for counsel appointed to represent public defense clients [and] [p]erformance for legal representation . . . .”<sup>448</sup> The legislature makes the executive director of OPDS responsible for implementing and ensuring compliance with those policies, procedures, standards, and guidelines.<sup>449</sup>

Importantly, PDSC and OPDS have chosen to establish and maintain a system for providing the right to counsel that, for the most part, requires the same contractors and the same individual attorneys to provide representation in adult criminal, juvenile delinquency, dependency, and/or civil commitment proceedings. No matter the type of case to which an attorney is appointed, each attorney must have the qualifications, training, and experience necessary for each specific case. (*See* “Problems posed when the same attorneys are required to provide adult criminal and all dependency representation” at pages 106 to 107).

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<sup>446</sup> NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, ch. 13 (The Defense), Standard 13.16 (1973); *see also* NATIONAL LEGAL AID & DEFENDER ASSOCIATION, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guidelines 1.2(b), 1.3(a) (1995) (“Prior to handling a criminal matter, counsel should have sufficient experience or training to provide quality representation,” and “[b]efore agreeing to act as counsel or accepting appointment by a court, counsel has an obligation to make sure that counsel has available sufficient time, resources, knowledge and experience to offer quality representation to a defendant in a particular matter. If it later appears that counsel is unable to offer quality representation in the case, counsel should move to withdraw.”).

<sup>447</sup> *See* AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 10 (Feb. 2002) (“Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards”). The commentary adds, “Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors.”

<sup>448</sup> OR. REV. STAT. § 151.216(1)(f)(F)-(G) (2017).

<sup>449</sup> OR. REV. STAT. § 151.219(1)(b) (2017).

## PROBLEMS POSED WHEN THE SAME ATTORNEYS ARE REQUIRED TO PROVIDE ADULT CRIMINAL AND ALL DEPENDENCY REPRESENTATION

The scope of the evaluation that the Sixth Amendment Center was charged with conducting was limited to the provision of the Sixth Amendment right to counsel to adults in Oregon's circuit courts; that is, adult criminal proceedings at the trial level. Throughout the state, however, the same contractors and attorneys that provide adult criminal representation are often also responsible for representing financially eligible people in dependency cases.<sup>450</sup> As a result, it is impossible to objectively evaluate adult criminal representation without considering the demands placed on the public defense system as a whole and the contractor attorneys specifically by their responsibilities in dependency cases. And, dependency cases are different from criminal cases in several significant ways.

First, dependency cases are civil in nature, rather than criminal. They are governed by a separate set of statutes and rules,<sup>451</sup> have a different burden and standard of proof, and require training and experience in a broad range of areas entirely different than that needed in criminal cases. To the extent that the same system and attorneys are appointed in dependency cases as are appointed in criminal cases, those attorneys must receive separate and different training and have different types of qualifications<sup>452</sup> to effectively represent clients in all of these case types.

Second, a dependency case may involve multiple children from a single family who are all entitled to public counsel.<sup>453</sup> Similarly, there may be several parents or guardians who are entitled to have counsel appointed.<sup>454</sup> While a single district attorney can represent the state's interests or a single attorney general can represent the interests of DHS in a dependency case without a conflict, the children and parents in these cases often have conflicting interests, such that each person must have their own individual attorney appointed to represent them. (See "The challenge of providing an adequate number of attorneys in dependency cases" at p. 83.) And, these cases not infrequently involve (as children, or parents, or witnesses) some of the same people that the public defense system and attorneys are called upon to represent in

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<sup>450</sup> The same contractors and attorneys are also responsible for representing financially eligible parties in civil commitment proceedings, but these cases represent such a small number of the whole that we do not address their impact.

<sup>451</sup> See OR. REV. STAT. §§ 419B.005 *et seq.* (2017).

<sup>452</sup> See PDSC, QUALIFICATION STANDARDS FOR COURT-APPOINTED COUNSEL TO REPRESENT FINANCIALLY ELIGIBLE PERSONS AT STATE EXPENSE, standard IV.7.B. (dependency), standard IV.7.C. (termination of parental rights) (Dec. 15, 2016).

<sup>453</sup> See OR. REV. STAT. § 419B.195 (2017).

<sup>454</sup> See OR. REV. STAT. § 419B.205 (2017).

criminal cases. Each dependency case can create increasing conflicts with regard to those same attorneys' representation of defendants in concurrent or future criminal cases.

For example, underlying the allegations of abuse and neglect in a dependency case, it is not unusual that an adult parent may be charged with the crime of abuse against his child. In those circumstances, the parent is both defendant in a criminal case and an interested party in the dependency case. That parent has a right to counsel in both cases, but the legal interests involved might be different or altogether contrary (e.g., by accepting a plea offer in the criminal case, the parent jeopardizes his custodial interests in his child in the dependency case). A single lawyer's ability to provide effective assistance to the parent in both cases may be compromised by the need to assert and protect different legal interests of the same client in different proceedings.

Moreover, as is commonly the case, the dependency case can arise before the prosecution files criminal charges. That is, where DHS takes the child into protective custody, the court must hear the issue of the child's shelter care within 24 hours of removal from the home.<sup>455</sup> But the prosecution may not institute criminal charges against the allegedly abusive parent for several days, weeks, or even months following the incident. If an attorney in a public defender office or a law firm under contract with PDSC is appointed to represent the child in the dependency case, then because of imputed conflicts of interest,<sup>456</sup> every lawyer in that public defender office or law firm is prohibited from representing any other party in the dependency case *or* in the related adult criminal case.

Finally, dependency cases in particular can span more than a decade during which the appointed counsel for the parent, guardian, or child is responsible for their representation. For example, DHS could commence a dependency case in the interest of a baby and that case can continue in various stages of dependency or termination of parental rights or both simultaneously until that baby reaches adulthood.

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<sup>455</sup> OR. REV. STAT. § 419B.183 (2017).

<sup>456</sup> OR. R. PROF. CONDUCT 1.10.

## 1. The role of PDSC & OPDS

### *a. Qualifications*

The commission has adopted standards for the minimum qualifications that attorneys must have to be appointed in particular types of cases.<sup>457</sup> Generally, PDSC requires that every attorney appointed to represent financially eligible people in any type of case must:

- (1) be an “active member of the Oregon State Bar;” and
- (2) agree that they will “provide competent representation to each client” and not “accept caseloads that . . . interfere with providing competent representation to each client or lead to the breach of professional obligations;” and
- (3) either meet certain minimum qualifications for each type of case they handle; or “[p]ossess significant experience and skill equivalent to or exceeding [the] minimum qualifications” and demonstrated to the satisfaction of OPDS; or “[w]ork under the supervision of an attorney who does have the requisite qualifications.”<sup>458</sup>

In other words, an attorney does not have to have any qualifications, experience, or skill, so long as they work under the supervision of an attorney who does. But otherwise the attorney must meet or exceed the minimum qualifications for each type of case they handle. Additionally, every attorney must:

- (4) “[h]ave adequate support staff and regularly monitored email and telephone systems;”
- (5) “[h]ave an office or other regularly available and accessible private meeting space other than at a courthouse;” and
- (6) read, understand, and abide by “the current edition of the Oregon State Bar’s Performance Standards for Counsel in Criminal, Delinquency, Dependency, Civil Commitment, and Post-Conviction Relief Cases.”<sup>459</sup>

PDSC and OPDS do not take any steps to ensure that the attorneys appointed to represent financially eligible people actually comply with these requirements. Instead, they leave it to each individual attorney, or their employer, to decide whether the attorney meets these basic requirements. So, the attorney decides whether he has adequate support staff, and the attorney may decide it is adequate to have no support staff. The attorney decides whether he is providing competent representation to each client and whether his caseload interferes with that representation. The attorney decides whether he is complying with the Oregon State Bar’s performance standards.

<sup>457</sup> PDSC, QUALIFICATION STANDARDS FOR COURT-APPOINTED COUNSEL TO REPRESENT FINANCIALLY ELIGIBLE PERSONS AT STATE EXPENSE (Dec. 15, 2016).

<sup>458</sup> PDSC, QUALIFICATION STANDARDS FOR COURT-APPOINTED COUNSEL TO REPRESENT FINANCIALLY ELIGIBLE PERSONS AT STATE EXPENSE standard III (Dec. 15, 2016).

<sup>459</sup> PDSC, QUALIFICATION STANDARDS FOR COURT-APPOINTED COUNSEL TO REPRESENT FINANCIALLY ELIGIBLE PERSONS AT STATE EXPENSE standard III (Dec. 15, 2016).

The commission has adopted more specific qualifications that must be met by an attorney working without supervision to be appointed in specific levels of criminal cases.<sup>460</sup> The lowest level of qualification is for an attorney to be appointed in a misdemeanor case, contempt proceeding, or a misdemeanor probation violation proceeding. Each additional level of qualification requires meeting the qualifications for the level below it. So, to be appointed as counsel in any type of criminal case, the attorney must be familiar with: “the ABA Standards for Criminal Justice relating to representation in criminal cases; the Oregon Rules of Professional Conduct; the Criminal, Vehicle and Evidence Codes of Oregon; the criminal drug offenses, and other crimes outside the Criminal Code; the Uniform Trial Court Rules; and Oregon State Bar, Criminal Law (current version).<sup>461</sup> Again, though, PDSC and OPDS leave it to the individual attorney to decide whether they are familiar with these laws, rules, standards, and guidance.

The only other requirement for an attorney to be appointed to represent defendants in misdemeanor cases can be met in any one of five ways, including by merely observing “five complete trials of criminal cases that were tried to a jury” or more commonly by having been a certified law student representing clients under the supervision of an attorney for at least six months.<sup>462</sup> In other words, an attorney who graduates law school in May and passes the bar exam in October can, on the first day after watching five criminal jury trials, be appointed to represent without any supervision or guidance a person charged with a misdemeanor who faces the possibility of a sentence of up to one year in prison.

To be sure, the commission requires additional qualifications to handle more serious levels of criminal cases. For “lesser felony cases,” defined as “all felony drug cases and all Class C felonies other than sexual offenses,” an attorney must have been misdemeanor qualified for at least nine months and either been co-counsel in any two criminal jury trials or been co-counsel in one felony jury trial alongside an experienced felony trial attorney.<sup>463</sup> Throughout the sample counties, this is referred to as minor felony qualification. Again, as attorneys pointed out, “You can become minor felony qualified while in law school,” by handling misdemeanor cases for nine months as a certified law student and second chairing one or two jury trials during that time. All that is then required for an attorney to be appointed in “major felony cases,” defined as “all A and B felonies other than drug cases, all felony sex offenses, and all homicides

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<sup>460</sup> PDSC, QUALIFICATION STANDARDS FOR COURT-APPOINTED COUNSEL TO REPRESENT FINANCIALLY ELIGIBLE PERSONS AT STATE EXPENSE standard IV (Dec. 15, 2016).

<sup>461</sup> PDSC, QUALIFICATION STANDARDS FOR COURT-APPOINTED COUNSEL TO REPRESENT FINANCIALLY ELIGIBLE PERSONS AT STATE EXPENSE standard IV.1.A. (Dec. 15, 2016).

<sup>462</sup> PDSC, QUALIFICATION STANDARDS FOR COURT-APPOINTED COUNSEL TO REPRESENT FINANCIALLY ELIGIBLE PERSONS AT STATE EXPENSE standard IV.1.B. (Dec. 15, 2016).

<sup>463</sup> PDSC, QUALIFICATION STANDARDS FOR COURT-APPOINTED COUNSEL TO REPRESENT FINANCIALLY ELIGIBLE PERSONS AT STATE EXPENSE standard IV.2. (Dec. 15, 2016).

other than murder and capital murder cases,” is that the attorney be minor felony qualified for nine months.<sup>464</sup> As one attorney boldly put it during this evaluation, “The state qualification standards are a joke.” One public defender office among the sample counties believes as an organization that the state standards for attorney qualification are not high enough to ensure minimum quality.

When a contractor applies to OPDS for the first time (but not when subsequently applying in ensuing biennium), as part of the proposal the applicant must attach a *Certificate of Attorney Qualification and Supplemental Questionnaire* for each individual attorney included in the proposal.<sup>465</sup> OPDS reviews the qualifications of each attorney within a proposal from a new applicant, and each attorney within a contractor cannot begin accepting cases until OPDS has certified the attorney as qualified.<sup>466</sup> A contractor that is applying to renew an annual contract is not required to show the qualifications of its constituent attorneys. As explained at pages 85 to 102, most annual contractors experience a high and frequent turnover among attorneys.

During the course of the annual contracts, contractors submit monthly reports to OPDS that show the specific cases & type of case to which each contractor & attorney was appointed during the reporting month and the number of case credits claimed by the contractor under the contract for that case.<sup>467</sup> OPDS audits the reports to ensure that attorneys are only taking case types for which they are qualified.<sup>468</sup> “If it is revealed during an audit that an attorney is taking case types for which they are not qualified, the analyst for that contractor’s county is notified and follows up with the contractor for an explanation or updated paperwork. More often than not, it is the case that the contractor has not provided an updated certificate of qualification and once the certificate is provided, they are typically found to qualify for that case type.”<sup>469</sup> There is currently no other formal mechanism for OPDS to monitor whether attorneys are qualified for the cases to which they are appointed.<sup>470</sup> OPDS is sometimes notified by judges when an attorney appears in their courtroom on a case for which the judge believes the attorney is not qualified.<sup>471</sup> OPDS follows up on this information and, in some cases, attorneys have been removed from cases they were in fact not qualified to handle.<sup>472</sup>

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<sup>464</sup> PDSC, Qualification Standards for Court-Appointed Counsel to Represent Financially Eligible Persons at State Expense standard IV.3. (Dec. 15, 2016).

<sup>465</sup> Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018).

<sup>466</sup> Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018).

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For the most part, though, PDSC and OPDS shift the responsibility to the contractor groups to ensure that their constituent attorneys are only appointed to cases for which they are qualified. The PDSC annual contracts require the contractor to “ensure that the attorney assigned to represent a client under this contract [p]ossesses the qualifications for representation of the case-type involved . . . .”<sup>473</sup>

Even where the individual attorney who is appointed in a case does have the qualifications necessary to handle that type of case, in most of the sample counties and particularly within public defender offices, attorneys regularly stand in for each other or cover entire dockets of cases, such that the attorney who is actually advising a defendant may not have the necessary qualifications. (See discussion of workloads at pages 132 - 148.)

*b. Training and supervision*

PDSC and OPDS’s own efforts at supervising and evaluating the provision of the right to counsel are relatively minimal. As previously discussed, from December 2003 through March 2018, OPDS conducted “service delivery reviews” to determine “whether the right structures were in place” in 32 of the 36 counties.<sup>474</sup> (See discussion of selection of attorneys at Chapter III.A., pages 71 to 102.) Beginning in 2004, OPDS also sent “quality assurance task force” teams to evaluate the “quality of representation” provided by some contractors in some counties, focusing first on the largest contractors.<sup>475</sup> OPDS treated these evaluations as confidential, and the final report was “provided only to the contractor and OPDS.”<sup>476</sup> “This meant that [the] Commission and for a time even [the] contracting staff [at OPDS] could not see or hear the specifics about these reports.”<sup>477</sup> Due to this confidentiality policy, it is not possible

<sup>473</sup> Public Defense Legal Services Contract, General Terms ¶ 7.2.2(a) (Jan. 1, 2018 to Dec. 31, 2019).

<sup>474</sup> Email from OPDS General Counsel Paul Levy to Sixth Amendment Center (Mar. 18, 2018); see generally *Reports & Publications, Service Delivery Reports*, PUBLIC DEFENSE SERVICES COMMISSION, <https://www.oregon.gov/opds/commission/Pages/reports.aspx>.

<sup>475</sup> Email from OPDS General Counsel Paul Levy to Sixth Amendment Center (Mar. 18, 2018). See, e.g., OPDS’s Final Report to the Public Defense Services Commission on Service Delivery in Klamath County p. 3 (Dec. 2005) (“In 2004, site teams . . . visited the largest contractors in Deschutes, Clackamas and Washington Counties and prepared reports assessing the quality of their operations and services and recommending changes and improvements. In 2005, the [task force] is planning site visits of the largest contractors in counties . . . including Columbia, Jackson, Klamath, Multnomah and Umatilla Counties.”).

<sup>476</sup> See, e.g., Public Defense Services Commission Service Delivery Plan for Lincoln County p. 2 (June 2011) (“[A] Quality Assurance Task Force (QATF) site team, comprised of volunteer lawyers from around the state, conducted a thorough review of the quality of services provided by the Lincoln Defense Consortium. That evaluation occurred in September of 2006. A final report was presented to the consortium in January of 2007. Since QATF evaluations are confidential, with the final report being provided only to the contractor and OPDS, no conclusions from that evaluation are included in this report.”).

<sup>477</sup> Email from OPDS General Counsel Paul Levy to Sixth Amendment Center (Mar. 18, 2018).

to know the substance or outcome of any of the quality reviews conducted by OPDS of contractors between 2003 and 2012.<sup>478</sup>

Beginning in 2013, OPDS's structural service delivery reviews of jurisdictions and its qualitative evaluations of individual contractors were merged together into a process known as peer reviews.<sup>479</sup> The reports generated by these reviews are no longer confidential,<sup>480</sup> and OPDS typically returns to a county about one year after issuing a peer review report to see how the jurisdiction and its contractors have responded to any recommendations made.<sup>481</sup> Over the past five years, OPDS has peer reviewed and publicly reported on contractors in four counties: Clackamas, Deschutes, Marion, and Washington.<sup>482</sup> With a total of 36 counties, and 63 annual contractors constituted of approximately 647 individual attorneys, it is unlikely that OPDS and through it PDSC can exercise any significant level of supervision or oversight of the provision of the right to counsel through the peer review process.

The only other formalized method OPDS has for gathering information about the effectiveness of the representation that appointed attorneys provide is through its annual survey. Each year, typically during the summer months, OPDS sends out a survey to the judges, district attorneys, DHS supervisors, Citizen Review Board members, mental health professionals, and others in all 36 counties, asking for their feedback, suggestions, and comments about the attorneys who provide appointed representation in their jurisdictions. As the analysts at OPDS explained, this gives people the opportunity to raise issues and expound on concerns, but then OPDS has little ability to act on that information. If a survey reveals serious or continually recurring problems, then the analyst for that county and one of OPDS' general counsel might visit the county to meet with stakeholders in person. In very rare cases, OPDS might conduct a peer review of a specific contractor. For the most part, though, the

<sup>478</sup> OPDS conducted confidential QATF evaluations of 36 contractors, some more than once, during this time. Email from OPDS Data & Research Analyst Rachel Woods to Sixth Amendment Center (Nov. 27, 2018) (list of QATF evaluations on file with Sixth Amendment Center).

<sup>479</sup> Public Defense Services Commission Washington County Service Delivery Review Final Report p. 1 (Dec. 2015).

<sup>480</sup> Public Defense Services Commission Washington County Service Delivery Review Final Report p. 1 (Dec. 2015); email from OPDS General Counsel Paul Levy to Sixth Amendment Center (Mar. 18, 2018).

<sup>481</sup> Public Defense Services Commission Washington County Service Delivery Review Final Report p. 1 (Dec. 2015); email from OPDS General Counsel Paul Levy to Sixth Amendment Center (Mar. 18, 2018).

<sup>482</sup> Clackamas County: OPDS, PEER REVIEW EVALUATION OF CLACKAMAS INDIGENT DEFENSE CORPORATION (Feb. 2016); PDSC, CLACKAMAS COUNTY SERVICE DELIVERY REVIEW FINAL REPORT & TESTIMONY (Aug. 2017). Deschutes County: OPDS, PEER REVIEW EVALUATION OF CRABTREE & RAHMSDORFF DEFENSE SERVICES, INC. (Mar. 2017). Marion County: OPDS, MARION COUNTY ASSOCIATION OF DEFENDERS, LTD. PEER REVIEW (May 2013); PDSC, MARION COUNTY SERVICE DELIVERY REVIEW FINAL REPORT (June 2015). Washington County: OPDS, PEER REVIEW EVALUATION OF METROPOLITAN PUBLIC DEFENDER, INC. WASHINGTON COUNTY OFFICE (Nov. 2014); PDSC, WASHINGTON COUNTY SERVICE DELIVERY REVIEW FINAL REPORT (Dec. 2015).



analysts at OPDS feel they are “identifying fires, but we are only putting out the worst of the worst.”

The PDSC annual contracts require:

Appointed counsel shall fulfill applicable state and national standards of performance, including those of the Oregon State Bar, American Bar Association, National Juvenile Defender Center and National Legal Aid and Defender Association. Counsel shall also satisfy applicable state and federal constitutional requirements for the provision of adequate and effective assistance of counsel, and meet state and federal statutory requirements for counsel in the applicable proceedings. And counsel shall satisfy the requirements of the Oregon Rules of Professional Conduct.<sup>483</sup>

Simply saying it must happen does not ensure that it does. Again, PDSC and OPDS shift the responsibility onto the annual contractors and individual attorneys to self-police. “Contractor shall ensure that persons providing client representation under this contract meet the standards of representation set forth in Section 7.1.1 of this contract.”<sup>484</sup>

All attorneys in Oregon are required to complete 45 hours of continuing legal education (CLE) every three years.<sup>485</sup> The PDSC annual contracts require each contractor to “ensure that all contract attorneys providing representation under [the] contract” get 12 hours of their CLE each year in areas related to their work (juvenile, criminal, or a combination of both).<sup>486</sup> Yet, PDSC and OPDS do not provide any funding to contractors or their constituent attorneys to provide or obtain this mandatory continuing legal education. Either contractors or individual attorneys must pay this cost. Nor do PDSC and OPDS require contractors or individual attorneys to provide proof of compliance with this requirement.

## 2. Public defender office contractors’ qualifications, training, and supervision

Among the contractor types, public defender offices are in the best position to appoint counsel to cases according to their qualifications and to formalize systems to supervise

<sup>483</sup> Public Defense Legal Services Contract, General Terms ¶ 7.1.1 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>484</sup> Public Defense Legal Services Contract, General Terms ¶ 7.2.1 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>485</sup> OR. STATE BAR, MINIMUM CONTINUING LEGAL EDUCATION RULES AND REGULATIONS § 3.2(a) (as amended through May 10, 2018). Of the 45 hours, “[a]t least five . . . shall be in subjects relating to ethics” and “[o]ne hour must be on the subject of a lawyer’s statutory duty to report child abuse and elder abuse.” *Id.* at (b),(d). Additionally, “[i]n alternate reporting periods, at least three of the required hours must be in programs accredited for access to justice . . .” *Id.* at (d).

<sup>486</sup> Public Defense Legal Services Contract, General Terms ¶ 7.2.3 (Jan. 1, 2018 to Dec. 31, 2019).

and train their attorney employees. Even so, because of the high rate of turnover in most of the public defender offices in the sample counties (*see* discussion of selection of attorneys at pages 85 to 92), the public defender office contractors struggle to retain adequately qualified attorneys.

The Umpqua Valley Public Defender in Douglas County serves as a prime example. It has 12 attorneys, but only four of those attorneys have more than five years' experience practicing law. The office sets a higher threshold for attorneys to handle felony cases than the minimum qualifications required by PDSC. Before allowing a new attorney to handle a felony case alone, they want to be sure the attorney is "actually ready" – "Do they have their trial feet yet, their trial style, comfort in the courtroom? Do they have a presentation in front of the jury – are they reading a speech or are they communicating?" The three most experienced attorneys in the office make up the trial management team that collectively supervises and trains all of the other nine attorneys. Yet all of the trial management team attorneys themselves carry a caseload and struggle to find adequate time in the day. The Umpqua Valley Public Defender wants its attorneys to focus on client-centered representation. But as they say: "It costs a lot of time" to constantly have to train new lawyers; "Salem is unsympathetic" to staff retention problems. The office has plans to develop a formal training and orientation program for new hires, but they do not have a training director who can focus on that. They wish they had time to put the office's internal standards into writing, but for now each senior attorney does their best to supervise, mentor, and train the younger attorneys as often and as well as possible. The office hosts a once a month CLE lunch program to which it invites the entire local defense bar; an attorney with two years' legal experience coordinates these defense bar luncheons. Umpqua Valley Public Defender requires and pays for all of its new attorneys to attend the OCDLA trial advocacy training. The office pays for all of its attorneys to attend standard OCDLA seminars and pays for each attorney to obtain two or three other CLE credits each year.

The Public Defender of Marion County, at about the same size with 13 attorneys, has almost identical experiences to those of Umpqua Valley. The average attorney has four years' legal experience. Responsibility for supervision and training is divided between the office's director and the deputy director; the deputy director has left the office since the time of this evaluation in September 2018. The office provides a \$700 stipend to each attorney to attend CLE each year, in addition to paying for room and board for every lawyer to attend the annual OCDLA conference.

Intermountain Public Defender Inc. is the smallest public defender office among the sample counties, and either because of or in spite of that attorneys receive more personalized training and supervision. Every attorney newly hired in the office gets a training manual. New hires shadow the office's director for at least the first few weeks before they are ever assigned a case to handle on their own. Before conducting a trial alone, they must co-counsel a trial with the director, even if they come to the

office with a good bit of experience. The director frequently sits as second chair when attorneys conduct their first few trials. The office pays for every attorney to attend at least one training program each year. Finally, the office director conducts a monthly training session every month, after work hours end. Despite all of these efforts, the director is the only supervisor in the office and she also carries a reduced caseload. One judge reported that the office needs to invest more in supervisors and mentors.

By way of contrast are the larger public defender offices in the sample counties. In Lane County, attorneys at Public Defender Services of Lane County as well as judges expressed concern; one judge observed “I don’t know what to think about the training issue. I don’t know if they’re just dropping files on people and expecting them to do their job.” In Multnomah County, the director of Metropolitan Public Defender Services, Inc.’s Multnomah County office – by far the largest public defender office in the state – reports that a common refrain in exit interviews is that the office did not train attorneys enough. Similarly, attorneys at Multnomah Defenders, Inc. say they get little if any supervision, performance evaluations required by the collective bargaining agreement rarely occur, and instead they “hit the ground running” with a full caseload as soon as they are hired.

### 3. Private law firm contractors’ qualifications, training, and supervision

The private law firms have the greatest vested interest in ensuring their associate attorneys are qualified, trained, and supervised. This is because those same associates handle the law firm’s privately retained cases and are the law firm’s representative in the criminal justice community.

For example, Arneson and Stewart, P.C. is widely recognized as providing excellent training of its associates. New attorneys spend their first five months at the law firm shadowing and second-chairing cases with other attorneys. At the six-month mark, associates begin being assigned their own cases. This six-attorney law firm holds weekly meetings to review open cases and discuss trial strategy. Every attorney in the office meets one-on-one with managing partner Jim Arneson every other month, and Arneson also conducts yearly evaluations of each attorney. Each attorney is provided an annual budget of typically \$1,200 to \$1,500 to pay for tuition and travel to attend training. Arneson and Stewart attorneys are also expected to attend the monthly bar luncheon CLE put on by the Umpqua Valley Public Defender. All of this comes as a real financial cost to the law firm though, because OPDS does not provide any funding to train attorneys.

#### 4. Consortium contractors' qualifications, training, and supervision

At the other and worse end of the spectrum are the consortia under annual contracts in the sample counties. The individual attorneys who participate in the various consortia run the full gamut from recent law school graduates with little experience who have hung out their own shingle to extremely experienced & highly talented attorneys. The problem is that the consortia have almost no ability at all to oversee their member attorneys.

The Marion County Association of Defenders, Limited with its 44 attorneys divide themselves into working groups of four to six attorneys who meet monthly. Though informal, the working groups allow attorneys to bounce ideas off each other and share motions and strategies.

As a result of an unflattering peer review, at the beginning of 2017, the Clackamas Indigent Defense Corporation instituted a monthly meeting at which it offers some continuing legal education credits at six to eight of the meetings each year. The consortium has also begun to match any new attorney member with a more experienced attorney member to serve as a mentor. But they worry that there is a limit to the amount of supervision the consortium can offer – “At the rate of increased oversight, we’re heading toward an employer-employee relationship . . . and that’s a problem.”

In all of the consortia, the individual attorneys must pay for their own mandatory continuing legal education out of their own pockets.

# CHAPTER IV

## WORKLOADS AND COMPENSATION OF THE ATTORNEYS WHO PROVIDE PUBLIC DEFENSE SERVICES

### A. UNDERSTANDING THE "SPECIFIC TERMS" AND "CASELOAD AND CASE VALUE MATRIX" IN PDSC CONTRACTS

In Chapter II.D., we explained that the “General Terms” of all of the 63 annual contracts that PDSC has for 2018 and 2019 are exactly the same. Each of those 63 annual contracts has its own “Specific Terms” that control the services a contractor provides and how the contractor earns the funds that PDSC has potentially allocated to it.

Within the “Specific Terms” of each annual contract (except for fixed value contracts, explained below at page 124) is a document titled “Caseload and Case Value Matrix.” (See sample “Caseload and Case Value Matrix” on page 118.) The “Caseload and Case Value Matrix” for each annual contractor is the key to understanding the types and stages of cases the contractor is *allowed* to be appointed to under its PDSC contract and the compensation that OPDS will pay to the contractor for each case type/stage *if* the contractor is actually appointed.

#### 1. Case types & codes

Each annual contractor is authorized to be appointed in certain types of cases and at certain stages of those cases. This authorization is shown in the “Caseload and Case Value Matrix” in the left-hand column titled “Case Types.” There, OPDS uses various codes that are its shorthand for a type of case and/or for a stage of a case. For 2015 through 2019, OPDS has used at least 77 different codes in its contracts.<sup>487</sup> (See “OPDS case type codes, 2015 through 2019” on page 119.)

There are several things about these codes that can make them difficult to understand. First, while most of the codes are used broadly across the state, some of them are unique to only a single contractor. For example, separate codes for adult drug court

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<sup>487</sup> To compile this list of codes, 6AC reviewed: all OPDS 2018 & 2019 contracts for the sample counties; a spreadsheet provided by OPDS of the number of credits by case type for which OPDS approved payment for 2015, 2016, and 2017, statewide and by county; and Public Defense Legal Services Contract, General Terms ¶¶ 10.1.1 through 10.5.1.4 (Jan. 1, 2018 to Dec. 31, 2019).

## SAMPLE CASELOAD AND CASE VALUE MATRIX

Contract between PDSC and Metropolitan Public Defender Services, Inc.,  
non-capital caseload and case value matrix

Case Types 1/1/18 - 12/31/18	Value	Mult. Cases	Wash. Cases	Total Cases	Total Value
MURD	\$21,964	6	6	12	\$263,568
JLAW	\$21,324	6	6	12	\$255,888
AM11/BM11/JM11	\$2,258	222	164	386	\$871,588
AFEL	\$1,217	140	92	232	\$282,344
BFEL	\$1,035	288	132	420	\$434,700
CFEL/DFEL/DVIO/UFEL/PCS/FAPA/SUPP	\$626	2,118	968	3,086	\$1,931,836
DUI/MISS/DWSS/OTMS/SCDV/CONT/EXTR/MHMI/OTHR	\$399	2,732	1,340	4,072	\$1,624,728
DPV/FPV/MPV/JPV	\$255	840	2,380	3,220	\$821,100
JDEC/JDEP	\$847	160	144	304	\$257,488
JPDC/JPDP	\$351	716	608	1,324	\$464,724
JUDF	\$785	32	88	120	\$94,200
JUDM/JUDO	\$393	32	84	116	\$44,428
JUTC/JUTP	\$2,823	20	24	44	\$124,212
Arrestment Staffing					\$231,942
Community Court					\$411,470
Drug Court/Mental Health Court					\$98,288
Immigration Consultation					\$75,000
STOP Court					\$192,396
50% ECR Coverage					\$357,204
Investigation Offset					\$1,894,860
Dependency Offset					\$77,480
Total		7,312	6,036	13,348	\$10,809,444

Case Types 1/1/19 - 12/31/19	Value	Mult. Cases	Wash. Cases	Total Cases	Total Value
MURD	\$21,964	6	6	12	\$263,568
JLAW	\$21,324	6	6	12	\$255,888
AM11/BM11/JM11	\$2,258	222	164	386	\$871,588
AFEL	\$1,217	140	92	232	\$282,344
BFEL	\$1,035	288	132	420	\$434,700
CFEL/DFEL/DVIO/UFEL/PCS/FAPA/SUPP	\$626	2,118	968	3,086	\$1,931,836
DUI/MISS/DWSS/OTMS/SCDV/CONT/EXTR/MHMI/OTHR	\$399	2,732	1,340	4,072	\$1,624,728
DPV/FPV/MPV/JPV	\$255	840	2,380	3,220	\$821,100
JDEC/JDEP	\$847	160	144	304	\$257,488
JPDC/JPDP	\$351	716	608	1,324	\$464,724
JUDF	\$785	32	88	120	\$94,200
JUDM/JUDO	\$393	32	84	116	\$44,428
JUTC/JUTP	\$2,823	20	24	44	\$124,212
Arrestment Staffing					\$231,942
Community Court					\$411,470
Drug Court/Mental Health Court					\$98,288
Immigration Consultation					\$75,000
STOP Court					\$192,396
50% ECR Coverage					\$357,204
Investigation Offset					\$1,894,860
Dependency Offset					\$77,480
Total		7,312	6,036	13,348	\$10,809,444
Contract Total		14,324	12,072	26,696	\$21,618,888

## OPDS CASE TYPE CODES, 2015 THROUGH 2019

OPDS code	OPDS description
ADC	adult drug court
AFEL	felony - Class A felony
AM11	felony - measure 11 felony - Class A
APPEAL	
APSRB	psychiatric security review board appeal
BFEL	felony - Class B felony
BM11	felony - measure 11 felony - Class B
CC	community court
CFEL	felony - Class C felony
CMUR	capital murder case
CONT	contempt case - contempt
CVHC	habeas corpus case
CVPC	post-conviction relief case
DDIV	adult drug court
DFEL	felony - DUII felony
DPV	probation violation - DUII probation violation
DRUG	
DUAD	DUI diversion
DUII	DUII
DVAD	domestic violence diversion
DVCT	domestic violence court
DVIO	felony - domestic violence Class C felony
DWSS	misdemeanor traffic case - misdemeanor driving while suspended
ECR	early case resolution
EDP	early disposition program
EDPA	early disposition program A felony
EDPB	early disposition program B felony
EDPC	early disposition program C felony
EDPM	early disposition program for misdemeanors
EXTR	extradition case
FAPA	contempt case - family abuse prevention act
FATC	family treatment court
FDC	family drug court
FPV	probation violation - felony probation violation
JDEC	juvenile dependency case - child
JDEP	juvenile dependency case - parent
JLAW	
JM11	felony - measure 11 felony - juvenile
JPDC	postdispositional proceeding - child
JPDP	postdispositional proceeding - parent

OPDS code	OPDS description
JPSRB	juvenile psychiatric security review board case
JPSRBhrg	juvenile psychiatric security review board hearing
JPV	probation violation or motion to modify
JUDF	juvenile felony
JUDM	juvenile misdemeanor
JUDO	juvenile other
JUTC	termination of parental rights case - child
JUTP	termination of parental rights case - parent
MHC	mental health court
MHMI	civil commitment case
MHTC	mental health treatment court
MISS	misdemeanor case
MPV	probation violation - misdemeanor probation violation
MURD	noncapital murder case
OHA	Oregon health authority case
OTHR	other cases
OTMS	misdemeanor traffic case - other traffic misdemeanor
PCS	possession of controlled substance
PSRB	psychiatric security review board case
RAP	juvenile drug court
SCDV	appointments after diversion or conditional discharge agreement
STOP	sanctions treatment opportunities progress drug court
SUPP	contempt case - support
UFEL	felony - unclassified felony
VC	veterans court
	arraignment staffing
	drug court
	drug court / mental health court
	DUII court
	immigration consultation
	juvenile law resource center
	mental health court
	veterans court
	veterans resource center
	investigation offset
	dependency offset
	fixed value contract
	dependency offset
	fixed value contract

**KEY:**

- Felony
- Misdemeanor
- Juvenile Delinquency
- Juvenile Dependency
- Other

are used for different contractors: the code for adult drug court (ADC) is used only in the contract for the Clatsop County Defenders Association, and the code for adult drug court (DDIV) is used only in the contract for the Umpqua Valley Public Defender.<sup>488</sup> OPDS uses different codes for each of these contractors, even though both codes mean “adult drug court.”

Second, some codes have a different meaning depending on the contractor to which they are applied, and the meaning may not be self-evident or may be different than what one would expect. For example, the code APPEAL applies to only two contractors within the sample counties and has a different meaning for each: for Multnomah Defenders, Inc., it is civil commitment appeals; for Youth, Rights & Justice, it is juvenile appeals.<sup>489</sup>

Finally, some codes encompass several types of cases that are dramatically different in what they require of a lawyer. For example, the code for “juvenile other” (JUDO) includes matters that are basically civil in nature, such as status offenses and emancipation, but it also includes matters that have serious criminal consequences, such as waiver of a child to adult court for criminal prosecution.<sup>490</sup>

## 2. Credits (the workload a contractor undertakes)

Each annual contractor is authorized to be appointed (and therefore paid) for a certain number of “credits” of each case type. The number of credits per case type that a contractor is authorized is shown in the “Caseload and Case Value Matrix” in one of the center columns, usually titled something like “Total Cases” or “Quota (Number of Cases).” (See sample “Caseload and Case Value Matrix” on page 118.)

Importantly, a “credit” is not the same as a “case.” A “case,” as PDSC defines it, is “any action in this state in which Contractor has been appointed to represent a client under the terms of this contract in a matter to which there is a right to appointed counsel at state expense.”<sup>491</sup> So, for example, if Bobby Jones is an adult prosecuted in circuit court for a felony, and if Mr. Jones requests an appointed attorney and is determined to be financially eligible, once an annual contractor is appointed to represent Mr. Jones, then this is a “case.” But annual contractors are not paid to handle cases.

Instead, contractors are paid based on the number of “credits” they handle. “A ‘credit’ is an event or circumstance which counts toward Contractor’s satisfaction of this contract.”<sup>492</sup> In our example of Mr. Jones, the number of credits for which a contractor

<sup>488</sup> Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018).

<sup>489</sup> Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018).

<sup>490</sup> Public Defense Legal Services Contract, General Terms ¶ 10.5.1.3 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>491</sup> Public Defense Legal Services Contract, General Terms ¶ 1.4.8 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>492</sup> Public Defense Legal Services Contract, General Terms ¶ 1.4.9 (Jan. 1, 2018 to Dec. 31, 2019).



can bill will vary based on several factors, including the type of case, the allegations in the charging instrument, the timing of appointment, and case complexity.

**Type of case.** The first factor is the type of case. PDSC groups all cases into seven broad “appointment type” categories:<sup>493</sup> criminal cases, probation violations, contempt cases, civil commitment cases, juvenile cases, other civil cases, and other cases. Each appointment type category has special rules about how a contractor is to bill for credits.<sup>494</sup> For purposes of this report, we focus on criminal cases<sup>495</sup> and probation violations.<sup>496</sup>

**Charging instrument.** The second factor, in a criminal case, is the allegations in the charging instrument.<sup>497</sup>

If the prosecutor files a single charging instrument against Mr. Jones that alleges he committed one count of a class B felony, then the contractor can bill for one class B felony credit (BFEL). But if the prosecutor files a single charging instrument against Mr. Jones that alleges he committed five or more counts of a class B felony, and if each of those counts are alleged to have occurred on different days, then the contractor can bill for five class B felony credits (BFEL). The number of credits for which the contractor can bill in the case is equal to the number of counts alleged to have occurred on different days, up to a maximum of five credits.

If the prosecutor includes a count in the charging instrument against Mr. Jones that seeks the criminal forfeiture of his assets, then the contractor can additionally bill for one “other case” credit (OTHR).<sup>498</sup>

**Timing of appointment.** The third factor, in a criminal case, is the timing of when the contractor is appointed to represent the defendant. In the simplest version of a criminal case, an attorney is appointed to represent a financially eligible defendant at arraignment, and that attorney continues to represent the defendant through disposition of the charge at the trial court level (whether the charge is dismissed, the defendant pleads guilty, or the case is tried). But criminal cases do not always proceed so simply. Instead, it is fairly common for the prosecution of a criminal case to start and

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<sup>493</sup> Public Defense Legal Services Contract, General Terms ¶¶ 10.1 through 10.7 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>494</sup> Public Defense Legal Services Contract, General Terms ¶ 1.5 (generally), ¶¶ 1.5.1 through 1.5.6 (criminal cases), ¶¶ 1.5.5, 1.5.6, and 1.5.7.6 (probation violations), ¶ 1.5.9 (contempt cases), ¶ 1.5.8 (civil commitment cases), ¶¶ 1.5.7 through 1.5.7.7 (juvenile cases), ¶¶ 1.5.10 and 1.5.11 (other civil cases), and ¶ 10.7 (other cases) (Jan. 1, 2018 to Dec. 31, 2019).

<sup>495</sup> Public Defense Legal Services Contract, General Terms ¶¶ 10.1 through 10.1.8 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>496</sup> Public Defense Legal Services Contract, General Terms ¶¶ 10.2 through 10.2.1.3 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>497</sup> Public Defense Legal Services Contract, General Terms ¶ 1.5.2 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>498</sup> Public Defense Legal Services Contract, General Terms ¶ 1.5.2(d) (Jan. 1, 2018 to Dec. 31, 2019).

stop, or be put on hold, at various junctures and for various reasons. To explain how contractors are required to bill OPDS for credits in these circumstances, we use our example of Mr. Jones.

If Mr. Jones is arrested on one count of allegedly committing a class B felony, he may have an attorney appointed to represent him after his arrest but before a charging instrument is filed against him to begin the prosecution in circuit court. In this scenario, the contractor will claim one class B felony credit (BFEL) when he is appointed to represent Mr. Jones.<sup>499</sup>

Oregon law creates some types of diversion programs that are usually administered by the district attorney offices and that allow the criminal charge against the defendant to be dismissed if the defendant successfully completes the terms of the program.<sup>500</sup> When Mr. Jones enters into a diversion program, the original charge against him is disposed of and the original appointment of an attorney ends. If during Mr. Jones' participation in the diversion program, at any point the district attorney believes Mr. Jones is not complying with the requirements, then there might be a court hearing to determine compliance. If more than 180 days has passed since Mr. Jones entered into the diversion program, or if an attorney was never previously appointed to represent Mr. Jones, then the contractor who represents Mr. Jones at the show cause hearing to address alleged non-compliance can bill OPDS for one "appointment after diversion or conditional discharge agreement" credit (SCDV).<sup>501</sup>

Once a formal criminal prosecution begins in the circuit court, it can be put on hold for numerous reasons. Even though a contractor has already billed OPDS for one class B felony credit (BFEL) in representing Mr. Jones, that same contractor may be allowed to bill OPDS for one more class B felony credit (BFEL), depending on the reason the case was put on hold and the length of time it has been on hold.<sup>502</sup> If Mr. Jones was found not competent to aid and assist counsel and 365 days have passed when Mr. Jones is brought back to the trial court for further proceedings, then the contractor can bill OPDS for one class B felony credit (BFEL).<sup>503</sup> If Mr. Jones fails to appear for a court proceeding and a bench warrant is issued for his arrest, and if 180 days have passed when Mr. Jones is located and the case continues, then the contractor can bill OPDS for one class B felony credit (BFEL).<sup>504</sup> If the state takes an interlocutory

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<sup>499</sup> Public Defense Legal Services Contract, General Terms ¶ 1.5.2 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>500</sup> *See, e.g.*, OR. REV. STAT. §§ 135.881 through 135.901 (2017).

<sup>501</sup> Public Defense Legal Services Contract, General Terms ¶ 1.5.6 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>502</sup> Public Defense Legal Services Contract, General Terms ¶ 1.5.4 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>503</sup> Public Defense Legal Services Contract, General Terms ¶ 1.5.4(a) (Jan. 1, 2018 to Dec. 31, 2019).

<sup>504</sup> Public Defense Legal Services Contract, General Terms ¶ 1.5.4(a)-(b) (Jan. 1, 2018 to Dec. 31, 2019).

appeal from a ruling by the trial court in Mr. Jones' case and the case continues for further prosecution in the trial court after ruling on the interlocutory appeal, then the contractor can bill OPDS for one class B felony credit (BFEL).<sup>505</sup>

A criminal prosecution in circuit court may be disposed of by a conviction that leads to a defendant being placed on probation. At that disposition, the original charge against Mr. Jones is disposed of and the original appointment of an attorney ends. If during Mr. Jones' period of probation, at any point there is an allegation that he has violated the terms of that probation, then there might be a court hearing to determine violation or compliance. The contractor that is appointed to represent Mr. Jones on that probation violation can bill OPDS for one felony probation violation credit (FPV).<sup>506</sup>

A criminal prosecution in circuit court may appear to be disposed of, and yet events can occur that cause that prosecution to recommence. Even though a contractor has already billed OPDS for one class B felony credit (BFEL) in representing Mr. Jones, that same contractor may be allowed to bill OPDS for one more class B felony credit (BFEL), depending on the reason the case is recommenced and/or the length of time since the original disposition.<sup>507</sup> If Mr. Jones' case is dismissed but more than 180 days later the prosecution is reinstated, then the contractor can bill OPDS for one class B felony credit (BFEL).<sup>508</sup> If Mr. Jones has a trial that ends in a mistrial or hung jury, when the case is scheduled for a new trial then the contractor can bill OPDS for one class B felony credit (BFEL).<sup>509</sup> If Mr. Jones is convicted and wins a new trial or sentencing as a result of an appeal or a post-conviction relief proceeding, then when the case returns to the trial court the contractor can bill OPDS for one class B felony credit (BFEL).<sup>510</sup>

***Extraordinary or complex case.*** The fourth and final factor, in a criminal case, is for a case that is extraordinary or complex.

A contractor may ask for permission to bill for additional credit(s) in a case if the contractor believes the case “required an extraordinary amount of time, effort, or expense” after the normally allowed number of credits have been billed.<sup>511</sup> Importantly, *only* the commission can approve this request – “Only PDSC may approve additional credit for cases assigned under this contract. Contractors shall not make requests of the court or court staff to approve additional credit.”<sup>512</sup>

<sup>505</sup> Public Defense Legal Services Contract, General Terms ¶ 1.5.4(f) (Jan. 1, 2018 to Dec. 31, 2019).

<sup>506</sup> Public Defense Legal Services Contract, General Terms ¶ 1.5.5 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>507</sup> Public Defense Legal Services Contract, General Terms ¶ 1.5.4 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>508</sup> Public Defense Legal Services Contract, General Terms ¶ 1.5.4(d) (Jan. 1, 2018 to Dec. 31, 2019).

<sup>509</sup> Public Defense Legal Services Contract, General Terms ¶ 1.5.4(g) (Jan. 1, 2018 to Dec. 31, 2019).

<sup>510</sup> Public Defense Legal Services Contract, General Terms ¶ 1.5.4(e) (Jan. 1, 2018 to Dec. 31, 2019).

<sup>511</sup> Public Defense Legal Services Contract, General Terms ¶¶ 4.3, 5.7 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>512</sup> Public Defense Legal Services Contract, General Terms ¶ 4.3 (Jan. 1, 2018 to Dec. 31, 2019).

If a criminal case is a “complex case,” then all of the preceding rules discussed in this section do not apply to it, and the contractor instead bills OPDS for one complex case credit.<sup>513</sup> PDSC defines a “complex case” as “an appointment on a case type valued at \$2,600 or more.”<sup>514</sup> In the sample counties, this is only the criminal case types of non-capital murder (MURD) and Jessica’s Law (JLAW).

### 3. Values (the compensation a contractor can receive)

Each contractor is authorized to be paid a certain “value” for the credits it handles. The value that OPDS pays a contractor for credits of a particular case type is shown in the “Caseload and Case Value Matrix” in the column titled “Value.” (See sample “Caseload and Case Value Matrix” on page 118.) Multiplying the value assigned to a credit of a particular case type by the number of credits of that case type that the contractor is authorized to handle yields the “Total Value” the contractor can potentially be paid by OPDS for that case type.

OPDS does not pay all contractors the same amount for work of the same type. According to OPDS, all contractors of the same type (i.e., public defender office, consortium, law firm, individual) within a given county or judicial district are usually paid the same amount per case type credit *except* in Multnomah and Washington counties,<sup>515</sup> and variations in the amount paid per case type credit across jurisdictions are due to the cost of living, district attorney salaries, and lack of funding to PDSC.<sup>516</sup>

PDSC assigns five different kinds of values in its contracts: hourly rate; fixed value contract; flat rate per credit; fixed fee line item; and line item offset. A given contract may contain more than one kind of value.

**Hourly rate.** As explained in Chapter II, PDSC has contracts for 2018 and 2019 with 29 individual private attorneys to accept capital murder cases from anywhere in the state on a case-by-case basis.<sup>517</sup> When appointed, these attorneys bill OPDS \$100/hour using the case type code CMUR (capital murder case).<sup>518</sup>

**Fixed value contract.** PDSC has a small number of contracts for 2018 and 2019 where the contractor is paid a fixed dollar amount in exchange for handling up to a total maximum number of credits, but the number of credits to be handled is not broken down by case type, and the contractor does not have to refund any money to OPDS if

<sup>513</sup> Public Defense Legal Services Contract, General Terms ¶ 1.5.1 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>514</sup> Public Defense Legal Services Contract, General Terms ¶ 1.4.11 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>515</sup> Email from OPDS General Counsel Paul Levy to Sixth Amendment Center (June 6, 2018); email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018).

<sup>516</sup> Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018).

<sup>517</sup> Email from OPDS General Counsel Paul Levy to Sixth Amendment Center (June 6, 2018).

<sup>518</sup> Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018); email from OPDS General Counsel Paul Levy to Sixth Amendment Center (June 6, 2018).

the number of credits to which it is actually appointed is less than the total maximum number. PDSC uses this type of contract to ensure that, “regardless of the mix of cases, contractors receive a fixed monthly amount allowing them to maintain services within the jurisdiction regardless of the fluctuating caseload.”<sup>519</sup>

Among the sample counties, PDSC has this type of contract in 2018 and 2019 only with the two contractors who provide public defense representation in Grant and Harney counties: John B. Lamborn PC, and Law Office of Robert S. Raschio PC.

**Flat rate per credit.** OPDS pays most contractors, for most case types, at a flat rate for each credit handled by the contractor. In the 2018 and 2019 contracts, OPDS pays one or more contractors in the sample counties a flat rate for each credit handled in 47 different case types.

OPDS does not pay all contractors the same flat rate for work on the same case type. There is no place in any of the materials provided to the 6AC that definitively explains how PDSC and OPDS assign a flat rate value to a particular case type or to a particular contractor. 6AC compiled all of the information contained in the 2018 and 2019 contracts for the sample counties to determine the range of values that OPDS pays to various contractors for each case type credit. That analysis shows that OPDS groups the 47 various case types into 12 categories for which it pays a particular range of flat rates and then one miscellaneous group of case types.

Code	OPDS description	OPDS payment category	OPDS range of rates paid	
			Low	High
MURD	noncapital murder case	noncapital murder per credit flat rate	\$17,351/credit	\$21,964/credit
JLAW		JLAW per credit flat rate	\$16,846/credit	\$21,324/credit
AM11	felony - measure 11 felony - Class A	M11 per credit flat rate	\$1,788/credit	\$2,258/credit
BM11	felony - measure 11 felony - Class B	M11 per credit flat rate	\$1,788/credit	\$2,258/credit
JM11	felony - measure 11 felony - juvenile	M11 per credit flat rate	\$1,788/credit	\$2,258/credit
AFEL	felony - Class A felony	A felony per credit flat rate	\$1,090/credit	\$1,303/credit
BFEL	felony - Class B felony	B felony per credit flat rate	\$913/credit	\$1,103/credit
JUDF	juvenile felony	juvenile felony per credit flat rate	\$598/credit	\$914/credit
CFEL	felony - Class C felony	C felony per credit flat rate	\$565/credit	\$626/credit
DFEL	felony - DUIII felony	C felony per credit flat rate	\$565/credit	\$626/credit
DVIO	felony - domestic violence Class C felony	C felony per credit flat rate	\$565/credit	\$626/credit
FAPA	contempt case - family abuse prevention act	C felony per credit flat rate	\$565/credit	\$626/credit
PCS	possession of controlled substance	C felony per credit flat rate	\$565/credit	\$626/credit
SUPP	contempt case - support	C felony per credit flat rate	\$565/credit	\$626/credit
UFEL	felony - unclassified felony	C felony per credit flat rate	\$565/credit	\$626/credit
CONT	contempt case - contempt	misd per credit flat rate	\$331/credit	\$399/credit
DUIS	DUII	misd per credit flat rate	\$331/credit	\$399/credit
DWSS	misdemeanor traffic case - misdemeanor driving while suspended	misd per credit flat rate	\$331/credit	\$399/credit
EXTR	extradition case	misd per credit flat rate	\$331/credit	\$399/credit
JUDM	juvenile misdemeanor	misd per credit flat rate	\$331/credit	\$399/credit
JUDO	juvenile other	misd per credit flat rate	\$331/credit	\$399/credit
MHMI	civil commitment case	misd per credit flat rate	\$331/credit	\$399/credit
MISS	misdemeanor case	misd per credit flat rate	\$331/credit	\$399/credit
OTHR	other cases	misd per credit flat rate	\$331/credit	\$399/credit
OTMS	misdemeanor traffic case - other traffic misdemeanor	misd per credit flat rate	\$331/credit	\$399/credit

<sup>519</sup> Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018).

SCDV	appointments after diversion or conditional discharge agreement	misd per credit flat rate	\$331/credit	\$399/credit
DPV	probation violation - DUII probation violation	prob viol per credit flat rate	\$221/credit	\$255/credit
FPV	probation violation - felony probation violation	prob viol per credit flat rate	\$221/credit	\$255/credit
JPV	probation violation or motion to modify	prob viol per credit flat rate	\$221/credit	\$255/credit
MPV	probation violation - misdemeanor probation violation	prob viol per credit flat rate	\$221/credit	\$255/credit
JUTC	termination of parental rights case - child	TPR per credit flat rate	\$2,494/credit	\$3,208/credit
JUTP	termination of parental rights case - parent	TPR per credit flat rate	\$2,494/credit	\$3,208/credit
JDEC	juvenile dependency case - child	dependency per credit flat rate	\$779/credit	\$847/credit
JDEP	juvenile dependency case - parent	dependency per credit flat rate	\$779/credit	\$847/credit
JPDC	postdispositional proceeding - child	post-disp per credit flat rate	\$322/credit	\$401/credit
JPDP	postdispositional proceeding - parent	post-disp per credit flat rate	\$322/credit	\$401/credit
APPEAL		miscellaneous per credit flat rate	\$3,425/credit	\$4,396/credit
JPSRB	juvenile psychiatric security review board case	miscellaneous per credit flat rate		\$6,182/credit
JPSRBhrg	juvenile psychiatric security review board hearing	miscellaneous per credit flat rate		\$2,060/credit
PSRB	psychiatric security review board case	miscellaneous per credit flat rate	\$352/credit	\$417/credit

*Noncapital murder rate.* This flat rate is used only for the case type code for non-capital murder (MURD). Some of the sample county contracts include a value for this code, but then show -0- as the number of credits of this type to be handled by the contractor. The amount paid for this case type varies among the contractors in the sample counties, ranging from a low of \$17,351/credit to a high of \$21,964/credit.

*Jessica’s Law rate.* This flat rate is used only for the case type code for Jessica’s Law (JLAW). PDSC created this case type beginning in its 2016 and 2017 contracts, in response to passage of “Jessica’s Law”<sup>520</sup> that requires mandatory minimum sentences in certain sex crimes.<sup>521</sup> Some of the sample county contracts include a value for this code, but then show -0- as the number of credits of this type to be handled by the contractor. The amount paid for this case type varies among the contractors in the sample counties, ranging from a low of \$16,846/credit to a high of \$21,324/credit.

*Measure 11 rate.* This flat rate is used for three case type codes: measure 11 class A felony (AM11), measure 11 class B felony (BM11), and measure 11 felony by a juvenile (JM11). Collectively, these are referred to as “measure 11” cases, which are certain felonies that carry a mandatory minimum sentence.<sup>522</sup> The amount OPDS pays a given contractor for the three different case types is always the same (though a given contractor may not handle all three of the case types), but the amount paid varies among the contractors in the sample counties, ranging from a low of \$1,788/credit to a high of \$2,258/credit.

*A felony rate.* This flat rate is used only for the class A felony case type code (AFEL). The amount OPDS pays for this case type varies among the contractors in the sample counties, ranging from a low of \$1,090/credit to a high of \$1,303/credit.

<sup>520</sup> OR. REV. STAT. § 137.700 (2017).

<sup>521</sup> Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018).

<sup>522</sup> OR. REV. STAT. §§ 137.700, 137.707 (2017).

*B felony rate.* This flat rate is used only for the class B felony case type code (BFEL). The amount OPDS pays for this case type varies among the contractors in the sample counties, ranging from a low of \$913/credit to a high of \$1,103/credit.

*Juvenile felony rate.* This flat rate is used only for the juvenile felony case type code (JUDF). The amount OPDS pays for this case type varies among the contractors in the sample counties, ranging from a low of \$598/credit to a high of \$914/credit.

*C felony rate.* This flat rate is used for seven case type codes: class C felony (CFEL); felony driving under the influence of intoxicants (DFEL); domestic violence class C felony (DVIO); contempt case under family abuse prevention act (FAPA); possession of controlled substance (PCS); contempt in support case (SUPP); and unclassified felony (UFEL). The amount OPDS pays a given contractor for the seven different case types is always the same, and every contractor that handles any of these case types handles all of them. But the amount that OPDS pays varies among the contractors in the sample counties, ranging from a low of \$565/credit to a high of \$626/credit.

*Misdemeanor rate.* This flat rate is used for 11 case type codes: contempt (CONT); driving under the influence of intoxicants – nonhabitual (DUIS); traffic misdemeanor driving while suspended (DWSS); extradition (EXTR); juvenile misdemeanor (JUDM); juvenile other (JUDO); civil commitment (MHMI); misdemeanor generally (MISS); other generally (OTHR); traffic misdemeanor generally (OTMS); and “after diversion or conditional discharge agreement” (SCDV). The amount OPDS pays a given contractor for the 11 different case types is almost<sup>523</sup> always the same (though a given contractor may not handle all 11 of the case types). But the amount paid varies among the contractors in the sample counties, ranging from a low of \$331/credit to a high of \$399/credit.

*Probation violation rate.* This flat rate is used for four case type codes: DUII probation violation (DPV); felony probation violation (FPV); juvenile probation violation or motion to modify (JPV); and misdemeanor probation violation (MPV). The amount OPDS pays a given contractor for the four different case types is always the same (though a given contractor may not handle all four of the case types). But the amount paid varies among the contractors in the sample counties, ranging from a low of \$221/credit to a high of \$255/credit.

*Termination of parental rights rate.* This flat rate is used for two case type codes: child in a termination of parental rights case (JUTC); and parent in a termination of parental

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<sup>523</sup> In Clackamas County, Independent Defenders Inc. is paid \$336/credit for JUDM and JUDO, but it is paid \$345/credit for MHMI. In Multnomah County, Metropolitan Public Defender Services, Inc. is paid \$383/credit for JUDM and JUDO, but it is paid \$399/credit for all of the other misdemeanor rate case types. In Umatilla County, both of the two contractors – Blue Mountain Defenders, and Intermountain Public Defender, Inc. – are paid \$331/credit for JUDM and JUDO, but they are paid \$391/credit for all of the other misdemeanor rate case types.

rights case (JUTP). The amount OPDS pays a given contractor for the two different case types is always the same, and every contractor that handles either of these case types handles both of them. But the amount OPDS pays varies among the contractors in the sample counties, ranging from a low of \$2,494/credit to a high of \$3,208/credit with one exception. Sage Legal Center in Multnomah County is paid an even higher rate of \$3,613/credit because it handles almost exclusively cases that are subject to the Indian Child Welfare Act.<sup>524</sup>

*Dependency rate.* This flat rate is used for two case type codes: child in a dependency case (JDEC); and parent in a dependency case (JDEP). The amount OPDS pays a given contractor for the two different case types is always the same, and every contractor that handles either of these case types handles both of them. But the amount OPDS pays varies among the contractors in the sample counties, ranging from a low of \$779/credit to a high of \$847/credit with one exception. Sage Legal Center in Multnomah County is paid an even higher rate of \$1,135/credit because it handles almost exclusively cases that are subject to the Indian Child Welfare Act.<sup>525</sup>

*Post-disposition rate.* This flat rate is used for two case type codes: child in a post-disposition proceeding (JPDC); and parent in a post-disposition proceeding (JPDP). The amount OPDS pays a given contractor for the two different case types is always the same, and every contractor that handles either of these case types handles both of them. But the amount OPDS pays varies among the contractors in the sample counties, ranging from a low of \$322/credit to a high of \$401/credit with one exception. Sage Legal Center in Multnomah County is paid an even higher rate of \$423/credit because it handles almost exclusively cases that are subject to the Indian Child Welfare Act.<sup>526</sup>

*Miscellaneous rates.* There are four case type codes that each apply to only one or two contractors in the sample counties. OPDS pays the following flat rates per credit handled for each of these case types:

- appeal (APPEAL) – Multnomah Defenders, Inc. is paid \$3,425/credit for appeals in civil commitment cases. Youth, Rights & Justice in Multnomah County is paid \$4,396/credit for appeals in juvenile cases.
- juvenile psychiatric security review board (JPSRB) – Youth, Rights & Justice in Multnomah County is paid \$6,182/credit for juvenile psychiatric security review board cases. These are proceedings related to juveniles who were found “responsible except for insanity.”<sup>527</sup>
- juvenile psychiatric security review board hearing (JPSRBhrng) – Youth, Rights & Justice in Multnomah County is paid \$2,060/credit for juvenile psychiatric security review board hearings.
- psychiatric security review board (PSRB) – These are proceedings related to

<sup>524</sup> Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018).

<sup>525</sup> Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018).

<sup>526</sup> Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018).

<sup>527</sup> See OR. REV. STAT. §§ 161.385 through 161.400, 419C.411, 419C.520 through 419C.544 (2017).



defendants found “guilty except for insanity.”<sup>528</sup> In Marion County, Harris S. Matarazzo is paid \$417/credit for both hearings and appeals in psychiatric security review board cases. Public Defender of Marion County is paid \$352/credit for psychiatric security review board cases.

**Fixed fee line item.** OPDS pays many contractors a fixed annual amount to represent all of the participants in a program or to provide a particular type of service during each year of the two-year contract, without regard to how many participants are involved or how much time is required for the service. Some contractors are not paid for any fixed fee line items at all. Twelve of the 25 annual contractors in the sample counties during 2018 and 2019 are paid through one or more fixed fee line items.<sup>529</sup> All of these fixed fee line items appear to be for workload such as early case resolution programs, diversion programs, arraignment dockets, specialty courts, immigration consultations, or a juvenile law resource center.

Some of the contracts use a case type code for these fixed fee line items, while some of the contracts just list a description, and across contracts OPDS often uses different case type codes or descriptions to pay for what is basically the same type of representation. Not rarely, a single contract uses a case type code for some fixed fee line items and uses a description for other fixed fee line items.

There is a wide range in the fixed fee line item compensation paid to the various contractors for handling all of the participants in a given program. For example, among the contractors in the sample counties, Public Defender of Marion County is paid the lowest fixed fee line item amount of \$14,037 each year for handling “veterans court.” By way of contrast, Metropolitan Public Defender Services, Inc. and Multnomah Defenders, Inc. are each paid the highest fixed fee line item amount of \$411,470 per year for handling “community court” in Multnomah County.

**Line item offset.** OPDS pays many, though not all, contractors a fixed amount for one or both of two things: investigation, and dependency. OPDS refers to these as “offsets.” PDSC created the investigation offset beginning with the 2016 and 2017 contracts, and it created the dependency offset beginning with the 2018 and 2019 contracts.<sup>530</sup> One of the reasons for adding this method of paying a contractor is as

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<sup>528</sup> OR. REV. STAT. § 161.346(11) (2017).

<sup>529</sup> Two of the three contractors in Clackamas County: Clackamas Indigent Defense Corp, and Independent Defenders Inc. One of the four contractors in Douglas County: Umpqua Valley Public Defender. One of the three contractors in Lane County: Public Defender Service of Lane County. Three of the four contractors in Marion County: Juvenile Advocacy Consortium, Marion County Association of Defenders, and Public Defender of Marion County. Four of the seven contractors in Multnomah County: Metropolitan Public Defender Service, Multnomah Defenders Inc, Portland Defense Consortium, and Youth, Rights & Justice. One of the two contractors in Umatilla County: Intermountain Public Defender.

<sup>530</sup> Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018).

an attempt to hedge against the fluctuations caused by PDSC’s case credit system of contracting, whereby a contractor can experience large peaks and troughs in earnings when caseload assignments fluctuate.<sup>531</sup> For example, OPDS explains: “In the last recession when the caseload collapsed in Lane County, the PDs office was facing a very large shortfall that resulted in that office losing 25% of its staff to layoffs.”<sup>532</sup>

*Investigation offset.* OPDS pays some contractors a fixed amount for the contractor to provide investigation in the cases it handles. OPDS says an additional reason for the investigation offset is an attempt to standardize case rates within a judicial district between public defender office contractors that have in-house staff investigators and the consortia contractors that do not have in-house staff investigators.<sup>533</sup> Any contractor that does not receive an investigation offset must request funds in advance from PDSC for investigation on a case-by-case basis.<sup>534</sup>

*Dependency offset.* OPDS pays some contractors a fixed amount to assist the contractor to provide representation in dependency cases. OPDS says an additional reason for the dependency offset is an attempt to stabilize contractor budgets for contractors in counties that are not part of the “Parent Child Representation Project” but had been subject to a DHS enforcement policy of “differentiated response” that created additional work.<sup>535</sup> The Parent Child Representation Project is a pilot project that has been operating in three counties (Linn and Yamhill beginning August 2014; Columbia beginning January 2016) and will soon add two more (Coos and Lincoln, funded by 2018 legislature), where attorneys are limited to 80 dependency/delinquency cases open at any moment.<sup>536</sup>

Notably, the Parent Child Representation Project is the *only* real circumstance where PDSC knows and places a limit on how many open cases a contracting attorney can handle.<sup>537</sup> These are also the only cases where the compensation is calculated to include overhead and to pay equivalent to the prosecutorial counterpart.<sup>538</sup>

#### 4. Working and getting paid

As explained in Chapter II, OPDS sends a check to each contractor, at the beginning of each month of the annual contract, in an amount that is roughly equal to 1/24th of

<sup>531</sup> Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018).

<sup>532</sup> Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018).

<sup>533</sup> Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018).

<sup>534</sup> PDSC & OPDS, PUBLIC DEFENSE PAYMENT POLICY AND PROCEDURES ¶¶ 3.6.1 - 3.6.12, 3.13.1 - 3.14.2, and Exh. 2 Schedule of Guideline Amounts (rev’d Apr. 1, 2018).

<sup>535</sup> Email from OPDS Executive Director Lane Borg to Sixth Amendment Center (June 28, 2018).

<sup>536</sup> Email from OPDS General Counsel Paul Levy to Sixth Amendment Center (Mar. 26, 2018).

<sup>537</sup> Email from OPDS General Counsel Paul Levy to Sixth Amendment Center (Mar. 26, 2018).

<sup>538</sup> Email from OPDS General Counsel Paul Levy to Sixth Amendment Center (Mar. 26, 2018).

that contractor's total two-year contract value.<sup>539</sup> This represents in essence an advance payment for work the contractor has not yet performed.

Among the sample counties, the two contractors who have fixed value contracts – John B. Lamborn PC and Law Office of Robert S. Raschio PC – both earn the advance paid to them each month by providing representation in all cases to which they are appointed in the 24th Judicial District Circuit Court. These contractors do not have to account for the services their constituent attorneys provide in order to earn the monthly advance.

For all of the other contractors in the sample counties, to the extent that their contract pays them any investigation or dependency offset, the contractor earns that portion of the advance paid to them each month by continuing to provide representation in all cases to which they are appointed. The contractors do not have to account for the services their constituent attorneys provide in order to earn this portion of the monthly advance.

To the extent that a contract pays a fixed fee line item value, the contractor earns that portion of the advance paid to them each month by generally providing the service or representation described. The contractors do not have to account for the services or representation their constituent attorneys provide in order to earn this portion of the monthly advance.

But, the portion of a contract that pays the contractor a flat rate per credit based on case type must be earned and accounted for by the 20th day of the month following. Each contractor must file a report with OPDS showing the number of case credits of each type to which its constituent attorneys were appointed. The case credits of each type are multiplied by the flat rate that OPDS pays the contractor for that case type. The total represents the amount of the advance that the contractor has actually earned.

On the basis of the monthly reports, OPDS begins to reconcile the money that it has advanced to a contractor with the money the contractor has earned. Over time during a contract, a contractor may handle fewer credits (or credits of a lesser value) than projected under its contract and thereby end up owing money back to OPDS (referred to as being under quota), or a contractor may handle more credits (or credits of a higher value) than projected under its contract and thereby end up being owed additional money from OPDS (referred to as being over quota). But either way, a contractor's constituent attorneys are providing representation to individual defendants in individual cases, for which they hope and expect to be paid.

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<sup>539</sup> There are some small variances from this general description. Clackamas Indigent Defense Corporation has only a one-year contract, so its monthly checks are for approximately 1/12th of the contract value. Almost all contractors are paid a few more dollars in January of each year than in the other 11 months that year. Metropolitan Public Defender Services, Inc. is paid less during 2018 than during 2019.

## B. ASSIGNING CRIMINAL CASES TO INDIVIDUAL ATTORNEYS

Under the public defense system established by PDSC and OPDS, cases are appointed first to an annual contractor in a county. The method by which this occurs depends on the structure and processes of the circuit court in that county, the number and type of annual contractors in the county, and the specific terms of the PDSC annual contract for each of the contractors. Among the sample counties, we group the methods into three categories:

- Sole provider in a jurisdiction (Clackamas County).
- Appointing cases by county in multi-county jurisdictions (24th Judicial District, Grant & Harney counties; 6th Judicial District, Umatilla & Morrow counties).
- Appointing cases among multiple providers in a jurisdiction (in order of increasing complexity: Lane County; Marion County; Douglas County; Multnomah County).

Once a case is appointed to an annual contractor, then that contractor assigns one of its individual attorneys to each case. Contractors make these assignments in a wide variety of ways, as explained below.

### 1. Sole provider in a jurisdiction – Clackamas County

Although there are three PDSC annual contractors in Clackamas County, all adult criminal cases are appointed to Clackamas Indigent Defense Corporation. Clackamas Indigent Defense Corporation is a consortium of 29 private attorneys working out of their individual offices, and so it is capable of providing multiple attorneys in a single case (though many of the attorneys share office space and support staff with each other, and four attorneys are presently not accepting new appointments).

The consortium assigns one attorney to staff the out-of-custody arraignments that take place Monday through Thursday at 1:30 p.m. and at 3:30 p.m. and also assigns one attorney to staff the in-custody initial appearances and arraignments that take place every day at 3:00 p.m. Each consortium attorney is typically assigned to staff two dockets each month. But the attorneys are not appointed to represent defendants during these dockets other than in probation violation cases. Instead, for financially eligible defendants, the court appoints Clackamas Indigent Defense Corporation; in turn, the consortium assigns the case to an individual attorney one to two days later.

The consortium administrator's part-time administrative assistant assigns the cases to individual consortium attorneys, based on the rotations for which each attorney has contracted with the consortium – measure 11, major felony, class C felony, and/

or misdemeanors. All cases of a given type are assigned in rotation to each of the attorneys who have contracted with the consortium for that case type. Attorneys can “go off rotation” for up to five weeks every quarter, during which the attorney is not assigned any new cases.

Four of the consortium attorneys each spend half a day each week staffing one of the four Clackamas County specialty courts. The consortium attorneys are also responsible under the 2018 PDSC annual contract for providing representation in appointed civil commitment proceedings in Clackamas County.<sup>540</sup>

The consortium attorneys are expressly allowed to maintain a private law practice, in addition to their appointed cases under the PDSC annual contract.<sup>541</sup> For example, several of the attorneys accept conflict cases in other counties at the PDSC hourly rate. Some also serve as appointed counsel in nearby municipal courts. All of the individual attorneys have private law practices. One attorney maintains a private law practice of family, probate, and personal injury law, and says “at any given time, I have open files in six different counties.”

## 2. Appointing cases by county in multi-county jurisdictions

### *a. Grant & Harney counties, 24th Judicial District*

In the 24th Judicial District comprising Grant and Harney counties, the two PDSC annual contractors for 2018 and 2019 divide the caseload by county. Because of the conflict of interest rules, each law firm can only provide one attorney in a given case.

For cases arising out of Harney County, the John B. Lamborn PC law firm is the primary provider, meaning they are appointed first in every case, and the Law Office of Robert S. Raschio PC law firm is only appointed if the Lamborn law firm has a conflict or if more than one attorney is required in a single case. For cases arising out of Grant County, the Raschio law firm is the primary provider, meaning they are appointed first in every case, and the Lamborn law firm is only appointed if the Raschio law firm has a conflict or if more than one attorney is required in a single case. In both counties, whenever more than two attorneys are required in a single case,<sup>542</sup> the circuit court appoints a private attorney from a list of five that has been pre-approved by OPDS.

***John B. Lamborn PC*** is a private for-profit law firm of two attorneys. Law firm owner John Lamborn distributes appointed cases internally between himself and his associate. Lamborn generally assigns the less serious cases of most misdemeanors and

<sup>540</sup> Public Defense Legal Services Contract between PDSC and Clackamas Indigent Defense Corporation, Specific Terms (Jan. 1, 2018 through Dec. 31, 2018).

<sup>541</sup> Public Defense Legal Services Contract, General Terms ¶ 1.4.5 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>542</sup> Dependency cases frequently require three or more unconflicted attorneys, and the two PDSC annual contractors can only provide one attorney each in a given case.

some minor felonies to his associate, and he assigns himself to handle the remaining caseload regardless of seriousness. Because the Lamborn contract with PDSC is a fixed value contract, Lamborn is only required to file a report with OPDS annually, rather than monthly. Lamborn believes the law firm is typically (in past biennial contract periods) within 10% of the number of case credits estimated in the contract; more often above that estimate, but occasionally falling below the estimate.

The two Lamborn law firm attorneys are also responsible for providing appointed representation in juvenile delinquency, dependency, and civil commitment cases, primarily in Harney County and secondarily in Grant County, under the 2018 and 2019 PDSC annual contract.<sup>543</sup> In addition to the appointed caseload in Harney and Grant counties, the attorney John Lamborn also takes appointed conflict cases in Malheur County at the PDSC hourly rate, and he works as a mediator and arbitrator. The two attorneys in the Lamborn law firm also have a private law practice handling primarily wills and trusts, probate matters, and contracts.

***Law Office of Robert S. Raschio PC*** is a private for-profit law firm of two attorneys. Law firm owner Robert Raschio distributes appointed cases internally between himself and his associate. Raschio generally assigns most misdemeanors and some minor felonies to his associate, and he assigns himself to handle the remaining caseload. Because the Raschio contract with PDSC is a fixed value contract, Raschio is only required to file a report with OPDS annually, rather than monthly. Raschio believes the law firm is typically (in past biennial contract periods) within 10% of the number of case credits estimated in the contract, and Raschio reports that during the immediately preceding 2016 & 2017 biennium, the law firm was below the number of case credits estimated in the contract.

The two Raschio law firm attorneys are also responsible for providing appointed representation in juvenile delinquency, dependency, and civil commitment cases, primarily in Grant County and secondarily in Harney County, under the 2018 and 2019 PDSC annual contract.<sup>544</sup> In addition to the appointed caseload in Harney and Grant counties, the attorney Robert Raschio takes appointed conflict cases in Malheur County at the PDSC hourly rate. He operates a separate law office in Baker County where he employs a different associate attorney. Raschio's Baker County law office is part of the Eagle Cap Defenders consortium, which holds an annual contract with PDSC to provide appointed representation in Baker County, and the attorney Robert Raschio is also the contract administrator for the Eagle Cap Defenders consortium. The attorney Raschio also serves as appointed counsel in a Grant County justice court. The two attorneys in the Raschio law firm in Grant County also have a private law practice handling mostly criminal cases.

<sup>543</sup> Public Defense Legal Services Contract between PDSC and John B. Lamborn PC, Specific Terms (Jan. 1, 2018 through Dec. 31, 2019).

<sup>544</sup> Public Defense Legal Services Contract between PDSC and Law Office of Robert S. Raschio PC, Specific Terms (Jan. 1, 2018 through Dec. 31, 2019).

*b. Umatilla & Morrow counties, 6th Judicial District*

In the 6th Judicial District comprising Umatilla and Morrow counties, the two PDSC annual contractors for 2018 and 2019 divide the caseload by county. Intermountain Public Defender Inc. is a public defender office employing nine attorneys. Because of the conflict of interest rules, Intermountain Public Defender Inc. can only provide one attorney in a given case. Blue Mountain Defenders is a consortium, capable of providing up to eight attorneys in a single case.

For cases arising out of Umatilla County, Intermountain Public Defender is the primary provider for three weeks out of each month, meaning they generally are appointed first in every case except where a Blue Mountain Defenders attorney has previously represented a defendant then that attorney will be appointed to any new case of that defendant, and otherwise Blue Mountain Defenders is appointed only if Intermountain Public Defender has a conflict or if more than one attorney is required in a single case. During the first week of each month, Blue Mountain Defenders is the primary provider in Umatilly County, meaning they are appointed first in every case, and Intermountain Public Defender is appointed only if all eight of the Blue Mountain Defenders consortium attorneys have a conflict.

For cases arising out of Morrow County, Blue Mountain Defenders is the primary provider, meaning they are appointed first in every case, and Intermountain Public Defender is appointed only if all eight of the Blue Mountain Defenders consortium attorneys have a conflict.

In both counties, when both Intermountain Public Defender and Blue Mountain Defenders have a conflict or when additional attorneys are needed, the circuit court appoints a private attorney from a list that has been pre-approved by OPDS.

Three of the five circuit court judges are located at the Umatilla County courthouse in Pendleton, where each judge conducts initial appearances and arraignments at 1:15 p.m. daily as needed on the cases allotted to that judge. Thirty miles away, two other circuit court judges are located at the Umatilla County courthouse in Hermiston, where each judge conducts initial appearances and arraignments at 3:00 p.m. daily as needed on the cases allotted to that judge.<sup>545</sup> On a rotating schedule, one of the five judges sits every Thursday at the Morrow County courthouse and can conduct proceedings on other days as needed. This results in attorneys having to cover initial appearance and arraignment dockets in up to three courthouse locations and up to five courtrooms at the same time.

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<sup>545</sup> At the time of this evaluation, one of the judges assigned to the Umatilla County courthouse at Hermiston was recused from all Umatilla County criminal cases, but not from Morrow County criminal cases.

During the three weeks each month that Intermountain Public Defender is appointed primarily in Umatilla County, the public defender office assigns one of its nine attorneys to staff each of the up to four courtrooms conducting initial appearances and arraignments daily; up to three attorneys in total for the three courtrooms in Pendleton beginning at 1:15 p.m., and one attorney for the one judge that was at the time of this evaluation presiding over criminal cases in Hermiston beginning at 3:00 p.m. But the attorneys who staff these dockets are not appointed to individual cases during these dockets. Instead, for financially eligible defendants, the court appoints the appropriate contractor and within a day or two notifies the contractor of the cases to which it has been appointed. Each contractor subsequently assigns the cases to its individual attorneys.

*Intermountain Public Defender* distributes cases internally among its nine staff attorneys using a “point system” based on each attorney’s qualification level, their existing workload, and the complexity of each new case, but all attorneys are assigned to criminal cases in all three of the courthouses. Due to time constraints caused by overlapping court schedules and the distances between the three courthouses, the public defender office attorneys often cover for each other on their cases. The public defender office provides an attorney to staff the drug court, which resumed operation in mid-2018 after having been inactive for approximately a year. The public defender office attorneys are also responsible under the 2018 and 2019 PDSC annual contract for providing representation in appointed juvenile delinquency, dependency, and civil commitment cases in Umatilla and Morrow counties.<sup>546</sup> Attorneys employed by a public defender office are prohibited from practicing law outside of their appointed cases under the PDSC contract.<sup>547</sup>

*Blue Mountain Defenders’* consortium administrator has an administrative assistant who distributes cases among the eight individual consortium attorneys based on the preferences each of them have indicated to the consortium administrator – in part on the number of cases they are available to receive, in part on the geographic location of the court presiding over the case, and in part on the type of case. Two of the eight attorneys are available to receive what they characterize as a full-time caseload, while the other six attorneys accept only a part-time caseload. Although all eight attorneys are willing to handle a case at any of the three courthouses to maintain an expected level of case assignments, each attorney has preferred geographic locations. Three of the attorneys typically take all Morrow County cases, five of the attorneys typically take all Umatilla County cases at the Pendeton courthouse, and three of the attorneys typically take all Umatilla County cases at the Hermiston courthouse. Measure 11 cases are assigned to five of the consortium attorneys, but one of those attorneys only

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<sup>546</sup> Public Defense Legal Services Contract between PDSC and Intermountain Public Defender Inc., Specific Terms (Jan. 1, 2018 through Dec. 31, 2019).

<sup>547</sup> Public Defense Legal Services Contract, General Terms ¶ 1.4.3 (Jan. 1, 2018 to Dec. 31, 2019).



takes cases valued at two or more credits. Jessica’s Law cases are assigned primarily to one of the attorneys, then to three of the other attorneys as needed. All other adult felony and misdemeanor cases are distributed among the eight consortium attorneys based on the geographic location of the court presiding over the case. The table below illustrates the typical distribution of criminal cases based on all three preference factors:

Attorney <sup>548</sup>	Caseload	Preferred geography	Case type – qualifications and preferences
BMD 1	full time	Morrow County (1st) Umatilla County - Hermiston	measure-11 Jessica’s Law (secondary) felony and misdemeanor, by geography
BMD 2	full time	Umatilla County - Pendleton	measure-11 Jessica’s Law (secondary) felony and misdemeanor, by geography
BMD 3	part time	Umatilla County - Hermiston	measure-11 felony and misdemeanor, by geography
BMD 4	part time	Umatilla County - Pendleton	measure-11 Jessica’s Law (secondary) felony and misdemeanor, by geography
BMD 5	part time	Umatilla County - Pendleton	measure-11 (only if 2+ credits) Jessica’s Law (primary) felony and misdemeanor, by geography
BMD 6	part time	Morrow County (2nd) Umatilla County - Hermiston	felony and misdemeanor, by geography
BMD 8	part time	Umatilla County - Pendleton	felony and misdemeanor, by geography
BMD 9	part time	Morrow County (3rd) Umatilla County - Pendleton	felony and misdemeanor, by geography

The consortium is also responsible under the 2018 and 2019 PDSC annual contract for providing primary representation in Morrow County and secondary representation in Umatilla County in appointed juvenile delinquency, dependency, and civil commitment cases.<sup>549</sup> Three of the consortium attorneys take most of the dependency cases, with one attorney (BMD 6) primarily appointed to represent children and two attorneys (BMD 2 and BMD 3) primarily appointed to represent parents.

All of the consortium attorneys are expressly allowed to maintain a private law practice, in addition to their appointed cases under the PDSC annual contract.<sup>550</sup> One of the consortium attorneys, for example, works exclusively handling appointed cases, but takes appointments from three area municipal courts, one justice court, and one tribal court, and also serves as the master on the Umatilla County drug court team.

<sup>548</sup> There are only eight attorneys in the Blue Mountain Defenders consortium in 2018. The designations used here correspond to the designations used on page 204 of this report regarding 2017 case credit assignments. The attorney designated as BMD 7 in that discussion of 2017 case credit assignments no longer participates in the consortium in 2018.

<sup>549</sup> Public Defense Legal Services Contract between PDSC and Blue Mountain Defenders, Specific Terms (Jan. 1, 2018 through Dec. 31, 2019).

<sup>550</sup> Public Defense Legal Services Contract, General Terms ¶ 1.4.5 (Jan. 1, 2018 to Dec. 31, 2019).

Another consortium attorney takes conflict appointments in two nearby counties at the PDSC hourly rate, in addition to handling privately retained cases. A third consortium attorney takes conflict appointments in four nearby counties at the PDSC hourly rate and from several tribal courts, in addition to handling privately retained criminal and family cases. The consortium administrator does not attempt to monitor the workloads of the consortium attorneys and instead trusts them to alert him if they have too many cases.

### 3. Appointing cases among multiple providers in a jurisdiction

#### *a. Lane County*

Two of the three PDSC annual contractors for 2018 and 2019 provide adult criminal defense representation. Public Defender Services of Lane County is a public defender office employing 22 attorneys, but because of the conflict of interest rules it can only provide one attorney in a given case. As of August 2018, two of the public defender office's full-time positions were vacant, and two of the attorneys were part-time (one working 20 hours per week, and one working 10 hours per week). Lane County Defense Consortium is capable of providing up to approximately 12 attorneys in a single case.

Adult criminal cases are appointed to either Public Defender Services of Lane County or Lane County Defense Consortium during initial appearance and arraignment dockets. The initial appearance and arraignment dockets are held Monday through Friday at 8:30 a.m. for out-of-custody defendants and Monday through Friday at 1:30 p.m. for in-custody defendants.

For each in-custody initial appearance and arraignment docket, Public Defender Services of Lane County assigns two attorneys (the office director and one other rotating attorney) to staff the docket and Lane County Defense Consortium also assigns two attorneys (based on a rotation the consortium attorneys sign up for). During each daily docket, roughly two cases are assigned to Public Defender Services of Lane County for each one case assigned to Lane County Defense Consortium.

“For each out-of-custody arraignment docket, Public Defender Services of Lane County assigns three attorneys to staff the out-of-custody arraignment docket. On the first Monday of each month, all cases arising on the docket are appointed to Lane County Defense Consortium; on all other days of the month, all cases arising on the docket are appointed to Public Defender Services of Lane County. Thus, in a month with four weeks and five court days each week, Public Defender Services of Lane County is appointed to all of the cases arraigned on 19 out of 20 days (absent a conflict), and Lane County Defense Consortium is appointed to all of the cases arraigned on one out of 20 days (absent a conflict).

***Public Defender Services of Lane County.*** For all cases to which Public Defender Services of Lane County is appointed, the office's assistant director assigns each case to one of the office's 22 attorneys based on the attorney's level of qualification, the nature of the case, the attorney's workload, and the personal contact a given attorney may have with the client. Both the office director and assistant director are assigned to reduced caseloads. The public defender office also assigns attorneys to staff each of the four Lane County specialty courts and to operate the Veterans' Resource Center. One attorney staffs the veterans' treatment court every Thursday morning for two to four hours, operates the statewide Veterans' Resource Center that consumes on average 10 hours or more each week, and is assigned to predominantly misdemeanor cases but expects assignment to minor felony cases soon. Another attorney is assigned full-time to staff the drug court. The office's 20-hour per week part-time attorney staffs the mental health court during Tuesday afternoons and covers all of the low level misdemeanor cases on a Monday morning docket.

The public defender office attorneys are also responsible under the 2018 and 2019 PDSC annual contract for providing representation in appointed juvenile delinquency, dependency, and civil commitment cases in Lane County.<sup>551</sup> OPDS occasionally, probably "fewer than 30 [times per] year," designates Public Defender Services of Lane County to handle a case in another county, most often Douglas, Marion, or Curry counties. The office assigns these cases typically to one of the attorneys in the office who has a professional relationship with the other county. Attorneys employed by the public defender office are prohibited from practicing law outside of their appointed cases.<sup>552</sup>

***Lane County Defense Consortium.*** The approximately 12 individual attorneys in the Lane County Defense Consortium each participate as either full, half, or quarter caseload attorneys. Based on their participation level, the attorneys sign up to staff the available initial appearance and arraignment dockets proportionately during each month, though attorneys can remove themselves from the rotation temporarily. The consortium attorney who staffs an initial appearance or arraignment docket is appointed the attorney of record on all of the cases assigned to the Lane County Defense Consortium during that docket, absent a conflict of interest. Where the consortium attorney has a conflict of interest, the consortium administrator re-assigns the case to a different consortium attorney. The number of criminal cases a consortium attorney receives out of a given docket varies from day to day and is fairly

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<sup>551</sup> Public Defense Legal Services Contract between PDSC and Public Defender Services of Lane County, Specific Terms (Jan. 1, 2018 through Dec. 31, 2019).

<sup>552</sup> Public Defense Legal Services Contract, General Terms ¶ 1.4.3 (Jan. 1, 2018 to Dec. 31, 2019).

unpredictable. The consortium attorneys are also responsible under the 2018 and 2019 PDSC annual contract for providing representation in appointed civil commitment proceedings in Lane County.<sup>553</sup>

The consortium attorneys are expressly allowed to maintain a private law practice, in addition to their appointed cases under the PDSC annual contract.<sup>554</sup> The consortium administrator (at the time of this evaluation in August 2018) had no way to monitor the workloads of the consortium attorneys and had no guidance or regulations on which to rely in any event.

*b. Marion County*

Two of the four PDSC annual contractors for 2018 and 2019 provide adult criminal defense representation. Public Defender of Marion County is a public defender office employing 13 attorneys, but because of the conflict of interest rules it can only provide one attorney in a given case. Marion County Association of Defenders, Limited is a consortium capable of providing up to approximately 33 unconflicted attorneys.<sup>555</sup>

Adult criminal cases are appointed to either Marion County Association of Defenders, Limited or Public Defender of Marion County during initial appearance and arraignment dockets held daily in one or both of the Annex courtrooms at 9:30 a.m. for out-of-custody defendants and at 3:00 p.m. for in-custody defendants. Public Defender of Marion County is appointed to represent all defendants who appear at initial appearance or arraignment on Mondays (absent a conflict of interest). Cases that Public Defender of Marion County cannot accept due to a conflict are assigned to Marion County Association of Defenders. On Tuesdays through Fridays, Marion County Association of Defenders, Limited is appointed to represent all defendants who appear at initial appearance or arraignment.

***Public Defender of Marion County.*** On Mondays, the Public Defender of Marion County director staffs each initial appearance and arraignment docket, with the help of a legal assistant. The next day, the director distributes the cases assigned to the public defender office among the office's 13 attorneys. Each attorney may be assigned to all levels of cases for which they are qualified. The director carries a reduced caseload of all case types, in addition to staffing the arraignment dockets and supervisory duties. One attorney is assigned to all of the probation violation cases. The bulk of the criminal cases are divided among the office's other 11 attorneys, with three

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<sup>553</sup> Public Defense Legal Services Contract between PDSC and Lane County Defense Consortium, Specific Terms (Jan. 1, 2018 through Dec. 31, 2019).

<sup>554</sup> Public Defense Legal Services Contract, General Terms ¶ 1.4.5 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>555</sup> Though the consortium has 44 members, 10 of the attorneys are not actively accepting appointments. The 34 active attorneys practice in 33 separate law firms.

attorneys qualified for measure 11 cases, two attorneys qualified for major felonies, three attorneys qualified for minor felonies, and three attorneys qualified for at least misdemeanors and possibly higher level cases.

The public defender office is also responsible under its 2018 and 2019 PDSC annual contract for providing representation in appointed civil commitment proceedings in Marion County,<sup>556</sup> which it assigns to the attorney who handles probation violation cases. That same attorney also represents all defendants previously appointed to the public defender office while they are participating in the adult drug court, the mental health court, the veterans' treatment court, or the newly launched Resiliency Court. Attorneys employed by the public defender office are prohibited from practicing law outside of their appointed cases.<sup>557</sup>

***Marion County Association of Defenders, Limited*** assigns cases to its consortium attorneys using the method in place since at least the 1970s, whereby the attorneys sign up with the assistant to the consortium administrator to serve as “attorney of the day” at the initial appearance and arraignment dockets on Tuesdays through Fridays. Each day, there are three attorney of the day positions – a misdemeanor attorney, a felony attorney, and a measure 11 attorney – but the measure 11 attorney often signs up to also be the felony attorney. The attorney of the day is appointed to all cases of the designated level that appear on the docket that day, absent a conflict of interest. If the attorney has a conflict, the consortium administrator reassigns the case to another consortium attorney. In addition, the consortium attorneys sign up for “overflow days” to be appointed to the Monday docket cases in which the Public Defender of Marion County has a conflict. The number of criminal cases a consortium attorney receives out of a given docket varies from day to day and is fairly unpredictable. The lawyers are not required to sign up for any set amount of days and can choose as many or a few as they like to manage their own caseloads. At the time of this evaluation, 10 of the consortium’s 44 members are not actively accepting new appointments.

Four of the consortium attorneys represent all defendants previously appointed to any consortium attorney while they are participating in the adult drug court, the mental health court, the veterans' treatment court, or the newly launched Resiliency Court – one attorney staffs each of these specialty courts. The consortium attorneys are also responsible under the 2018 and 2019 PDSC annual contract for providing representation in appointed civil commitment proceedings in Marion County,<sup>558</sup> although it appears that in practice these cases may all be assigned to the Public Defender of Marion County.

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<sup>556</sup> Public Defense Legal Services Contract between PDSC and Public Defender of Marion County, Specific Terms (Jan. 1, 2018 through Dec. 31, 2019).

<sup>557</sup> Public Defense Legal Services Contract, General Terms ¶ 1.4.3 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>558</sup> Public Defense Legal Services Contract between PDSC and Marion County Association of Defenders, Limited, Specific Terms (Jan. 1, 2018 through Dec. 31, 2019).

The consortium attorneys are expressly allowed to maintain a private law practice, in addition to their appointed cases.<sup>559</sup> For example, one attorney accepts appointed cases from nearby municipal courts and also handles retained family law matters. Another attorney has only a handful of privately retained cases but accepts appointed conflict cases paid at the PDSC hourly rate in at least three other counties. Another consortium attorney says about one-quarter of his caseload is appointed post-conviction cases paid at the PDSC hourly rate and another quarter is privately retained federal employment law cases, noting “it’s miserable” to do only public defense work. Finally, two of the consortium attorneys also participate in the Juvenile Advocacy Consortium under its 2018 and 2019 contract with PDSC in Marion County.

*c. Douglas County*

All four of the PDSC annual contractors for 2018 and 2019 provide adult criminal defense representation. Umpqua Valley Public Defender is a public defender office employing 12 attorneys, Arneson and Stewart, P.C. is a law firm of six attorneys, and Richard A. Cremer PC is a law firm of two attorneys. Because of the conflict of interest rules, each of these three contractors can only provide one attorney in a given case. Roseburg Defense Consortium is capable of providing up to four attorneys in a single case.<sup>560</sup>

Umpqua Valley Public Defender is required by its PDSC contract to perform “case distribution functions for public defense cases in Douglas County” and to “distribute cases based on case type quotas for each contractor, as detailed in each contractor’s case load matrix.”<sup>561</sup> Adult criminal cases are appointed to one of the four annual contractors, or for aggravated homicide or Jessica’s Law cases to an attorney from a list pre-approved by OPDS, during or within about 48 hours following the initial appearance and arraignment dockets. The out-of-custody dockets are conducted by one of the circuit court judges on a rotating basis daily at 8:30 a.m. The in-custody dockets are conducted by the pro tem referee daily at 1:15 p.m.

The Umpqua Valley Public Defender office manager assigns one of the public defender office attorneys to staff each of the initial appearance and arraignment dockets, on a rotating basis depending on “who is not busy.” During the in-custody dockets, cases are assigned to one of the four annual contractors. During the out-of-custody dockets, defendants are told they will receive appointed counsel, but the contractor to which each case will be assigned is not determined during the docket. Umpqua Valley Public Defender has two case assistant specialists who distribute individual cases among the four annual contractors.

<sup>559</sup> Public Defense Legal Services Contract, General Terms ¶ 1.4.5 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>560</sup> Though the consortium has five members, two of the attorneys share secretaries and so they do not take cases conflicting with each other.

<sup>561</sup> Public Defense Legal Services Contract between PDSC and Umpqua Valley Public Defender, Specific Terms ¶ 7 (Jan. 1, 2018 through Dec. 31, 2019).

For adult criminal cases (other than aggravated homicide or Jessica's Law cases), if any of the four contractors are presently representing a defendant in another pending case, then that contractor is appointed to represent the same defendant in a new case. Otherwise, Umpqua Valley Public Defender is appointed first in every case unless it has a conflict. If Umpqua Valley Public Defender has a conflict or if more than one attorney is required in a single case, then Arneson and Stewart, P.C. or Richard A. Cremer, PC is appointed according to a precise rotation list provided by OPDS that is broken down by various case types. Roseburg Defense Consortium is only appointed (where it is not already representing the defendant in another case) if all three of the other contractors have a conflict or if more than three attorneys are required in a single case. Umpqua Valley Public Defender notifies each of the other contractors by email when they are appointed to a new case. Each contractor distributes the cases to which it is appointed to its constituent attorneys.

***Umpqua Valley Public Defender.*** For all cases appointed to Umpqua Valley Public Defender, either the director, assistant director, or one of the case assistant specialists assigns the cases among the office's 12 attorneys, trying to consider the circumstances of the client and case, the qualifications of the attorneys, and the attorneys' active caseloads. Because the office's attorneys can receive new case assignments from three different individuals, the resulting lack of coordination can compound workload challenges the lawyers face. The public defender office attorneys report that open cases frequently have to be reassigned due to attorney turnover.

One of the public defender office attorneys represents all financially eligible defendants in Douglas County while they are participating in any of the specialty courts, in addition to being assigned a partial caseload of individual cases. The public defender office attorneys are also responsible under the 2018 and 2019 PDSC annual contract for providing representation in appointed juvenile delinquency, dependency, and civil commitment cases in Douglas County.<sup>562</sup> Attorneys employed by the public defender office are prohibited from practicing law outside of their appointed cases under the PDSC contract.<sup>563</sup>

***Arneson and Stewart, P.C.*** For all cases appointed to the Arneson and Stewart, P.C. law firm, the two partners assign the cases among the law firm's six attorneys. Managing partner Jim Arneson is approaching retirement and only takes a small percentage of the appointed cases, while partner Gina Stewart takes most of the serious felony cases. The four associate attorneys are assigned cases based in part on their qualification level, in part on the relative weight of cases (determined internally by the law firm partners based on perceived case complexity), and in part on attorney

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<sup>562</sup> Public Defense Legal Services Contract between PDSC and Umpqua Valley Public Defender, Specific Terms (Jan. 1, 2018 through Dec. 31, 2019).

<sup>563</sup> Public Defense Legal Services Contract, General Terms ¶ 1.4.3 (Jan. 1, 2018 to Dec. 31, 2019).

preferences (that is, an attorney can ask to not receive certain case types, which is generally honored). The two law firm partners sit as co-counsel to the associate attorneys as they gain increasing levels of qualification. In addition to adult criminal cases, Arneson and Stewart, P.C. is responsible under the 2018 and 2019 PDSC contract for providing representation in appointed juvenile delinquency, dependency, and civil commitment cases in Douglas County.<sup>564</sup> The law firm is expressly allowed to maintain a private law practice, in addition to its appointed cases.<sup>565</sup> The firm estimates that 80% of its work is appointed and the remainder is privately retained.

***Richard A. Cremer, PC.*** For all cases appointed to the Richard A. Cremer, PC law firm, the firm's owner assigns the cases between himself and his one associate attorney. The associate is assigned a higher percentage overall of the appointed cases, while the firm's owner generally handles the most serious cases such as measure 11 and Jessica's Law cases. In addition to adult criminal cases, Richard A. Cremer, PC is responsible under the 2018 and 2019 PDSC contract for providing representation in appointed juvenile delinquency, dependency, and civil commitment cases in Douglas County.<sup>566</sup> The law firm is expressly allowed to maintain a private law practice, in addition to its appointed cases.<sup>567</sup> The law firm's owner handles most of the firm's privately retained cases, about 30% of which are in dependency matters. The associate attorney takes a small number of retained cases in lower courts.

***Roseburg Defense Consortium.*** The administrative assistant to the Roseburg Defense Consortium's administrator distributes cases appointed to the consortium among the five individual consortium attorneys. If a defendant has previously been represented by a consortium attorney, the assistant assigns any case of that defendant to that same attorney. Otherwise, the assistant assigns cases to each of the five attorneys through a simple rotation, absent a conflict, so that each attorney generally is appointed to every fifth case. Over time, the consortium aims to ensure that each of the five attorneys are appointed to roughly equal numbers of measure 11 cases and of other criminal cases. In addition to adult criminal cases, the consortium attorneys are responsible under the 2018 and 2019 PDSC annual contract for providing representation in appointed juvenile delinquency, dependency, and civil commitment cases in Douglas County.<sup>568</sup>

The consortium attorneys are expressly allowed to maintain a private law practice, in addition to their appointed cases under the PDSC annual contract,<sup>569</sup> and all five of the

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<sup>564</sup> Public Defense Legal Services Contract between PDSC and Arneson and Stewart, P.C., Specific Terms (Jan. 1, 2018 through Dec. 31, 2019).

<sup>565</sup> Public Defense Legal Services Contract, General Terms ¶ 1.4.4 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>566</sup> Public Defense Legal Services Contract between PDSC and Richard A. Cremer, PC, Specific Terms (Jan. 1, 2018 through Dec. 31, 2019).

<sup>567</sup> Public Defense Legal Services Contract, General Terms ¶ 1.4.4 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>568</sup> Public Defense Legal Services Contract between PDSC and Roseburg Defense Consortium, Specific Terms (Jan. 1, 2018 through Dec. 31, 2019).

<sup>569</sup> Public Defense Legal Services Contract, General Terms ¶ 1.4.5 (Jan. 1, 2018 to Dec. 31, 2019).



Roseburg Defense Consortium attorneys do so. One attorney has a retained practice of mostly personal injury and some criminal cases, and also serves as municipal court judge in two Douglas County towns. A second attorney accepts appointed conflict cases in Jackson County at the PDSC hourly rate and takes retained criminal cases throughout southern Oregon. Another attorney serves as the public defense attorney in two municipal courts. A fourth attorney estimates that approximately 60% of his cases are retained domestic relations, estate planning, corporate, and other cases. The fifth attorney holds public defense contracts in three justice courts.

*d. Multnomah County*

Three of the seven PDSC annual contractors for 2018 and 2019 provide adult criminal defense representation. Metropolitan Public Defender Services Inc. is a public defender office employing 45 attorneys to handle its Multnomah County workload, and Multnomah Defenders Inc. is a public defender office employing 25 attorneys, but because of the conflict of interest rules each of these offices can only provide one attorney in a given case. Portland Defense Consortium is capable of providing up to six attorneys in a single case. Adult criminal cases are appointed to one of the three contractors during the initial appearance and arraignment dockets held daily in five separate courtrooms.

For felony cases, Metropolitan Public Defender Services assigns one felony attorney on a daily rotating basis to staff the initial appearance and arraignment docket in courtroom JC3 daily at 9:00 a.m. and 2:00 p.m. During the dockets, cases are assigned to one of the three contractors. Any defendant who is presently being represented by any of the three contractors in an open case is usually assigned to that contractor. Spanish-speaking defendants usually are assigned to the Portland Defense Consortium, absent a conflict. All other defendants are assigned to Metropolitan Public Defender Services, Inc. unless it has a conflict. If Metropolitan Public Defender Services, Inc. has a conflict, the defendant is assigned to either Multnomah Defenders, Inc. or Portland Defense Consortium based on a master grid provided by OPDS for each type of felony case. Over the course of the day, the proper ratio of felony assignments to each of the three contractors is achieved. The OPDS master grid allocates felony cases to each of the three contractors as follows:

Felony Case Type	MPD	MDI	PDC	Total
Murder	6	1	17	24
Jessica's Law	12	0	12	24
Measure 11	17	3	16	36
A Felony	17	4	15	36
B Felony	20	6	10	36
C Felony	17	12	7	36

For misdemeanor cases arising east of 122nd Avenue, Multnomah Defenders, Inc. is required by its PDSC contract to be appointed to all misdemeanor cases and proceedings, barring a conflict, held in the Gresham courthouse. Multnomah Defenders, Inc. assigns two of its attorneys permanently to the Gresham courthouse, where they divide up the cases between themselves.

For misdemeanor cases arising west of 122nd Avenue, Metropolitan Public Defender Services, Inc. is required by its PDSC contract to staff the initial appearances and arraignments. By agreement though, Metropolitan Public Defender Services, Inc. and Multnomah Defenders, Inc. divide responsibility for staffing the initial appearance and arraignment docket in courtroom JC4 daily at 9:00 a.m. and 2:00 p.m. Multnomah Defenders, Inc. assigns one of its attorneys on a rotating basis to staff the dockets on Mondays, Thursday, and Fridays, and Multnomah Defenders Inc. is appointed to all of the cases on those days, barring a conflict or for a defendant who is presently being represented by another contractor in an open case. Metropolitan Public Defender Services, Inc. assigns one misdemeanor attorney on a weekly rotating basis to staff the dockets on Tuesdays and Wednesdays, and Metropolitan Public Defender Services, Inc. is appointed to all of the cases on those days, barring a conflict or for a defendant who is presently being represented by another contractor in an open case. On all five days, conflict cases are appointed by the judge to a private attorney from a list pre-approved by OPDS.

For low-level misdemeanor cases diverted to community court, Metropolitan Public Defender Services, Inc. is required by its PDSC contract to staff the initial appearances and arraignments. By agreement though, Metropolitan Public Defender Services, Inc. and Multnomah Defenders, Inc. divide responsibility for staffing the docket in courtroom 602 that runs all day Monday through Thursday. Multnomah Defenders, Inc. permanently assigns one of its attorneys to staff the community court docket on Mondays and Tuesdays, and that attorney is appointed to all of the cases on those days, barring a conflict. Metropolitan Public Defender Services, Inc. permanently assigns one of its attorneys to staff the community court on Wednesdays and Thursdays, and that attorney is appointed to all of the cases on those days, barring a conflict.

For probation violation cases, Portland Defense Consortium is required by its PDSC contract to be assigned all probation violation proceedings, but it is not. Portland Defense Consortium's administrator staffs the initial appearance and arraignment docket for probation violation cases in courtroom JC2. Probation violation cases are assigned to either Portland Defense Consortium, Multnomah Defenders, Inc. including those arising out of misdemeanor drug possession cases, or Metropolitan Public Defender Services, Inc.

***Metropolitan Public Defender Services, Inc.*** For felony and misdemeanor cases assigned to Metropolitan Public Defender Services, Inc., its dockets unit assigns each

case to one of 26 of the office's attorneys, using separate rotation grids for measure 11 cases, major felonies, minor felonies, and misdemeanors. The rotation grid for each level of case lists the names of the attorneys to whom those cases can be assigned, and the attorney names are listed in proportion to the caseload they carry, i.e., some attorneys such as supervisors carry less than a full caseload. The appointed lawyer is notified of the new case by receiving a paper file placed in their office mailbox within "a few days" of the arraignment, however, attorneys note that heavy caseloads often delay action on their newly assigned cases. For example, one attorney had a client arrested on a Friday and assigned to the office the following Monday at his initial appearance, but "I don't think I know about it before Thursday, at the earliest. And I don't do anything on the case until the following Monday, maybe." Thus it is possible, if not likely, that more than a week passes before the appointed lawyer for the first time opens the file of an in-custody client. Given the high caseloads and over-loaded court schedules, legal assistants usually make the initial contact with clients within 24 hours of the office being appointed.

Even though each case is assigned to an individual attorney, the Metropolitan Public Defender Services, Inc. attorneys routinely cover for one another on their cases, because the attorneys are often scheduled to be in multiple courtrooms at the same time. Additionally, the office formally assigns one or more attorneys to serve as the "coverage" attorney for certain dockets. The felony attorneys each sign up for a day at a time to serve as coverage attorney for all of the Metropolitan Public Defender Services, Inc. cases set on the felony morning call docket, at which felony cases are either continued or assigned to a judge for trial to begin the following day. The misdemeanor attorney who is assigned to the JC4 docket for a week also serves as the coverage attorney for all of the Metropolitan Public Defender Services, Inc. cases set on the CPC misdemeanor call docket during that week, at which misdemeanor cases are expected to be scheduled for trial the following day. The office also assigns some number of attorneys to staff the "STOP" adult drug court, the "START" court for property offenders, and the mental health court. The Metropolitan Public Defender Services, Inc. attorneys are also responsible under the 2018 and 2019 PDSC annual contract for providing representation in appointed juvenile delinquency, dependency, and civil commitment cases in Multnomah County.<sup>570</sup> Attorneys employed by the public defender office are prohibited from practicing law outside of their appointed cases under the PDSC contract.<sup>571</sup>

***Multnomah Defenders, Inc.*** Two of the Multnomah Defenders, Inc. attorneys divide between themselves all of the misdemeanor cases and proceedings at the Gresham courthouse. For all felony and other misdemeanor cases assigned to Multnomah Defenders, Inc., its dockets manager assigns each case to one of the office's other

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<sup>570</sup> Public Defense Legal Services Contract between PDSC and Metropolitan Public Defender Services, Inc., Specific Terms (Jan. 1, 2018 through Dec. 31, 2019).

<sup>571</sup> Public Defense Legal Services Contract, General Terms ¶ 1.4.3 (Jan. 1, 2018 to Dec. 31, 2019).

23 attorneys who are divided into three groups based on their qualification level (misdemeanor, minor felony, and major felony). The executive director describes assigning cases as “an art not a science.” Within each practice group, cases are assigned based on experience level and caseloads, with easier cases going to the less experienced attorneys in each group. Attorneys within groups are sometimes cross-assigned, so that for example attorneys can second chair to achieve a higher qualification level, or a defendant with both a felony and a misdemeanor case will be represented by just one attorney. Even though each case is assigned to an individual attorney, the Multnomah Defenders, Inc. attorneys end up covering for one another on their cases, particularly in misdemeanor cases, because the attorneys are often scheduled to be in multiple courtrooms at the same time. The Multnomah Defenders, Inc. attorneys are also responsible under the 2018 and 2019 PDSC annual contract for providing representation in appointed juvenile delinquency, dependency, and civil commitment cases in Multnomah County, and for handling civil commitment appeals.<sup>572</sup> Attorneys employed by the public defender office are prohibited from practicing law outside of their appointed cases under the PDSC contract.<sup>573</sup>

***Portland Defense Consortium.*** Portland Defense Consortium is a consortium of six separate law firms that collectively have a total of 12 private attorneys.<sup>574</sup> The consortium administrator is a solo practitioner who staffs the initial appearance and arraignment docket for probation violation cases in the JC2 courtroom and handles only cases on that docket. Felony cases assigned to Portland Defense Consortium from the JC3 courtroom are allocated among the other five law firms according to a “blind grid.” Each firm assigns its cases to a particular attorney. The consortium attorneys are also responsible under the 2018 and 2019 PDSC annual contract for providing representation in appointed civil commitment proceedings in Multnomah County.<sup>575</sup> The consortium attorneys are expressly allowed to maintain a private law practice, in addition to their appointed cases under the PDSC annual contract.<sup>576</sup>

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<sup>572</sup> Public Defense Legal Services Contract between PDSC and Multnomah Defenders, Inc., Specific Terms (Jan. 1, 2018 through Dec. 31, 2019).

<sup>573</sup> Public Defense Legal Services Contract, General Terms ¶ 1.4.3 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>574</sup> At the time the contract was awarded, OPDS showed the Portland Defense Consortium as having 15 attorneys. *See* OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION, MEMBERSHIP DIRECTORY, OREGON PUBLIC DEFENSE CONTRACTS (Mar. 19, 2018). At that time, those 15 attorneys worked out of eight separate law firms. Since then, three attorneys have left the consortium, and two of the remaining attorneys have joined together in practice.

<sup>575</sup> Public Defense Legal Services Contract between PDSC and Portland Defense Consortium, Specific Terms (Jan. 1, 2018 through Dec. 31, 2018).

<sup>576</sup> Public Defense Legal Services Contract, General Terms ¶ 1.4.5 (Jan. 1, 2018 to Dec. 31, 2019).

## C. SUFFICIENT RESOURCES & COMPENSATION (OVERHEAD, CASE-RELATED EXPENSES, AND FEES)

The U.S. Supreme Court explained in *Cronic* that “[t]he right to the effective assistance of counsel” means that the defense must put the prosecution’s case through the “crucible of meaningful adversarial testing.”<sup>577</sup> For this to occur, states must ensure that both the prosecution and the defense have the resources they need at the level their respective roles demand. “While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators.”<sup>578</sup> If a defense attorney is either incapable of or barred from challenging the state’s case because of a structural impediment – “if the process loses its character as a confrontation between adversaries”<sup>579</sup> – a constructive denial of counsel occurs.

The *Cronic* Court clearly advises that governmental interference that infringes on a lawyer’s independence to act in the stated interests of defendants or places the lawyer in a conflict of interest causes a constructive denial of counsel.<sup>580</sup> The *Oregon Rules of Professional Conduct* expressly prohibit all lawyers from representing a client whenever a conflict of interest exists.<sup>581</sup> Generally, unless a “client gives informed consent, confirmed in writing,” a lawyer cannot represent a client if the lawyer has a conflict of interest.<sup>582</sup>

An attorney cannot represent a client if the attorney’s own personal interests are likely to be at odds with the client’s case-related interests.<sup>583</sup> When the needs of a client’s case require the lawyer to spend money out of his own compensation, there is a conflict between the lawyer’s personal interests and that of the client. In short, any structure of services that places the attorney’s personal financial wellbeing in direct competition with the stated interest of a defendant is a constructive denial of counsel. The State of Oregon, therefore, has a constitutional obligation to ensure the systems established

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<sup>577</sup> United States v. *Cronic*, 466 U.S. 648, 656-57 (1984) (“The right to the effective assistance of counsel is thus the right of the accused to require the prosecution’s case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted – even if defense counsel may have made demonstrable errors – the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.”).

<sup>578</sup> United States v. *Cronic*, 466 U.S. 648, 657 (1984) (citing United States *ex rel.* Williams v. Twomey, 510 F.2d 634, 640 (7th Cir. 1975)).

<sup>579</sup> United States v. *Cronic*, 466 U.S. 648, 656-57 (1984).

<sup>580</sup> United States v. *Cronic*, 466 U.S. 648, 658-61 (1984).

<sup>581</sup> OR. R. PROF. CONDUCT 1.7.

<sup>582</sup> OR. R. PROF. CONDUCT 1.7.

<sup>583</sup> OR. R. PROF. CONDUCT 1.7(a)(2) (“a lawyer shall not represent a client if . . . there is a significant risk that the representation . . . will be materially limited by . . . a personal interest of the lawyer.”).

for providing Sixth Amendment services are free from financial conflicts that interfere with counsel's ability to render effective representation to each defendant.<sup>584</sup>

There are three categories of financial resources that are needed for the defense of every case: law office overhead; case-related expenses; and fair lawyer compensation.<sup>585</sup>

- *Law office overhead.* For an attorney to simply show up and be available to represent clients each day, there are certain expenses that must be paid. These include office rent, furniture and equipment, computers and cellphones, telephone and internet and other utilities, office supplies including stationery, malpractice insurance, state licensing and bar dues, and legal research materials, plus the cost of staff such as a secretary or legal assistant. All of these expenses, commonly referred to as “overhead,” must be incurred before a lawyer represents a single client.<sup>586</sup>
- *Case-related expenses.* Once an attorney is designated to represent a specific client in a specific case, there are additional expenses that must be paid. These are the expenses that the attorney would not incur but for representing that client, and they include, for example: postage to communicate with the client and witnesses and the court system, long-distance and collect telephone charges, mileage and other travel costs to and from court and to conduct investigations, preparation of copies and exhibits, costs incurred in obtaining discovery, along with the costs of hiring necessary investigators and experts in the case. These costs vary from case to case – some cases requiring very little in the way of expense; other cases costing quite a lot. The individual expenses that are necessary, though, must be paid for in every client's case.

<sup>584</sup> See, e.g., *Wood v. Georgia*, 450 U.S. 261, 271 (1981) (“Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest.”); *Cuyler v. Sullivan*, 446 US 335, 346 (1980) (“Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial.”); *Glasser v. United States*, 315 U.S. 60, 70 (1942) (“[A]ssistance of counsel’ guaranteed by the Sixth Amendment contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests.”).

<sup>585</sup> See, e.g., AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, commentary to Principle 8 (Feb. 2002) (“Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses. Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should . . . separately fund expert, investigative, and other litigation support services.”).

<sup>586</sup> “The 2012 *Survey of Law Firm Economics* by ALM Legal Intelligence estimates that over 50 percent of revenue generated by attorneys goes to pay overhead expenses,” NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, RATIONING JUSTICE: THE UNDERFUNDING OF ASSIGNED COUNSEL SYSTEMS 8 (Mar. 2013), and overhead tends to be a higher percentage of gross receipts as a law office gets smaller. See ALM LEGAL INTELLIGENCE, 2012 SURVEY OF LAW FIRM ECONOMICS, Executive Summary at 4 (showing overhead ranging from 38.9 percent of receipts in the largest law firms to 47.2 percent in smaller law offices).

- *Fair lawyer compensation.* Compensation is the attorney's take home pay.

All national standards require that: "Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses. Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual or complex cases, and separately fund expert, investigative, and other litigation support services."<sup>587</sup>

In 2013, the National Association of Criminal Defense Lawyers published a comprehensive study of the rates of compensation paid to private attorneys to provide representation to indigent people, whether under contract or appointed on a case by case basis, in all fifty states<sup>588</sup> and found generally that the low compensation rates provided to lawyers across America are a "serious threat to our criminal justice system."<sup>589</sup> The requirement that attorneys who represent the poor be adequately compensated does not arise out of concern for the welfare of the attorneys. Rather, adequate compensation for the attorney is required to ensure that the attorney provides effective representation to each client. Inadequate compensation "leads to a decrease in the overall number of attorneys willing to accept court appointments"<sup>590</sup> and can "encourage some attorneys to accept more clients than they can effectively represent in order to make ends meet."<sup>591</sup>

The American Bar Association's *Standards for Criminal Justice* explain that attorneys must have adequate resources and support staff in order to render quality legal representation.

Among these are secretarial, investigative, and expert services, which includes assistance at pre-trial release hearings and sentencing. In addition to personal services, this standard contemplates adequate facilities and equipment, such as computers, telephones, facsimile machines, photocopying, and specialized equipment required to perform necessary investigations.<sup>592</sup>

<sup>587</sup> AMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, commentary to Principle 8 (Feb. 2002).

<sup>588</sup> NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS. RATIONING JUSTICE: THE UNDERFUNDING OF ASSIGNED COUNSEL SYSTEMS (Mar. 2013) .

<sup>589</sup> NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS. RATIONING JUSTICE: THE UNDERFUNDING OF ASSIGNED COUNSEL SYSTEMS 12 (Mar. 2013).

<sup>590</sup> NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS. RATIONING JUSTICE: THE UNDERFUNDING OF ASSIGNED COUNSEL SYSTEMS 15 (Mar. 2013).

<sup>591</sup> NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS. RATIONING JUSTICE: THE UNDERFUNDING OF ASSIGNED COUNSEL SYSTEMS 16 (Mar. 2013).

<sup>592</sup> AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE – PROVIDING DEFENSE SERVICES, commentary to Standard 5-1.4 (3d ed. 1992).

The Supreme Court has determined that the failure to conduct adequate investigation can be grounds for a finding of ineffective assistance of counsel.<sup>593</sup> Moreover, it is crucial that an investigator be available to assist the attorney with interviewing witnesses, else “the attorney may be placed in the untenable position of either taking the stand to challenge the witnesses’ credibility if their testimony conflicts with statements previously given or withdrawing from the case.”<sup>594</sup> The U.S. Supreme Court has also held, for example, that an indigent accused is entitled to the assistance of a psychiatrist at public expense to assert an insanity defense.<sup>595</sup>

The government is responsible for providing the resources needed in each defendant’s case. It can do so by providing a government paid-for building stocked with all the necessary supplies and equipment and a budget for investigation, experts, and support staff. Or it can do so by paying or repaying the public attorneys for these expenses. What government *cannot do*, as has been held by state supreme courts all across the country, is place the burden of paying for the indigent defense system onto the public attorneys.<sup>596</sup>

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<sup>593</sup> Kimmelman v. Morrison, 477 U.S. 365, 385 (1986) (“[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.”).

<sup>594</sup> AMERICAN BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE – PROVIDING DEFENSE SERVICES, commentary to Standard 5-1.4 (3d ed. 1992).

<sup>595</sup> Ake v. Oklahoma, 470 U.S. 68 (1985).

<sup>596</sup> See, e.g., Wright v. Childree, 972 So. 2d 771, 780-81 (Ala. 2006) (determining assigned counsel are entitled to a reasonable fee in addition to overhead expenses, in case where state’s Attorney General had issued an opinion against paying the overhead rate and the state comptroller subsequently stopped paying); May v. State, 672 So. 2d 1307, 1308 (Ala. Crim. App. 1993) (determining indigent defense attorneys were entitled to overhead expenses, presumptively set at \$30 per hour, in addition to a reasonable fee); DeLisio v. Alaska Superior Court, 740 P.2d 437, 443 (Alaska 1987) (determining that appointed cases did not simply merit a reasonable fee and overhead, but rather the fair market rate of an average private case. “[R]equiring an attorney to represent an indigent criminal defendant for only nominal compensation unfairly burdens the attorney by disproportionately placing the cost of a program intended to benefit the public upon the attorney rather than upon the citizenry as a whole.” Alaska’s constitution “does not permit the state to deny reasonable compensation to an attorney who is appointed to assist the state in discharging its constitutional burden,” because doing so would be taking “private property for a public purpose without just compensation.”); State ex rel Stephan v. Smith, 747 P.2d 816, 242 Kan. 336, 383 (Kan. 1987) (the state “has an obligation to pay appointed counsel such sums as will fairly compensate the attorney, not at the top rate an attorney might charge, but at a rate which is not confiscatory, considering overhead and expenses;” testimony showed the average overhead rate of attorneys in Kansas in 1987 was \$30 per hour); State v. Wigley, 624 So.2d 425, 429 (La. 1993) (finding that “in order to be reasonable and not oppressive, any assignment of counsel to defend an indigent defendant must provide for reimbursement to the assigned attorney of properly incurred and reasonable out-of-pocket expenses and overhead costs.”); Wilson v. State, 574 So.2d 1338, 1340 (Miss. 1990) (determining that indigent defense attorneys are entitled to “reimbursement of actual expenses” in addition to a reasonable sum; defining “actual expenses” to include “all actual costs to the lawyer for the purpose of keeping his or her door open to handle this case,” and allowing defense attorneys to receive a “pro rata share of actual overhead”); State v. Lynch, 796 P.2d 1150, 1161 (Okla. 1990) (finding that state government “has an obligation to pay appointed lawyers sums which will fairly compensate the lawyer, not at the top rate which a lawyer might charge, but at a rate which is not confiscatory, after



The Oregon legislature has instructed the Public Defense Services Commission to “[a]dopt policies, procedures, standards and guidelines regarding . . . [t]he fair compensation of counsel appointed to represent a person financially eligible for appointed counsel at state expense . . . [and] [a]ny other costs associated with the representation of a person by appointed counsel in the state courts that are required to be paid by the state . . .”<sup>597</sup> The legislature makes the executive director of OPDS responsible for implementing and ensuring compliance with those policies, procedures, standards, and guidelines and for paying the expenses of the PDSC and the OPDS.<sup>598</sup>

#### 1. Resources & compensation provided by PDSC and OPDS to contractors

PDSC’s method of compensating contractors is a fixed fee compensation scheme that can negatively affect the provision of effective assistance of counsel.<sup>599</sup>

**Overhead.** PDSC requires every annual contractor (or its constituent individual attorneys) to pay all of the overhead costs of being available to provide representation. The General Terms of the contracts expressly state that PDSC will pay each contractor only the amount established by the Specific Terms of the contract – that is, the flat rate value for case credits, fixed fee line items, and/or line item offsets – and that PDSC will reimburse the contractor for certain delineated case-related expenses as explained more fully by the PDSC’s *Public Defense Payment Policy and Procedures*.<sup>600</sup> PDSC expressly provides that “[o]verhead expenses, including services performed by an employee or an independent contractor of provider, are not reimbursable, except in extraordinary circumstances with the preauthorization of OPDS,”<sup>601</sup> and the overhead expenses that it will not reimburse includes, but are not limited to:

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considering overhead and expenses;” “provision must be made for compensation of defense counsel’s reasonable overhead and out of pocket expenses” in order “to place the counsel for the defense on an equal footing with counsel for the prosecution”); *Jewell v. Maynard*, 383 S.E.2d 536, 540 (W. Va. 1989) (raising the hourly rate paid to court appointed attorneys on a finding that they were forced to “involuntarily subsidize the State with out-of-pocket cash,” because the then-current rates did not cover attorney overhead shown to be \$35 per hour in West Virginia in 1989. “Perhaps the most serious defect of the present system is that the low hourly fee may prompt an appointed lawyer to advise a client to plead guilty, although the same lawyer would advise a paying client in a similar case to demand a jury trial.”).

<sup>597</sup> OR. REV. STAT. § 151.216(1)(f)(C) - (E) (2017).

<sup>598</sup> OR. REV. STAT. § 151.219(1)(b),(h) (2017).

<sup>599</sup> Privately retained criminal defense attorneys frequently, perhaps predominantly, set a fixed fee to represent an individual privately retained client in a specific case. In that circumstance, both the attorney and the client are able to fully discuss the parameters of the representation required in reaching agreement about the fee, and both the attorney and the client are able to accept or decline the terms of that arrangement. This is not the situation under the representation system devised by PDSC and OPDS, where neither the attorney nor the client are able to walk away from the attorney client relationship and neither have any input into whether the funds provided are adequate for effective representation.

<sup>600</sup> Public Defense Legal Services Contract, General Terms ¶¶ 6.2, 6.3 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>601</sup> PDSC & OPDS, PUBLIC DEFENSE PAYMENT POLICY AND PROCEDURES ¶ 3.4.2 (rev’d Apr. 1, 2018).

- Travel time and expenses between home and office;
- Paraprofessional Services (law clerk, legal assistant, paralegal, and secretarial services);
- Timekeeping and bill preparation;
- Rent and utilities;
- Office equipment and supplies;
- Library materials; and,
- Computerized legal research software, installation and monthly access fees.<sup>602</sup>

The PDSC's failure to reimburse contractors for the cost of overhead means that contractors or their constituent attorneys must pay for these costs out of whatever fee they earn, reducing the lawyer's take home pay. This creates a disincentive for the attorney to incur any overhead costs that benefit indigent defendants (even such as secretarial time or legal research capability), without regard to whether the resources are necessary to provide effective representation.

***Case-related expenses.*** PDSC provides for case-related expenses in one of two ways.

Those contractors that have a line item offset for investigation in the Specific Terms of their contracts<sup>603</sup> are generally expected by PDSC to provide all necessary investigation in all cases handled by that contractor out of that line item offset amount.<sup>604</sup> However, contractors are not required to account to OPDS for how they spend the funds provided through a line item offset for investigation, so PDSC and OPDS have no way of knowing whether necessary investigation is being conducted or whether the contractor is putting the funds to some other use. Further, there is no mechanism to determine whether the amount of funds PDSC provides through a line item offset for investigation is in fact sufficient to provide all necessary investigation in all cases handled by a given contractor.

In all other instances when case-related expenses must be incurred in a case, PDSC has a process the attorney must follow. Some expenses, such as producing copies or long-distance telephone calls or hiring an interpreter, are defined by PDSC as "routine expenses" that the attorney is always allowed to incur up to a specified amount,<sup>605</sup> and so long as the attorney carefully follows the rules, then the attorney can be reimbursed after the case is disposed.<sup>606</sup> Other expenses, including the use of experts, are defined

<sup>602</sup> PDSC & OPDS, PUBLIC DEFENSE PAYMENT POLICY AND PROCEDURES ¶ 3.4.2 (rev'd Apr. 1, 2018).

<sup>603</sup> In the sample counties, seven of the 16 annual contractors who provide adult criminal representation in 2018 and 2019 receive a line item offset for investigation: Arneson and Stewart, P.C.; Umpqua Valley Public Defender; Public Defender Services of Lane County; Public Defender of Marion County; Metropolitan Public Defender Services, Inc.; Multnomah Defenders, Inc.; and Intermountain Public Defender Inc.

<sup>604</sup> Telephone interview of OPDS Executive Director Lane Borg (Oct. 29, 2018).

<sup>605</sup> PDSC & OPDS, PUBLIC DEFENSE PAYMENT POLICY AND PROCEDURES ¶¶ 3.5.1 - 3.5.12 and Exh. 2 Schedule of Guideline Amounts (rev'd Apr. 1, 2018).

<sup>606</sup> PDSC & OPDS, PUBLIC DEFENSE PAYMENT POLICY AND PROCEDURES ¶¶ 2.6.1, 3.9.1 (rev'd Apr. 1,

by PDSC as “non-routine expenses” and an attorney must get permission from PDSC in advance, through a process known as “preauthorization,” in order to obtain these necessary resources for a client’s case<sup>607</sup> – else the attorney cannot be reimbursed for these costs other than in very limited circumstances.<sup>608</sup> In other words, no matter how necessary the attorney believes a case-related expense to be, it can only be obtained in a case if PDSC approves it. Even then, the attorney must first pay out of pocket for all routine expenses and generally will only be reimbursed by PDSC after a case is final, no matter how long the attorney represents the defendant in that case. This creates a disincentive to incur necessary case-related expenses.

**Attorney compensation.** PDSC pays each contractor an attorney fee in one or more of three ways: fixed value contract; fixed fee line item; or flat rate per credit – also each contractor that receives a line item offset has it available to use as they see fit. As noted, all contractors (or their constituent attorneys) must cover the cost of all overhead out of the attorney fee it earns. Additionally, if an attorney believes a given case-related expense is necessary but PDSC does not approve that expense, then the contractor or the attorney must pay that expense out of the available attorney fee or forgo it. What remains after payment of these costs is available to pay the individual attorneys who provide representation. A federal court in 2013 called the use of contracts such as this an “[i]ntentional choice[]” of government that purposely leaves “the defenders compensation at such a paltry level that even a brief meeting [with clients] at the outset of the representation would likely make the venture unprofitable.”<sup>609</sup>

Of the 16 annual contractors who provide adult criminal representation in the sample counties in 2018 and 2019, PDSC pays two of them through fixed value contracts. Both of these contractors are private law firms that are allowed to accept employment outside of their PDSC contracts. Each of these contractors are paid the fixed dollar amount of \$758,966 over the two years of the contracts to handle up to 660 cases in Harney and Grant counties.<sup>610</sup> The fee does not change no matter how few cases the contractor handles and no matter how many or few hours the contractor devotes to each case. As a result, these contracts create a financial incentive for the lawyer

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2018).

<sup>607</sup> PDSC & OPDS, PUBLIC DEFENSE PAYMENT POLICY AND PROCEDURES ¶¶ 3.6.1 - 3.6.12, 3.13.1 - 3.14.2, and Exh. 2 Schedule of Guideline Amounts (rev’d Apr. 1, 2018).

<sup>608</sup> PDSC & OPDS, PUBLIC DEFENSE PAYMENT POLICY AND PROCEDURES ¶¶ 3.6.1, 3.6.3, 3.7.1 - 3.7.2 (rev’d Apr. 1, 2018).

<sup>609</sup> Memorandum of Decision at 15, *Wilbur v. City of Mount Vernon*, No. C11-1100RSL (W.D. Wash., Dec. 4, 2013), available at <http://sixthamendment.org/wp-content/uploads/2013/12/Wilbur-Decision.pdf>.

<sup>610</sup> Public Defense Legal Services Contract between PDSC and John B. Lamborn, Attorney at Law, PC, Specific Terms (Jan. 1, 2018 through Dec. 31, 2019); Public Defense Legal Services Contract between PDSC and Law Office of Robert S. Raschio, PC, Specific Terms (Jan. 1, 2018 through Dec. 31, 2019).

to be appointed in as few cases as possible and to devote as few hours as possible to each case, leaving as many hours as possible available for more lucrative private employment. The fixed fee creates an incentive for the attorney to rush a client to plead guilty without regard to the facts of the case, avoid conducting investigation or legal research, and avoid engaging in hearings or a trial. It also incentivizes the attorney to favor the legal interests of his paying clients or other employment over the legal interests of the indigent defendants he is appointed to represent. Additionally, PDSC and OPDS have no mechanism for knowing whether the attorneys are devoting sufficient time to each case to provide effective assistance of counsel.

Among the other 14 annual contractors who provide adult criminal representation in the sample counties in 2018 and 2019, PDSC pays nine of them some amount of funds through one or more fixed fee line items.<sup>611</sup> In exchange for the funds provided through each fixed fee line item, the contractor is responsible for providing either a particular service or representation in a particular program or court, but the fee does not change no matter how few or how many clients are represented nor how few or how many hours the contractor devotes. Contractors are not required to account to OPDS for how they spend the funds provided through these fixed fee line items, so PDSC and OPDS have no way of knowing whether and how effectively the representation or service is provided. There is no way to determine whether the contractor is expending the funds for the service/representation or whether the contractor is putting the funds to some other use. Further, there is no mechanism to determine whether the amount of funds PDSC provides through a fixed fee line item is in fact sufficient to provide the necessary service/representation. Finally, the fixed fee line items in the contracts create a financial incentive for the contractor (and the individual lawyers) to devote as few hours as possible to providing the service or representation, because the fee the contractor earns decreases with each additional hour spent.

PDSC pays for the bulk of all adult criminal trial representation through the flat rate per credit scheme. The rate that PDSC pays the contractor does not change no matter how few or how many hours are necessary to effectively represent the client in a given case, creating a financial incentive for the contractor (or individual attorney) to dispose of cases as quickly as possible rather than as effectively as possible for the client. Even where the defendant has a winnable case, the lawyer's incentive nevertheless is to resolve it by plea. The attorney is not rewarded with additional pay for the additional work involved in zealous advocacy. Rather, the attorney is hurt financially the more he does for his clients. The flat rate per credit simultaneously creates an incentive for the contractor (or each constituent attorney) to take on as many cases as possible, because this is the only way to earn additional funds within the PDSC contract, without regard to whether the lawyer has adequate time to devote to each case.

<sup>611</sup> These contractors are: Clackamas Indigent Defense Corporation; Umpqua Valley Public Defender; Public Defender Services of Lane County; Marion County Association of Defenders, Limited; Public Defender of Marion County; Metropolitan Public Defender Services, Inc.; Multnomah Defenders, Inc.; Portland Defense Consortium; and Intermountain Public Defender Inc.

When lawyers' compensation decreases with each additional case, or when forced to pay for overhead out of the attorney's compensation, lawyers often come to resent their clients or at least the number of clients they are appointed to represent. Put another way, the government's compensation structure creates a conflict between the lawyer's financial interests and the case-related interests of each of his appointed clients. As a result of that conflict, the lawyer may triage the time and resources he puts into his cases.

## 2. Resources & compensation provided by contractors to individual attorneys

### *a. Public defender offices' compensation of attorneys*

In the counties visited as part of this study, six of the annual contractors that provide adult criminal representation are public defender offices:

<u>Contractor</u>	<u>County</u>
Umpqua Valley Public Defender	Douglas
Public Defender Services of Lane County	Lane
Public Defender of Marion County	Marion
Metropolitan Public Defender Services, Inc.	Multnomah
Multnomah Defenders, Inc.	Multnomah
Intermountain Public Defender Inc.	Umatilla & Morrow

For a public defender office contractor, PDSC pays the contractor in accordance with the Specific Terms of the contract. Public defender office contractors are generally prohibited from doing any legal work outside of the PDSC contract,<sup>612</sup> and so, absent a grant of some sort, the funds earned through the PDSC contract are the only amounts available to a public defender office contractor. The contractor decides what overhead is necessary, such as the amount of office space, the number and type of support staff, and the technology that will be available, and the contractor pays for all of the overhead out of the funds it earns from PDSC. The contractor decides how much it pays the attorneys it employs, and the individual attorneys do not personally incur any costs but they also cannot earn legal fees beyond the salary they receive from the office. The easiest way to understand how public defender offices use PDSC contract dollars is through the example of the Umpqua Valley Public Defender in Douglas County.

<sup>612</sup> Public Defense Legal Services Contract, General Terms ¶ 7.11 (Jan. 1, 2018 to Dec. 31, 2019).

Umpqua Valley Public Defender's contract with PDSC<sup>613</sup> provides a total two-year contract value of \$4,252,124. Of the total contract value, \$3,323,904 is for Umpqua Valley Public Defender to provide representation in a total of 7,456 adult criminal, juvenile delinquency, dependency, and civil commitment credits in Douglas County, and the contractor must account for these funds through the case credit billing system. The balance of the contract value is \$127,554 for adult drug court, \$50,428 for mental health/domestic violence court, and \$750,238 for investigation offset, and the contractor does not have to account for the services it provides through these funds.

Every month, OPDS pays Umpqua Valley Public Defender roughly \$177,171 (1/24th of the total contract amount),<sup>614</sup> and that money goes into the Umpqua Valley Public Defender's bank account. Of that monthly payment, \$38,675 is for fixed fee line items and line item offsets, and so it is earned without Umpqua Valley Public Defender having to account to OPDS for how they spend those funds. The remaining \$138,496 per month must be earned and accounted for by Umpqua Valley Public Defender through the flat rate per credit system.

**Overhead.** In approximately 2016, the Umpqua Valley Public Defender purchased a two-story building that it renovated to use for its offices. The office purchased iPads for attorneys in 2017 to increase their mobility. The office uses Time Matters software for its case management database, for which it pays a licensing fee. If anything goes wrong regarding Time Matters, the office requires external IT support to troubleshoot the problem. Time Matters is not used to track time; lawyers log their hours on cases with pen and paper, and the hours tracked are not entered into Time Matters.

Umpqua Valley Public Defender employs twelve support staff: two investigators, an office manager/human resources manager, two case assignment specialists, three legal secretaries, two receptionists, and two part-time file clerks. The office pays approximately \$485,976 in total non-attorney salaries and wages each year, not including benefits (or, an average of \$40,498 per month). The attorneys use the office's legal secretaries primarily to maintain their calendars, to prepare simple pro forma motions, and to help prepare requests to PDSC for expert resources.

**Case related expenses.** PDSC pays Umpqua Valley Public Defender a line item offset for investigation totaling \$750,238, or approximately \$31,260 per month. The office employs two full-time staff investigators that it pays a collective monthly total of approximately \$9,514, not including benefits. The office's attorneys acknowledge they use investigative resources less frequently than perhaps they should in their cases. Some lawyers suggest that they have not been trained adequately on how and when to use investigators. Attorneys find themselves doing a lot of work that might be better

<sup>613</sup> Public Defense Legal Services Contract between PDSC and Umpqua Valley Public Defender, Specific Terms (Jan. 1, 2018 through Dec. 31, 2019).

<sup>614</sup> OPDS pays Umpqua Valley Public Defender \$177,181 in January 2018 and in January 2019 and \$177,171 in each of the other 22 months.

suited for a social worker, including lining clients up with treatment providers and finding food banks and felony-friendly employers, but the office does not employ any social workers.

**Compensation of attorneys.** Umpqua Valley Public Defender employs 12 lawyers, who are paid a set annual salary roughly according to a pay scale established by the office. There is one director, two supervising attorneys, and nine full-time trial attorneys. In total, Umpqua Valley Public Defender pays approximately \$787,188 in attorney salaries each year, not including benefits (or, \$65,599 per month). The office pays attorneys about \$48,000 in salary (not including benefits) to start and up to about \$110,000 in salary (not including benefits) for the director position. Lawyers at Umpqua Valley Public Defender uniformly agree that the attorney salaries are too low to retain attorneys more than a few years. At the time of the site visit in October 2018, nine of the office's 12 attorneys have been with the office less than four years.

*b. Law firms' compensation of attorneys*

In the counties visited as part of this study, four of the annual contractors that provide adult criminal representation are private law firms:

<u>Contractor</u>	<u>County</u>
Arneson and Stewart PC	Douglas
Richard A. Cremer, PC	Douglas
John B. Lamborn PC	Harney & Grant
Law Office of Robert S. Raschio PC	Harney & Grant

For a private law firm contractor, PDSC pays the contractor in accordance with the Specific Terms of the contract. Private law firm contractors are allowed to do legal work outside of the PDSC contract, and so the law firm's income each month may include both PDSC funds and other funds. The owners of the law firm decide what overhead is necessary both to perform the PDSC contract and to provide private legal services, and the contractor pays for all of its overhead out of its total earnings. The owners of the law firm decide how much to pay the associate attorney(s) that the law firm employs. The law firm owners may personally benefit in a month with high earnings or personally suffer in a month with low earnings, but the associate attorneys that the law firm employs typically do not personally incur any costs and typically also cannot earn legal fees beyond the salary they receive from the law firm. The best way to understand how private law firms use PDSC contract dollars is through the example of Arneson and Stewart, P.C. in Douglas County.

Arneson and Stewart, P.C.'s contract with PDSC<sup>615</sup> provides a total two-year contract value of \$1,113,862. Of the total contract value, \$937,160 is for the law firm to provide

<sup>615</sup> Public Defense Legal Services Contract between PDSC and Arneson and Stewart, P.C., Specific Terms (Jan. 1, 2018 through Dec. 31, 2019).

representation in a total of 1,848 adult criminal, juvenile delinquency, dependency, and civil commitment credits in Douglas County, and the contractor must account for these funds through the case credit billing system. The balance of the contract value is \$176,702 for investigation offset, and the contractor does not have to account for the services it provides through these funds, but Arneson and Stewart, P.C. is required to provide investigation out of these funds for all of the cases it handles other than measure 11 cases.<sup>616</sup>

Every month, OPDS pays Arneson and Stewart, P.C. roughly \$46,411 (1/24th of its total contracted amount),<sup>617</sup> and that money goes into the law firm's bank account. Of that monthly payment, \$7,363 per month is for a line item offset, and so it is earned without the law firm having to account to OPDS for how they spend those funds. The remaining \$39,048 per month must be earned and accounted for by the law firm through the flat rate per credit system.

**Overhead.** Before any of Arneson and Stewart, P.C.'s six attorneys can take a case, whether publicly appointed or privately retained, the law firm must provide all of the necessary overhead. The overhead costs required to maintain and operate a law practice each month include at least office rent, equipment and supplies, telecommunications, utilities, support staff, accounting, bar dues and continuing legal education, legal research services, business travel, and professional liability insurance. The Arneson and Stewart, P.C. law firm pays all of these overhead costs for all of its attorneys.

Where a private law firm employs associate attorneys that the firm makes available to accept appointments under its contract with PDSC, the law firm also must pay the up-front cost of the associate attorneys' salaries and benefits. Thus, the Arneson firm's four associate attorneys' salaries and benefits are best thought of as part of Arneson and Stewart, P.C.'s overhead expenses. The Arneson law firm pays its associate attorneys a starting salary of about \$38,000 out of law school (\$40,000 if already misdemeanor qualified), with step increases to \$42,000 and \$44,000 as associate attorneys achieve PDSC's qualification levels for minor felonies and then major felonies respectively. Each associate's salary can increase annually based on an internal review process. At the time of this evaluation, Arneson and Stewart, P.C. pays approximately \$174,000 in associate attorney salaries each year, not including benefits (or, \$14,500 per month). In addition to their base salary, an associate attorney receives 25% of the privately retained work the associate bills.

In addition to attorneys, Arneson and Stewart, P.C. employs four full-time assistants and one part-time assistant. The assistants all serve as both legal secretary and

<sup>616</sup> Public Defense Legal Services Contract between PDSC and Arneson and Stewart, P.C., Specific Terms ¶ 7.3

(Jan. 1, 2018 through Dec. 31, 2019).

<sup>617</sup> OPDS pays Arneson and Stewart, P.C. \$46,421 in January 2018 and in January 2019 and \$46,410 in each of the other 22 months.



receptionist. Their duties include client contact, maintaining calendars, communicating with courts, and filing minor motions. They also occasionally do some factual and legal research and prepare and serve subpoenas. Just as with the associate attorneys, the law firm pays the non-attorneys' salaries and benefits each month as part of the cost of doing business.

**Case related expenses.** PDSC pays Arneson and Stewart, P.C. a line item offset for investigation totaling \$176,702, or approximately \$7,363 per month. The firm uses those funds to retain a private investigator on a monthly basis at the PDSC approved rate for investigation.<sup>618</sup> The firm's preferred investigator lives in Sutherlin, about a 20-minute drive outside of Roseburg.

**Compensation of law firm owner attorneys.** In a private law firm, the firm's owners are paid last – after covering all overhead expenses including the compensation of associate attorneys, the funds that remain are the law firm's profits, which the law firm owners can do with as they see fit.

*c. Consortia's compensation of attorneys*

In the counties visited as part of this study, six of the annual contractors that provide adult criminal representation are consortia:

Contractor	County
Clackamas Indigent Defense Corporation	Clackamas
Roseburg Defense Consortium	Douglas
Lane County Defense Consortium	Lane
Marion County Association of Defenders	Marion
Portland Defense Consortium	Multnomah
Blue Mountain Defenders	Umatilla & Morrow

Unlike public defender offices and law firms, which are relatively consistent in the manner that they use PDSC funds and compensate individual attorneys, consortia can take widely differing approaches. For a consortium contractor, PDSC pays the contractor in accordance with the Specific Terms of the contract. All of the consortia studied in this evaluation have some amount of administrative costs that are paid first out of each monthly PDSC check, usually for distributing cases to consortium members and handling all reporting to OPDS. Some of the consortia incur a small amount of additional overhead cost as a benefit to the consortium members, such as providing local continuing legal education or access to the court's case system that

<sup>618</sup> Investigation is defined by PDSC as a non-routine expense and the guideline amount that PDSC provides for investigation in non-capital cases is \$34 per hour for bilingual investigation and \$29 per hour for all other investigation. PDSC & OPDS, PUBLIC DEFENSE PAYMENT POLICY AND PROCEDURES ¶¶ 3.6.2, 3.13.1, 3.13.3, and Exh. 2 Schedule of Guideline Amounts (rev'd Apr. 1, 2018).

each attorney would otherwise have to pay for personally. After the consortium pays its own overhead costs, funds earned by the consortium from PDSC are paid out to the individual consortium attorneys in some fashion – some pay all of the consortium members an equal percentage of the total earnings, some pay a set monthly salary though the salary may vary among the attorneys, and some pay each attorney the funds that remain from the cases that attorney personally handled. The individual attorneys within a consortium are personally responsible for paying all of their own overhead costs such as rent, equipment, and support staff. Whatever remains after the attorney pays for their own overhead is the attorney's take home pay. Two consortium contractors from the closely studied counties offer good examples of these differences: Roseburg Defense Consortium in Douglas County, and the Clackamas Indigent Defense Corporation in Clackamas County.

***Roseburg Defense Consortium.*** Roseburg Defense Consortium's contract with PDSC<sup>619</sup> provides a total two-year contract value of \$1,174,480. The entire contract value is for Roseburg Defense Consortium to provide representation in a total of 2,456 adult criminal, juvenile delinquency, dependency, and civil commitment credits in Douglas County, and the contractor must account for the funds through the case credit billing system.

Every month, OPDS pays Roseburg Defense Consortium roughly \$48,937 (1/24th of its total contracted amount),<sup>620</sup> and that money goes into Roseburg Defense Consortium's bank account. All of that money every month must be earned and accounted for by Roseburg Defense Consortium through the flat rate per credit system.

In disbursing that money, Roseburg Defense Consortium first pays its administrator a monthly fee of \$1,750. The remaining available earned funds are divided equally among the five consortium attorneys. The amount of money that the consortium considers available to pay out to the individual attorneys each month depends on the number and value of the case credits to which the consortium attorneys were collectively appointed during the preceding month.

For example, if the value of credits earned equals exactly the monthly OPDS payment of \$48,937, then first the administrator is paid \$1,750 off the top. The remaining \$47,187 is divided equally among the five consortium attorneys – i.e., each lawyer is paid \$9,437.40 the next month. It is beyond unlikely that the consortium will ever see a month where the value of the credits earned is exactly the monthly advance that OPDS already paid. Thus, it is necessary to understand what happens when the consortium earns less value or more value than OPDS's monthly advance.

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<sup>619</sup> Public Defense Legal Services Contract between PDSC and Roseburg Defense Consortium, Specific Terms (Jan. 1, 2018 through Dec. 31, 2019).

<sup>620</sup> OPDS pays Roseburg Defense Consortium \$48,944 in January 2018 and in January 2019 and \$48,936 in each of the other 22 months.

When Roseburg Defense Consortium is appointed to *fewer* cases (earns less value) for a month than the monthly advance that OPDS paid, the consortium withholds an equal amount of money from each consortium attorney. Say, for example, there is a month where the consortium earned only half of the dollar amount that OPDS advanced. In this example, OPDS has advanced \$48,937, but the consortium has earned only \$24,468.50. So, the consortium actually owes OPDS \$24,468.50. Roseburg Defense Consortium plans for that by holding in its bank account the \$24,468.50 that it owes to OPDS because it has not yet earned it. From the \$24,468.50 that was earned, first the administrator is paid \$1,750 off the top. The remaining available earned funds of \$22,718.50 are divided equally among the five consortium attorneys – i.e., each lawyer is paid only \$4,543.70 the next month.

**Table:** RDC's method of paying consortium attorneys, comparison of (a) month at-quota to (b) month under-quota by 50 percent

	At-Quota	Under-Quota by 50%
OPDS monthly payment	\$48,936.00	\$48,936.00
Value of credits earned	\$48,936.00	\$24,468.00
Owed by (or owed to) OPDS	\$0.00	(\$24,468.00)
Administrative fee	\$1,750.00	\$1,750.00
Difference after admin fee (value of credits [or money available] minus administrative fee)	\$47,186.00	\$22,718.00
Share per attorney (difference divided by five)	\$9,437.20	\$4,543.60
Remaining in RDC bank account at end of month	\$0.00	\$24,468.00

When the consortium is appointed to *more* cases (earns more value) for a month than the monthly advance that ODPS paid, OPDS *owes* money to the consortium, but the consortium can only pay its member attorneys according to the money available in the consortium's bank account. Say, for example, there is a month where the consortium earned twice as much as what OPDS advanced. In this example, OPDS has advanced \$48,937 to the consortium at the beginning of the month, but the consortium has *earned* \$97,874. OPDS owes the consortium the other \$48,937, and the consortium owes its five attorneys their 1/5th of that earned money. With only \$48,937 available in the bank, first the administrator is paid \$1,750 off the top. The remaining \$47,187 is divided equally among the five consortium attorneys – i.e., each lawyer is paid \$9,437.40 the next month. But the consortium should have been able to disburse \$96,124 to the five attorneys (the earned \$97,874 less \$1,750 for administration), or \$19,224.80 per attorney. The consortium owes each attorney an additional \$9,787.40 for that month.

**Table:** RDC’s method of paying consortium attorneys, comparison of (a) month at-quota to (c) month at 200 percent of quota (i.e., over-quota by 100%)

	At-Quota	Over-Quota by 100%
OPDS monthly payment	\$48,936.00	\$48,936.00
Value of credits earned	\$48,936.00	\$97,872.00
Owed by (owed to) OPDS	\$0.00	\$48,936.00
Administrative fee	\$1,750.00	\$1,750.00
Difference after admin fee (value of credits [or money available] minus administrative fee)	\$47,186.00	\$47,186.00
Share per attorney (difference divided by five)	\$9,437.20	\$9,437.20
Remaining in RDC bank account at end of month	\$0.00	\$0.00
Amount actually due to attorneys (value of credits minus administrative fee)	\$47,186.00	\$96,122.00
Share per attorney, if paid full amount earned	\$9,437.20	\$19,224.40
Amount actually paid per attorney	\$9,437.20	\$9,437.20
Amount each RDC attorney is owed	\$0.00	\$9,787.20

If, over the course of several months, the consortium attorneys have earned back the value that was withheld during a previous month in which the consortium earned less value than OPDS had advanced to begin the month, out of caution the administrator still does not pay the lawyers the withheld funds. Rather, the administrator pays regular monthly payments of \$9,437.40 to each attorney because the consortium may again see months in which it does not earn the full value advanced by OPDS. The administrator reports that he would not feel comfortable distributing withheld money until the consortium has “run a surplus” consistently for at least five or six months in a row. “We err on the side of ultimate caution,” the administrator said.

Over the course of the two-year contract, this can mean that the consortium attorneys are either owed significant amounts of money or they are turning out to not earn what they expected under the contract. Imagine an extreme example of a month where the consortium earns no value at all. OPDS advanced the same \$48,937 to begin the month as it always does, but during that month the consortium earned \$0.00. In this situation, the consortium owes back to OPDS the full \$48,937 that OPDS has advanced, and there is no money in the bank to pay the consortium attorneys. To deal with such an extreme circumstance, the consortium would not pay the \$1,750 fee for administration that month, and the consortium would hold the full OPDS monthly payment in reserve; none of the five consortium lawyers is paid for that month.

*Roseburg Defense Consortium reconciliation with OPDS.* Roseburg Defense Consortium submits monthly reports to OPDS to account for the case credits it has earned. OPDS reviews those monthly reports every 90 days, going through every case that the consortium has claimed credits for to make sure they agree that the consortium should receive the number and value of the claimed credits. If there is a discrepancy or difference of opinion, OPDS tells the consortium and says they will investigate further.

If the consortium wants to challenge OPDS's determination, the administrator can write back to OPDS and declare why he thinks the consortium should get credit. These discrepancies are all rectified within a few weeks. That is, for credits earned from January through March for example, OPDS commences the reconciliation process in April and that process continues until the end of April and sometimes into the beginning of May. The same process takes place during each quarter of the contract.

There is no formal procedure for OPDS to pay the consortium the extra money owed when the consortium is over quota. Technically, the consortium can request the owed payment from OPDS at any time, but they understand that OPDS does not want them to request payment immediately for a single month or even for just a few months of running over the contract quota. Typically, Roseburg Defense Consortium likes to run a bit of a surplus so that it can continue to pay its member attorneys their anticipated check in those months that they run below the quota.

Typically, if a contractor is "substantially" over the contract, then OPDS will pay the overage due about once a year. As of November 2018, the Roseburg Defense Consortium administrator says the consortium had earned about \$180,000 more than OPDS had advanced against the 2018 & 2019 contract. The consortium received an overage payment from OPDS in October 2018, which according to the consortium administrator was "very early" compared to the overage payments in previous biennia.

For example, during the 2016 & 2017 contract, over several months Roseburg Defense Consortium accrued between \$170,000 and \$200,000 in value above the monthly advances paid by OPDS. When OPDS finally paid the consortium for the value its attorneys had earned, the "overage payments" were made in three separate allotments: the first payment came approximately 1 1/2 years into the two-year contract; the second in December 2017, at the close of the two-year contract period; and the third in March 2018, accounting for the final excess value the consortium had earned during the final quarter of the 2017 calendar year.

Roseburg Defense Consortium lawyers say they do not receive enough compensation through the contract that they can focus exclusively on public defense work; they need to supplement their PDSC work with fees earned through private practice. Moreover, the attorneys say the flat fee per credit compensation method directly affects the representation they provide, because, as one lawyer put it: "The [flat fee per credit] payments encourage us [collectively] to take as many cases as possible, instead of encouraging us to work our cases effectively."

***Clackamas Indigent Defense Corporation.*** Clackamas Indigent Defense Corporation's contract with PDSC<sup>621</sup> provides a total one-year contract value of \$3,514,764. Of the total 2018 contract value, \$3,458,457 is for Clackamas Indigent Defense Corporation to provide representation in a total of 7,564 adult criminal and civil commitment credits in Clackamas County, and the contractor must account for these funds through the case credit billing system. The balance of the 2018 contract value is \$18,769 for drug court, \$18,769 for DUII court, and \$18,769 for mental health court, and the contractor does not have to account for the services it provides through these funds.

Every month, OPDS pays the Clackamas Indigent Defense Corporation a steady \$292,897 (1/12th of the total contract amount). Of that monthly payment, \$4,692.25 is for fixed fee line items, and so it is earned without Clackamas Indigent Defense Corporation having to account to OPDS for how they spend those funds. The remaining \$288,204.75 per month must be earned and accounted for by Clackamas Indigent Defense Corporation through the flat rate per credit system.

Clackamas Indigent Defense Corporation first pays its administrator a fee. The subcontracts that Clackamas Indigent Defense Corporation enters into with its constituent attorneys say:

A percentage of the payment from the State shall be held by CIDC in a separate fund. The said fund shall be used by CIDC to pay administrative costs and may also be used for extraordinary work by contractors as determined by CIDC. Should the amounts being held in said fund ever prove to be insufficient to cover expenses, CIDC will increase the percentage being withheld.<sup>622</sup>

The administrator estimates that he charges Clackamas Indigent Defense Corporation about 3% of the contract amount to administer the consortium. About 3% of the projected total annual contract value of \$3,514,764 equals \$105,443 for administration fees during 2018 (or, about \$8,787 each month). From time to time, the consortium pays an outside labor lawyer at an hourly rate to provide legal advice and assistance.<sup>623</sup> In 2018, it has paid less than \$500 for these legal services. Clackamas Indigent Defense Corporation has a small amount of additional overhead costs for providing monthly educational programs and board expenses. They are developing an extern

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<sup>621</sup> Public Defense Legal Services Contract between PDSC and Clackamas Indigent Defense Corporation, Specific Terms (Jan. 1, 2018 through Dec. 31, 2018). OPDS pays Clackamas Indigent Defense Corporation \$292,897 in each month of the contract.

<sup>622</sup> See sample "CIDC Contract with Attorney" ¶ 2.D., provided by Clackamas Indigent Defense Corporation (on file with Sixth Amendment Center).

<sup>623</sup> Since 2015, Clackamas Indigent Defense Corporation has paid over \$11,000 in legal fees, including \$2,000 paid in 2017 and the \$500 as of the time of the 6AC site visit in 2018.

program through the local law schools that is resourced through in-kind equipment and time donations made by the consortium attorneys and some direct monetary expenditures for equipment. After Clackamas Indigent Defense Corporation pays these overhead costs, then it pays its constituent attorneys according to each attorney's individual subcontract with the consortium.

Clackamas Indigent Defense Corporation offers attorneys five different subcontract arrangements:<sup>624</sup>

- *Apprentice 1*: a six-month contract for an attorney to be assigned one misdemeanor case per week in exchange for a set salary. Adding an attorney under this type of subcontract does not require approval of the board of directors.
- *Apprentice 2*: an attorney is assigned to misdemeanors and minor felonies, with a “hard caseload cap,” in exchange for a set salary. Adding an attorney under this type of subcontract requires approval of the board of directors.
- *Entry 1*: an attorney is assigned to up to a full caseload rotation, but of only certain types of cases. This subcontract requires approval of the board of directors.
- *Entry 2*: an attorney is assigned to up to a full caseload rotation, but of only certain types of cases. This subcontract requires approval of the board of directors.
- *Full Contract*. Attorneys who are full-fledged consortium members practice “soup to nuts” and are assigned a full caseload rotation on all case types. This subcontract requires approval of the board of directors.

Consortium attorneys may, but are not required to, accept homicide cases through the consortium. The attorneys who accept homicide cases sign a separate “subcontract addendum” to their subcontract.<sup>625</sup>

The consortium pays each attorney, for the income they earn through their subcontract in a given month, by the tenth day of the following month. At least the attorneys with full contracts, and possibly the attorneys under Entry 1 and Entry 2 contracts, are paid:<sup>626</sup>

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<sup>624</sup> The case type rotations for which Clackamas Indigent Defense Corporation consortium attorneys can contract are measure 11, major felony, C felony, misdemeanor, and probation violations. See sample “CIDC Contract with Attorney” ¶ 1, provided by Clackamas Indigent Defense Corporation (on file with Sixth Amendment Center).

<sup>625</sup> See sample “Subcontract Addendum, HOMICIDES” provided by Clackamas Indigent Defense Corporation (on file with Sixth Amendment Center).

<sup>626</sup> See sample “CIDC Contract with Attorney” provided by Clackamas Indigent Defense Corporation (on file with Sixth Amendment Center).

	Case type	CIDC flat fee paid to attorney	
homicide addendum	Intentional Murder	\$ 17,251	paid in quarterly installments of \$4,312.75
	Other Homicides (flat rate for trial)	\$ 6,000	
	Other Homicides (flat rate for plea)	\$ 3,000	attorney may request additional fee, but "in no event" will compensation exceed \$6,000
standard subcontract	JLAW	\$ 16,700	paid in quarterly installments of \$4,175
	A&B M11	\$ 1,709	
	A Felonies	\$ 1,040	
	B Felonies	\$ 864	
	CFEL, PCS, DFEL, DVIO, FAPA, SUPP	\$ 547	
	A/B/CMIS/SCDIV/CONT/EXTR/OTHR	\$ 325	
	PVs	\$ 211	

The consortium pays its attorneys at the beginning of a case based on the highest valued case type with which the defendant is charged. At the conclusion of a case, if the attorney believes he is due additional compensation for handling a case based on the PDSC annual contract terms with Clackamas Indigent Defense Corporation, "it is the responsibility of the [sub]contractor to notify CIDC to verify appropriateness of any such credits. The time limit for requesting additional credits is no later than twenty days after judgment on each case."<sup>627</sup> The consortium's method of compensating lawyers at the time of their appointment, and prior to reconciling values earned with OPDS, raises several potential problems.

First, there is no means of predicting the total value an individual full-contract attorney will earn in a given month. Thus, it is possible that a consortium attorney can earn more value than OPDS has advanced to the consortium for that month. In a situation where the attorney earns more value in a month than the consortium has available to pay, then the consortium pays out the funds it has on hand and will pay the attorney the balance due out of the next OPDS monthly advance. Say, for example, that in January a lawyer is due \$1,000 but the consortium has only \$900 available; the consortium pays the attorney \$900 in January and pays the remaining \$100 from the OPDS advance at the beginning of February. Now, though, the consortium has \$100 less available to pay for value earned by its attorneys in the month of February. Over several months, it is possible for more and more dollars owed to lawyers to roll over into more and more future months. And so, it is possible for Clackamas Indigent Defense Corporation to fall so far behind that it pays out to its attorneys the entire \$292,897 advance to begin the new month, all based on money earned by the lawyers in prior months, leaving \$0.00 available to compensate lawyers for value earned that new month. The consortium administrator explains: "If, for example, we get a full month ahead we would negotiate/request a 'catch up' payment from our OPDS analyst mid contract."

<sup>627</sup> See sample "CIDC Contract with Attorney" ¶ 2.E., provided by Clackamas Indigent Defense Corporation (on file with Sixth Amendment Center).



Second, a different problem occurs when OPDS disagrees with the consortium about the number of credits claimed for a given case, but the consortium has already paid that credit value to a lawyer and now the consortium owes that money back to OPDS. The administrator says the consortium has not been presented with such a situation, but if it occurred the consortium would either request that the attorney reimburse the consortium or the consortium would “absorb that cost,” presumably by withholding funds from other consortium attorneys.

A third potential problem arises when an attorney is removed or withdraws from representing a client in the middle of a case. In fact, the court removed one consortium lawyer from all cases to which he had been appointed, and the consortium in turn terminated its subcontractor agreement with the lawyer for cause. At the time the attorney was removed, the consortium had already paid the lawyer approximately \$55,000 for cases that remained ongoing. Rather than seek (or sue for) reimbursement from the removed attorney, other consortium attorneys volunteered to take on that lawyer’s cases without compensation. Similarly, when Clackamas Indigent Defense Corporation opts not to renew its subcontract with a consortium attorney at the beginning of the year (as it did with some lawyers to begin the 2018 contract period), the consortium’s policy is to absorb the cost of funds already paid to that lawyer who is no longer a consortium member.

*Clackamas Indigent Defense Corporation reconciliation with OPDS.* Clackamas Indigent Defense Consortium submits monthly reports to OPDS to account for the case credits it has earned. OPDS reconciles the values submitted by the consortium on a quarterly basis. According to the consortium, the reconciliation process can take many months, or as one consortium attorney put it, the process “gets a little insane.” The lawyer offered an example in which he was appointed to a case in 2017 that was paid initially as one credit. Upon reviewing the charging document, the lawyer saw that the case was very complex, with five separate incidents, such that he could bill up to five credits for the case. In the year after the case resolved, OPDS challenged the lawyer’s request to bill five credits and asked for more information about the incident dates. Because the case was closed, the file was in storage, and so the lawyer had to retrieve the file and read through discovery again before he could respond to OPDS’s email. In all, it took the lawyer maybe three emails and approximately fifteen minutes of work to justify the charge – not a significant amount of time, he acknowledged. However, the lawyer was in the midst of writing a motion on a complicated legal issue, and it took him out of his train of thought on that other client’s work. As a former consortium board member suggests, the reconciliation process should be “more streamlined” and “it shouldn’t be that difficult to balance cases between us and Salem.”

The consortium’s lawyers, like many throughout the state, question “what end” OPDS’s long and drawn-out reconciliation process serves. They certainly do not see OPDS as working to improve their performance or the outcomes of their clients’ cases.

## IMBALANCE OF RESOURCES BETWEEN PROSECUTORS AND PUBLIC DEFENSE ATTORNEYS

As the Supreme Court said in *U.S. v. Cronin*, “while a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators.”<sup>628</sup> National standards, as summarized in the eighth of the American Bar Association’s *Ten Principles*, uniformly call for parity between the prosecution and defense with respect to resources.<sup>629</sup>

Prosecutors and defense attorneys have different roles and needs, but a disparity in resources between the two can have deleterious effects on the right to counsel. The U.S. Supreme Court determined that, because governments “quite properly spend vast sums of money to establish machinery to try defendants,” a poor person charged with crime cannot get a fair trial unless a lawyer is provided at state expense.<sup>630</sup> In the face of such “machinery,” due process requires the defense to subject the prosecution’s case to “the crucible of meaningful adversarial testing.”<sup>631</sup> The defendant’s right to an effective defense is, in many ways, the right to a fair fight.

District attorneys have at their disposal the entire investigative resources of law enforcement agencies. This includes at the very least the county sheriff, local police forces, and the Oregon state police, as well as any number of other state agencies with law enforcement responsibilities. The fair fight envisioned by our adversarial system of justice requires that the defense function must have adequate support resources, such as investigators, social workers, paralegals, substantive experts, and forensic testing. Thus, access to defense resources is a factor that may materially affect the adversarial nature of proceedings. When an attorney lacks adequate funds to hire secretaries, paralegals, social workers, and investigators, the attorney must personally perform work that is not only outside attorneys’ expertise, but also takes up valuable time that should be devoted to developing legal arguments and preparing the client’s case.

For example, throughout the counties studied, defense attorneys working as solo practitioners without secretaries report that they must prepare all their own case filings and maintain their office’s files. Defense attorneys who cannot afford paralegals spend more time researching cases and statutory law to prepare motions for their clients, or – worse yet – refrain from filing motions at all. Only a single PDSC annual contractor of the 25 studied in this evaluation has social workers on staff, yet social workers can help connect clients with treatment providers and identify critical community resources to help clients avoid further law enforcement contact.

<sup>628</sup> *United States v. Cronin*, 466 U.S. 648, 657 (1984) (citing *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (7th Cir. 1975)).

<sup>629</sup> AMERICAN BAR ASS’N, *ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM*, Principle 8 (Feb. 2002).

<sup>630</sup> *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

<sup>631</sup> *United States v. Cronin*, 466 U.S. 648, 656 (1984).

Similarly, inadequate compensation of defense attorneys can negatively affect the defendant's right to the effective assistance of counsel. For individual attorneys in law firm contractors and consortium contractors, inadequate pay can create concurrent conflicts of interest between the attorney's appointed clients and their privately retained clients, and a personal conflict of interest between the financial interests of the appointed lawyer and their indigent clients. In nearly every county visited for this report, the Sixth Amendment Center heard troubling reports of attorneys taking so many case credits to earn a living that they cannot devote adequate time to each of their clients. Particularly in rural and less affluent areas, the legal markets cannot sustain multiple defense attorneys in private practice, so the compensation private attorneys receive through PDSC annual contracts is often the primary, and sometimes nearly the only, reliable source of income these attorneys have.

Inadequate pay for staff attorneys in public defender offices can result in constant turnover, which can have direct, negative consequences for clients. Public defender offices find it difficult to attract and retain talented attorneys when their salaries fall far below what attorneys can make in private practice or in district attorney's offices. As lawyers leave for better paying jobs, the office constantly hires and trains new lawyers, and the office's clients as a result are represented by a steady stream of untrained and inexperienced lawyers. In Douglas County, for example, the public defender office had hired 14 new attorneys in the five years preceding this study – in an office with a total of just 12 attorneys.

Stakeholders throughout the counties studied – not only defense attorneys, but prosecutors and judges as well – stated unequivocally that defense attorneys and prosecutors should be paid equally. A full, statewide comparison of prosecution salaries and resources to those of the defense is beyond the scope of this study. Nevertheless, many criminal justice stakeholders, particularly in the more populous areas, raised deep concerns that deputy district attorneys receive salaries substantially higher than their public defense counterparts.<sup>632</sup> The issue of pay disparity between prosecution and defense has been the focus of recent media attention.<sup>633</sup> While simply ensuring identical salaries between defenders and prosecutors may not be possible,<sup>634</sup> or even the ideal solution, the State of Oregon must ensure that defense attorneys have adequate resources to protect their clients' rights and confront the power of the state.

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<sup>632</sup> Yet, some stakeholders in the less populous regions report that salaries are much more comparable, possibly even favoring defense attorneys.

<sup>633</sup> See Jack Moran, *Paying Fairly for Public Defense*, REGISTER-GUARD (Nov. 30, 2018), available at <https://www.registerguard.com/news/20181130/paying-fairly-for-public-defense>; Katie Shepard, *Public Defenders Make Far Less Than Prosecutors. An Oregon Lawmaker Wants to Give Them a Raise*, WILLAMETTE WEEK (Oct. 24, 2018), available at <https://www.wweek.com/news/courts/2018/10/24/public-defenders-make-far-less-than-prosecutors-an-oregon-lawmaker-wants-to-give-them-a-raise>; *Oregon DA's Make Case for Higher Pay*, BAKER CITY HERALD (Feb. 13, 2016), available at <https://www.bakercityherald.com/csp/mediapool/sites/BakerCityHerald/LocalNews/story.csp?cid=4129002&sid=818&fid=151>.

<sup>634</sup> A bill that would have required OPDS to implement policies to achieve parity, brought by Representative Williamson from Portland, failed in 2017. See [https://theworldlink.com/opinion/editorial/state-justice-system-needing-balancing/article\\_b04f7586-5573-572a-a0b5-408de1879095.html](https://theworldlink.com/opinion/editorial/state-justice-system-needing-balancing/article_b04f7586-5573-572a-a0b5-408de1879095.html).

## COMPENSATION OF ATTORNEYS IN DEPENDENCY REPRESENTATION

A dependency case remains an open matter before the court for as long as the child's safety and welfare remain at risk.<sup>635</sup> Thus, a dependency case, and the appointed lawyer's representation of a party in that case, can continue for many years, until the child turns 18 years of age.<sup>636</sup>

To some extent, PDSC's compensation method recognizes the long-term nature of representation in dependency cases. PDSC provides that a lawyer bills for one dependency case credit after "disposing of the original matter of the petition."<sup>637</sup> That single credit "covers representation from appointment to the court's entry of the dispositional order."<sup>638</sup> Then, the lawyer can bill for additional credits in that same case for certain eligible "postdispositional" hearings before the juvenile court or Citizens' Review Board.<sup>639</sup> Thus, as opposed to a criminal case in which the contractor is paid a single flat fee, the contractor can earn sequential flat fee values at specific points in the course of a dependency case.

The theory is that each flat fee value earned tides the lawyer over until occurrence of the next event in the case in which the lawyer earns additional value. To see how this works in practice, consider PDSC's 2018-2019 contract with Juvenile Advocacy Consortium. The contract provides three types of credits in a dependency case: a juvenile dependency case credit worth a flat \$794 per credit; a postdispositional proceeding credit worth a flat \$330 per credit; and a termination of parental rights case credit worth \$2,628 per credit.

Consider again our earlier example (page 83) of a home where a mother has two children (Child 1 and Child 2), who each have different fathers (Dad 1 and Dad 2), and a report of alleged abuse or neglect is made concerning either or both of the children. Say a Juvenile Advocacy Consortium attorney represents Dad 1 (the biological father of Child 1) in that dependency case. The actual appointment of counsel occurs within 24 hours of the child's removal from home, at an "initial shelter hearing" before the court, for which the appointed lawyer earns \$0.00 in value. The court holds a review on the issue of shelter every seven days that shelter remains at issue. Thus, where the child is placed out-of-home, the lawyer appears and argues on the child's behalf at that subsequent shelter hearing the next week, and the following week, and so on; for each shelter hearing, the appointed lawyer earns \$0.00 in value.

<sup>635</sup> See OR. REV. STAT. §§ 419B.090, 419B.100 (2017).

<sup>636</sup> See OR. REV. STAT. § 419B.100 (2017).

<sup>637</sup> See Public Defense Legal Services Contract, General Terms ¶ 1.5.7.4 (Jan. 1, 2018 to Dec. 31, 2019). See also PDSC & OPDS, PUBLIC DEFENSE PAYMENT POLICY AND PROCEDURES, ¶ 2.6.2 (rev'd Apr. 1, 2018)

<sup>638</sup> Public Defense Legal Services Contract, General Terms ¶ 1.5.7.4 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>639</sup> See Public Defense Legal Services Contract, General Terms ¶ 1.5.7.5 (Jan. 1, 2018 to Dec. 31, 2019). See also PDSC & OPDS, PUBLIC DEFENSE PAYMENT POLICY AND PROCEDURES, ¶ 2.6.2 (rev'd Apr. 1, 2018)

The appointed lawyer continues earning \$0.00 in value for representation provided in meetings and negotiations with the other various parties' attorneys (i.e., other attorneys representing other children or the parents, and the Oregon Department of Justice attorney representing the state Department of Human Services' case worker who filed the petition in the dependency case) in advance of and during the pre-trial conference.<sup>640</sup> If, prior to trial, the dependency case is resolved through a negotiated settlement, the underlying petition may be dismissed, and the lawyer earns \$794 in value on the case. If, however, the parties do not settle, the lawyer still does not earn anything yet and instead must prepare for the trial.

In advance of the trial, the appointed lawyer must, among other duties: review all pleadings, discovery, and investigative reports filed in the case;<sup>641</sup> research statutes, case law, and the evidence code, and draft motions and other legal arguments to present at the trial;<sup>642</sup> interview witnesses and prepare for direct and cross-examination of all potential witnesses at trial;<sup>643</sup> interview and prepare the client to testify at trial;<sup>644</sup> enlist expert assistance where needed, and interview opposing counsel's expert witnesses;<sup>645</sup> and prepare findings of fact and conclusions of law to be requested at the conclusion of the trial.<sup>646</sup> Then, the lawyer must conduct the trial, which depending on the number of parties and complexity of legal issues can take several hours to complete. Upon conclusion of the trial and entry of the court's dispositional order, the appointed lawyer earns and can bill for \$794 in value on the case.

After disposition, the dependency case can continue for many years – for as long as the court continues to have jurisdiction and the child is under 18 years of age. The appointed lawyer earns value for advocating the client's interests at each postdispositional review hearing to which the client is a party. For example, following disposition, the Citizens' Review Board (CRB) reviews any case involving a child placed outside of the parent(s)' home every six months.<sup>647</sup> At each CRB hearing, the appointed lawyer earns \$322 for the postdispositional review hearing credit.

In addition, there must be a permanency hearing held within one year of the child's removal, and at least annually thereafter while the court retains jurisdiction over the child,<sup>648</sup> but any party can request a permanency hearing earlier.<sup>649</sup> For example,

<sup>640</sup> See OREGON STATE BAR, SPECIFIC STANDARDS FOR REPRESENTATION IN JUVENILE DEPENDENCY CASES, standard 8 (June 23, 2017).

<sup>641</sup> See OREGON STATE BAR, SPECIFIC STANDARDS FOR REPRESENTATION IN JUVENILE DEPENDENCY CASES, standard 6 (June 23, 2017).

<sup>642</sup> See OREGON STATE BAR, SPECIFIC STANDARDS FOR REPRESENTATION IN JUVENILE DEPENDENCY CASES, standard 7(B) (June 23, 2017).

<sup>643</sup> See OREGON STATE BAR, SPECIFIC STANDARDS FOR REPRESENTATION IN JUVENILE DEPENDENCY CASES, standard 6 (June 23, 2017).

<sup>644</sup> See OREGON STATE BAR, SPECIFIC STANDARDS FOR REPRESENTATION IN JUVENILE DEPENDENCY CASES, standard 7(D) (June 23, 2017).

<sup>645</sup> See OREGON STATE BAR, SPECIFIC STANDARDS FOR REPRESENTATION IN JUVENILE DEPENDENCY CASES, standard 7(F) (June 23, 2017).

<sup>646</sup> See OREGON STATE BAR, SPECIFIC STANDARDS FOR REPRESENTATION IN JUVENILE DEPENDENCY CASES, standard 8(E) (June 23, 2017).

<sup>647</sup> See OR. REV. STAT. § 419A.106(1)(a) (2017).

<sup>648</sup> See OR. REV. STAT. §§ 419B.470(2), 419B.470(5) (2017).

<sup>649</sup> See OR. REV. STAT. § 419B.470(5) (2017).

where one parent has not been actively involved in the dependency case after disposition (e.g., continually fails to appear at hearings, scheduled visits, etc.), the second parent can request a permanency hearing as regards the first parent. A party can also request a permanency hearing to move for a change of plan (e.g., to change the court's plan from reunification to adoption and termination of parental rights). Where the change of plan is contested – e.g., where DHS wants to terminate the parental rights of one parent and the parent objects – the permanency hearing can last for two or three days. Nevertheless, at each permanency hearing whether contested or uncontested, the appointed lawyer earns \$322 for the postdispositional review hearing credit.

Finally, between permanency hearings, the court might schedule a review hearing to address myriad concerns. For example, if the court's jurisdiction over the child is at issue, the court will set a review hearing. If shelter is at issue, the court also will set a review hearing. At each postdispositional review hearing on the dependency case, the appointed lawyer earns \$322 for the postdispositional review hearing credit.

If the state files a petition to terminate Dad 1's parental rights,<sup>650</sup> the Juvenile Advocacy Consortium attorney earns a flat \$2,628 fee at the outset of the termination of parental rights case against Dad 1. The lawyer earns no additional value on the termination of parental rights case, regardless of case complexity or the duration of proceedings.

There are some circumstances in which appointed lawyers receive *no* additional compensation under PDSC's case-credit system, or as lawyers in various counties report, they handle such hearings "for free." Recall that, in our example, Dad 1 is the biological father of Child 1, but he may also be the "psychological father" of Child 2 in the same household, where he has raised Child 2 and been the only father that child has ever known. If the state files separate petitions for each child, the attorney representing Dad 1 must file a motion to intervene on behalf of the second child, else the court will not consider Dad 1 as a party to Child 2's dependency case.<sup>651</sup> And, where the Oregon Department of Justice objects to Dad 1's motion to intervene, the court holds a hearing on the motion that generally lasts three to five hours. In addition to the hearing itself, lawyers estimate the hearing requires between six and ten hours of advance preparation. For all of these hours of representation, the appointed lawyer earns \$0.00 in value. This is because PDSC's contract provides that an attorney appointed to represent a parent on a dependency petition earns one dependency case credit "regardless of the number of petitions filed."<sup>652</sup> Thus, a Juvenile Advocacy Consortium attorney representing Dad 1 will earn no additional value if the client is made a party to Child 2's case – the attorney is capped at the same flat \$794 fee earned in disposing of the petition in Child 1's case.

Appointed lawyers generally believe that PDSC *should* want – and probably PDSC does want – appointed lawyers doing this time-intensive work. But lawyers find the lack of compensation fundamentally unfair.

<sup>650</sup> See generally OR. REV. STAT. §§ 419B.498 to 419B.527 (2017).

<sup>651</sup> See OR. REV. STAT. § 419B.116 (2017).

<sup>652</sup> Public Defense Legal Services Contract, General Terms ¶ 1.5.7.4 (Jan. 1, 2018 to Dec. 31, 2019).

## D. SUFFICIENT TIME & WORKLOADS

The Court in *Powell v. Alabama* notes that the lack of “sufficient time”<sup>653</sup> to consult with counsel and to prepare an adequate defense was one of the primary reasons for finding that the Scottsboro Boys were constructively denied counsel. Impeding counsel’s time “is not to proceed promptly in the calm spirit of regulated justice, but to go forward with the haste of the mob.”<sup>654</sup> One state Supreme Court observed over twenty years ago, “as the practice of criminal law has become more specialized and technical, and as the standards for what constitutes reasonably effective assistance of counsel have changed, the time an appointed attorney must devote to an indigent’s defense has increased considerably.”<sup>655</sup> Insufficient time is, therefore, a marker of constructive denial of counsel. The inadequate time may itself be caused by any number of things, including but not limited to excessive workload or contractual arrangements that create fiscal incentives for lawyers to dispose of cases quickly rather than in the best interests of their clients.

No matter how complex or basic a case may seem at the outset, no matter how little or how much time an attorney wants to spend on a case, and no matter how financial matters weigh on an attorney, there are certain fundamental tasks each attorney must do on behalf of every client in every criminal case. Even in the simplest case, the attorney must, among other things:

- meet with and interview the client;
- attempt to secure pretrial release if the client remains in state custody (but, before doing so, learn from the client what conditions of release are most favorable to the client);
- keep the client informed throughout the duration of proceedings;
- request and review discovery from the prosecution;
- independently investigate the facts of the case, which may include learning about the defendant’s background and life, interviewing both lay and expert witnesses, viewing the crime scene, examining items of physical evidence, and locating and reviewing documentary evidence;
- assess each element of the charged crime to determine whether the prosecution can prove facts sufficient to establish guilt and whether there are justification or excuse defenses that should be asserted;
- prepare appropriate pretrial motions and read and respond to the prosecution’s motions;
- prepare for and appear at necessary pretrial hearings, wherein he must preserve his client’s rights;
- develop and continually reassess the theory of the case;
- assess all possible sentencing outcomes that could occur if the client is

<sup>653</sup> *Powell v. Alabama*, 287 U.S. 45, 59 (1932).

<sup>654</sup> *Powell v. Alabama*, 287 U.S. 45, 59 (1932).

<sup>655</sup> *State v. Wigley*, 624 So.2d 425, 428 (La. 1993).

- convicted of the charged crime or a lesser offense;
- negotiate plea options with the prosecution, including sentencing outcomes; and
- all the while prepare for the case to go to trial (because the decision about whether to plead or go to trial belongs to the client, not to the attorney).<sup>656</sup>

The lawyer owes all of these duties to every client in every case, and so national standards, as summarized by the American Bar Association, agree that “[d]efense counsel’s workload [must be] controlled to permit the rendering of quality representation.”<sup>657</sup> Workload includes the cases an attorney is appointed to handle within a given system (i.e., caseload), but it also includes the cases an attorney takes on privately, public defense cases to which the attorney is appointed in other jurisdictions, and other professional obligations such as obtaining and providing training and supervision.<sup>658</sup> In addition to considering the raw number of cases of each type that an attorney handles, all national standards agree that the lawyer’s workload must take into consideration “all of the factors affecting a public defender’s ability to adequately represent clients, such as the complexity of cases on a defender’s docket, the defender’s skill and experience, the support services available to the defender, and the defender’s other duties.”<sup>659</sup>

The National Advisory Commission on Criminal Justice Standards and Goals (“NAC”) created the first national defender caseload standards as part of an initiative funded by the U.S. Department of Justice.<sup>660</sup> It is these NAC caseload maximums to which national standards refer when they say that “in no event” should national caseload

<sup>656</sup> See generally NATIONAL LEGAL AID & DEFENDER ASSOCIATION, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (1995).

<sup>657</sup> AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 5 (Feb. 2002).

<sup>658</sup> AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, commentary to Principle 5 (Feb. 2002).

<sup>659</sup> Statement of Interest of the United States at 9, *Wilbur v. City of Mount Vernon*, No. C11-1100RSL (W.D. Wash., filed Aug 14, 2013), available at <http://www.justice.gov/crt/about/spl/documents/wilbursoi8-14-13.pdf>. See e.g., Mary Sue Backus and Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L. J. 1031, 1125 (2006) (“Although national caseload standards are available, states should consider their own circumstances in defining a reasonable defender workload. Factors such as availability of investigators, level of support staff, complexity of cases, and level of attorney experience all might affect a workable definition. Data collection and a consistent method of weighing cases are essential to determining current caseloads and setting reasonable workload standards.”).

<sup>660</sup> Building upon the work and findings of the 1967 President’s Commission on Law Enforcement and Administration of Justice, the Administrator of the U.S. Department of Justice Law Enforcement Assistance Administration appointed the National Advisory Commission on Criminal Justice Standards and Goals in 1971, with DOJ/LEAA grant funding to develop standards for crime reduction and prevention at the state and local levels. The NAC crafted standards for all criminal justice functions, including law enforcement, corrections, the courts, and the prosecution. Chapter 13 of the NAC’s report sets the standards for the defense function. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, ch.13 (The Defense) (1973).



standards be exceeded. NAC Standard 13.12 prescribes absolute maximum numerical caseload limits of:

- 150 felonies per attorney per year;
- 400 misdemeanors per attorney per year;
- 200 juvenile delinquencies per attorney per year;
- 200 mental health per attorney per year; or
- 25 appeals per attorney per year.<sup>661</sup>

This means a lawyer handling felony cases should not be responsible for more than a total of 150 felony cases in a given year, counting both cases the lawyer had when the year began and cases assigned to the lawyer during that year, and including all of the lawyer's cases (public, private, and pro bono). The NAC standards can be prorated for mixed caseloads. For example, an attorney could have a mixed caseload over the course of a given year of 75 felonies (50% of a maximum caseload) and 200 misdemeanors (50% of a maximum caseload) and be in compliance with national caseload standards. The caseload limits assume that the lawyer does not have any other duties, such as management or supervisory responsibilities.

The standards further contemplate that a full contingent of support staff – including paralegals, investigators, social workers, and secretaries – is available to the defense attorney.<sup>662</sup> Where public defender offices exist, those offices must maintain the support staff attorneys need to work most effectively. That support staff includes one supervisor for every ten attorneys; one investigator for every three attorneys;<sup>663</sup> one social service caseworker for every three attorneys; one paralegal for every four felony attorneys;<sup>664</sup> and one secretary for every four felony attorneys.<sup>665</sup> Lack of assistance for discovery review and investigation exacerbates the amount of time it takes attorneys to adequately prepare for cases.

The NAC caseload limits were established and remain as absolute maximums. Yet, policymakers in many states have since recognized the need to set localized workload standards. Localized standards are able to consider unique demands made on defense attorneys in each case, such as the travel distance between the court and the local jail,

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<sup>661</sup> NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, ch.13 (The Defense), Standard 13.12 (1973).

<sup>662</sup> See NATIONAL STUDY COMMISSION ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 4.1 (1976) (“Social workers, investigators, paralegal and paraprofessional staff as well as clerical/secretarial staff should be employed to assist attorneys in performing tasks not requiring attorney credentials or experience and for tasks where supporting staff possess specialized skills.”).

<sup>663</sup> NATIONAL STUDY COMMISSION ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 4.1 (1976) (“Defender offices should employ investigators with criminal investigation training and experience. A minimum of one investigator should be employed for every three staff attorneys in an office. Every defender office should employ at least one investigator.”).

<sup>664</sup> See BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, KEEPING DEFENDER WORKLOADS MANAGEABLE 10 (2001), available at <https://www.ncjrs.gov/pdffiles1/bja/185632.pdf>.

<sup>665</sup> *Id.*

or the prosecution’s charging practices, or increased complexity of forensic sciences and criminal justice technology. Demands of these types increase the amount of time, beyond that contemplated by the NAC standards, that is necessary for the lawyer to provide effective representation. For these reasons, many criminal justice professionals argue that the caseloads permitted by the NAC Standards are far too high and that the maximum caseloads allowed should be much lower.<sup>666</sup>

### 1. The role of PDSC & OPDS in workloads

PDSC has not adopted any caseload standards.<sup>667</sup> PDSC states as its policy that “neither defender organizations nor assigned counsel shall accept caseloads that, by reason of their size or complexity, interfere with providing competent representation to each client or lead to the breach of professional obligations.”<sup>668</sup>

PDSC and OPDS exercise some oversight of the number and type of cases that the courts assign to each contractor. But the PDSC annual contracts place the onus on each contractor to “ensure that the attorney assigned to represent a client under this contract . . . has a current workload, including private practice cases not covered by this contract, that will not interfere with competent and diligent representation . . .”<sup>669</sup> Each contractor decides for itself how, when, and how many cases it assigns to its constituent individual attorneys. PDSC and OPDS do not require contractors to explain the manner in which the contractor assigns cases to its constituent individual attorneys. And, PDSC and OPDS do not have any way of monitoring or controlling the caseloads being handled by an individual attorney. Further, the PDSC annual contracts expressly

<sup>666</sup> See, e.g., AMERICAN COUNCIL OF CHIEF DEFENDERS, STATEMENT ON CASELOADS AND WORKLOADS (Aug. 24, 2007), available at [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_train\\_caseloads\\_standards\\_ethics\\_opinions\\_combined\\_authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_train_caseloads_standards_ethics_opinions_combined_authcheckdam.pdf) (“In many jurisdictions, caseload limits should be lower than the NAC standards.”).

<sup>667</sup> Email from OPDS General Counsel Paul Levy to Sixth Amendment Center (Mar. 26, 2018). In 1996, the Oregon State Bar approved a guide to calculating maximum caseloads as part of a task force report promulgating performance standards. See OREGON STATE BAR, INDIGENT DEFENSE TASK FORCE REPORT: PRINCIPLES AND STANDARDS FOR COUNSEL IN CRIMINAL, DELINQUENCY, DEPENDENCY AND CIVIL COMMITMENT CASES, chap. 5 (Sept. 25, 1996). The 1996 performance standards were supplanted by a new task force in 2014, which adopted a standard on workload stating: “Before agreeing to act as counsel or accept appointment by a court, a lawyer has an obligation to make sure that he or she has sufficient time, resources, knowledge and experience to offer quality representation to a defendant in a criminal matter or a youth in a delinquency case. If it later appears that the lawyer is unable to offer quality representation in the case, the lawyer should move to withdraw.” OREGON STATE BAR, REPORT OF THE TASK FORCE ON STANDARDS OF REPRESENTATION IN CRIMINAL AND JUVENILE DELINQUENCY CASES, Standard 1.3 (Apr. 25, 2014).

<sup>668</sup> PDSC, QUALIFICATION STANDARDS FOR COURT-APPOINTED COUNSEL TO REPRESENT FINANCIALLY ELIGIBLE PERSONS AT STATE EXPENSE, Standard II (Dec. 15, 2016).

<sup>669</sup> Public Defense Legal Services Contract, General Terms ¶ 7.2.2(b) (Jan. 1, 2018 to Dec. 31, 2019).

allow all attorneys other than those working in public defender offices to engage in the practice of law beyond the cases to which they are appointed under the PDSC contract.<sup>670</sup>

The Sixth Amendment Center attempted to learn the actual caseloads of the individual attorneys in each of the sample counties as part of this evaluation. OPDS does not gather data about the total number of cases open at beginning of year, new cases opened during year, and cases closed during the year.<sup>671</sup> Nor do each of the contractors maintain that information. Rather than tracking *caseloads*, the contractors report monthly *credits* to OPDS in order to earn value under their contracts. Cumulating those monthly reports, OPDS was able to provide to the Sixth Amendment Center a database containing “the number of credits [OPDS] approved, by case type, for each county and statewide” from January 1, 2015 through March 31, 2018.

The National Center for State Courts and the Conference of State Court Administrators recommend the following uniform case definition: “Count the defendant and all charges involved in a single incident as a single case. If the charging document contains multiple defendants involved in a single incident, count each defendant as a single case.”<sup>672</sup> As OPDS explains and as noted elsewhere in this report, a credit is not the same as a case, although “in most instances” the two are the same (i.e., for a single criminal case, the contractor earns a single credit).<sup>673</sup> Where PDSC allows a contractor more than one credit per criminal case, it is recognizing that a certain felony case may be of greater complexity than another felony even when the two cases are of the same case type. PDSC also recognizes that some types of felony cases may require far more attorney time to render effective assistance of counsel than others. For example, a given contract provides a \$1,115 flat fee for a class A felony credit and provides a \$1,840 flat fee for a class A measure 11 felony credit. Even though both cases are felonies, PDSC recognizes the greater complexity of one felony case over the other. Although a credit is not the same as a case under PDSC’s compensation structure, an analysis of the credits approved per attorney offers some usefulness in understanding the workloads of attorneys handling trial level criminal cases under PDSC’s contract system.

The Sixth Amendment Center examined the credit data that OPDS provided, looking at the most recent full calendar year for which that data is available – from January 1 to December 31, 2017. Some of the attorneys included in that data were no

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<sup>670</sup> Public Defense Legal Services Contract, General Terms ¶¶ 1.4.3, 1.4.4, 1.4.5 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>671</sup> Email from OPDS General Counsel Paul Levy to Sixth Amendment Center (Mar. 19, 2018).

<sup>672</sup> CONFERENCE OF STATE COURT ADMINISTRATORS AND NATIONAL CENTER FOR STATE COURTS, STATE COURT GUIDE TO STATISTICAL REPORTING at 14 (ver. 2.1.2, Mar. 20, 2017), *available at* <http://www.courtstatistics.org/~/-/media/Microsites/Files/CSP/State%20Court%20Guide%20to%20Statistical%20Reporting%20v%202point1point2.ashx>.

<sup>673</sup> Email from ODPS General Counsel Paul Levy to Sixth Amendment Center (Mar. 26, 2018).

longer practicing within certain contractors at the time of this evaluation, and some contractors included in that data did not receive contracts for the current 2018 & 2019 biennium. Nonetheless, analysis of 2017 calendar year case credits permits conclusions about whether, on the whole, there are enough lawyers available to do the work in each jurisdiction.

To conduct a caseload analysis using the NAC standards required categorizing PDSC's credit types into the NAC case types. The NAC standards provide annual caseload maximums for five case types: felonies, misdemeanors, juvenile delinquencies, mental health cases, and appeals.<sup>674</sup>

- The NAC standards presume that cases of varying case complexity will balance out over time, and so for example the most serious felony cases (such as non-capital murder, Jessica's Law, and measure 11)<sup>675</sup> and potentially less serious felony cases (such as those resolved through fast-track "early disposition programs")<sup>676</sup> are all analyzed as "felonies" under the NAC standards, along with all Class A, B, C, and unclassified felonies.<sup>677</sup>
- Similarly, all types of credits that are billed at the misdemeanor flat rate per credit are analyzed as "misdemeanors" under the NAC standards.<sup>678</sup> Credits where the underlying misdemeanor case is resolved through a fast-track early disposition program or a court's misdemeanor diversion docket are also analyzed as "misdemeanors" under the NAC standards.<sup>679</sup>
- All credits from juvenile delinquency cases are analyzed as "delinquencies" under the NAC standards, regardless of whether the credit is billed as a juvenile felony credit or a juvenile misdemeanor credit.<sup>680</sup> This is because the NAC

<sup>674</sup> National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts, ch.13 (The Defense), Standard 13.12 (1973).

<sup>675</sup> OPDS codes credits for these cases as: MURD (noncapital murder case); JLAW (Jessica's Law); AM11 (felony - measure 11 felony - Class A); BM11 (felony - measure 11 felony - Class B); and JM11 (felony - measure 11 felony - juvenile tried as an adult).

<sup>676</sup> OPDS codes credits for these cases as: EDPA (early disposition program A felony); EDPB (early disposition program B felony); and EDPC (early disposition program C felony).

<sup>677</sup> OPDS codes credits for these cases as: AFEL (felony - Class A felony); BFEL (felony - Class B felony); CFEL (felony - Class C felony); DFEL (felony - DUII felony); DVIO (felony - domestic violence Class C felony); FAPA (contempt case - family abuse prevention act); PCS (possession of controlled substance); SUPP (contempt case – support, billed at the C felony per credit flat rate); and UFEL (felony - unclassified felony, billed at the C felony per credit flat rate).

<sup>678</sup> OPDS codes credits for these cases as: CONT (misdemeanor case); DUIS (DUII); DWSS (misdemeanor traffic case - misdemeanor driving while suspended); EXTR (extradition case); MISS (misdemeanor case); OTHR (other cases); OTMS (misdemeanor traffic case - other traffic misdemeanor); and SCDV (appointments after diversion or conditional discharge agreement).

<sup>679</sup> OPDS codes credits for these cases as: CC (community court); ECR (early case resolution); EDP (expedited disposition program); and EDPM (early disposition program for misdemeanors).

<sup>680</sup> OPDS codes credits for these cases: JUDF (juvenile felony); JUDM (juvenile misdemeanor); and

standards do not distinguish between delinquency cases. Indeed, in *In re Gault*, the U.S. Supreme Court found that even the most minor juvenile delinquency allegation is “comparable in seriousness to a felony prosecution.”<sup>681</sup>

- All credits relating to civil commitment hearings, or hearings before the Psychiatric Security Review Board or Oregon Health Authority, are analyzed as “mental health” under the NAC standards.<sup>682</sup>
- Finally, credits from appeals are analyzed as “appeals” under the NAC standards.<sup>683</sup>

PDSC compensates contractors for representation in other matters for which there is no applicable NAC standard: dependency cases,<sup>684</sup> termination of parental rights proceedings,<sup>685</sup> probation violation proceedings,<sup>686</sup> and specialty court proceedings.<sup>687</sup> Credits arising out of any of these case types cannot be analyzed against the NAC standards because there are none. It is sufficient for the caseload analysis here to acknowledge that, to the extent that attorneys representing clients in criminal or delinquency proceedings also represent clients in dependencies or specialty courts or so forth, those attorneys’ maximum caseload thresholds must be adjusted *downward* from the levels prescribed by the NAC standards.

## 2. Workloads of contractors and individual attorneys

### a. Clackamas County

***Clackamas Indigent Defense Consortium.*** Attorneys who participate in a consortium are expressly allowed to maintain a private law practice, in addition to their appointed

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JUDO (juvenile other).

<sup>681</sup> 387 U.S. 1, 36 (1967).

<sup>682</sup> OPDS codes credits for these cases as: MHMI (civil commitment case); JPSRB (juvenile psychiatric security review board case); JPSRBhr (juvenile psychiatric security review board hearing); OHA (Oregon health authority case); and PSRB (psychiatric security review board case).

<sup>683</sup> OPDS codes credits for these cases as APPEAL.

<sup>684</sup> OPDS codes credits for these cases as: JDEC (juvenile dependency case - child); JDEP (juvenile dependency case - parent); JPDC (postdispositional proceeding - child); and JPDP (postdispositional proceeding - parent).

<sup>685</sup> OPDS codes credits for these cases as: JUTC (termination of parental rights case - child); and JUTP (termination of parental rights case - parent).

<sup>686</sup> OPDS codes credits for these cases as: DPV (probation violation - DUII probation violation); FPV (probation violation - felony probation violation); JPV (probation violation or motion to modify); and MPV (probation violation - misdemeanor probation violation).

<sup>687</sup> OPDS codes credits for these cases as: ADC (adult drug court); DDIV (adult drug court); DRUG (drug court); DVCT (domestic violence court); FATC (family treatment court); FDC (family drug court); MHC (mental health court); MHTC (mental health treatment court); RAP (juvenile diversion court); STOP (sanctions treatment opportunities progress drug court); and VC (veterans court).

cases.<sup>688</sup> To the extent that Clackamas Indigent Defense Consortium attorneys maintain private practices, their individual caseloads are troubling.

**Table:** 2017 attorney caseloads, Clackamas Indigent Defense Consortium

Attorney	Felony		Misdemeanor		Delinquency		Mental Health		Appeal		Total NAC%	Dep.	PV	Tmt. Ct.	TPR
	credits	NAC%	credits	NAC%	credits	NAC%	credits	NAC%	credits	NAC%					
CIDC 1	2293	495%	337	84%							280%		2158		
CIDC 2	180	120%	241	60%							180%		132		
CIDC 3	113	75%	128	32%							107%		76		
CIDC 4	89	59%	166	42%							101%		53		
CIDC 5	89	59%	163	41%							100%		56		
CIDC 6	103	69%	121	30%							99%		57		
CIDC 7	101	67%	123	31%							98%		71		
CIDC 8	103	69%	115	29%							97%		9		
CIDC 9	100	67%	120	30%							97%		53		
CIDC 10	96	64%	122	31%							95%		52		
CIDC 11	98	65%	111	28%							93%		55		
CIDC 12	92	61%	120	30%							91%		61		
CIDC 13	90	60%	117	29%							89%		123		
CIDC 14	87	58%	118	30%							88%		55		
CIDC 15	90	60%	106	27%							87%		63		
CIDC 16	87	58%	113	28%							86%		76		
CIDC 17	86	57%	111	28%							85%		78		
CIDC 18	82	55%	117	29%							84%		61		
CIDC 19	78	52%	118	30%							82%		48		
CIDC 20	76	51%	93	23%							74%		52		
CIDC 21	65	43%	97	24%							68%		198		
CIDC 22	64	43%	92	23%							66%		29		
CIDC 23	46	31%	120	30%							61%		84		
CIDC 24	39	26%	36	9%							35%		19		
CIDC 25	22	15%	33	8%							23%		180		
CIDC 26	12	8%	44	11%							19%		50		
CIDC 27	9	6%	10	3%							9%		6		
CIDC 28			25	6%							6%		1		
CIDC 29	1	1%									1%				
<b>Total</b>	<b>2391</b>	<b>1594%</b>	<b>3217</b>	<b>804%</b>							<b>2398%</b>		<b>1956</b>		

In 2017, the consortium's total caseload was handled by 29 attorneys. Considering only felony and misdemeanor cases, the consortium required 23.9 FTE attorneys under NAC standards. Therefore at first glance, it appears the consortium had an adequate number of attorneys to handle the total felony and misdemeanor caseload assigned to

<sup>688</sup> Public Defense Legal Services Contract, General Terms ¶ 1.4.5 (Jan. 1, 2018 to Dec. 31, 2019).

the consortium, but the consortium also handled 1,956 probation violation proceedings that reduced the time for attorneys to adequately handle their felony and misdemeanor cases. Even at first glance though, the caseloads of some individual consortium attorneys are excessive: the five consortium attorneys with the largest appointed caseloads in 2017 were doing the work of 7.7 FTE attorneys under NAC standards, before accounting for the probation violation cases they also handled that year.

In addition, approximately seven attorneys who handled the fewest cases in 2017 were not “full” members of the consortium at that time<sup>689</sup> and/or they joined the consortium as full attorneys mid-way through the year. Thus, in 2017, the consortium had approximately 22 “full” attorneys to handle a felony and misdemeanor caseload requiring 23.9 FTE under NAC standards – again, before considering the 1,956 probation violation cases.

Moreover, to the extent that the “full” consortium attorneys maintained private practices, the consortium as a whole lacked a sufficient number of attorneys to work on the reported caseload. For example, CIDC Attorney 12 in the table above says he dedicates approximately 65% of his overall time to appointed cases and 35% to his privately retained clients’ cases. That means the attorney is at 91% of NAC (without considering probation violations), but has only 65% of time available to handle the appointed caseload.

The consortium’s administrator also carries a caseload. As of 2018, the current Clackamas Indigent Defense Consortium administrator handles a half caseload to permit time for administrative duties. (The administrator in 2017 carried a “full” caseload.) The average full caseload in 2017 required a single attorney to handle 105 felonies and 136 misdemeanors, which is 105% of NAC *before* considering that the same attorney also handled, on average, 76 probation violations. Thus, a “half” caseload requires more than a 0.5 FTE attorney. To the extent the administrator maintains a private law practice in addition to administering the consortium, the time available to represent the administrator’s court appointed clients is even further reduced.

Finally, there is nearly unanimous agreement among criminal justice stakeholders in Clackamas County that the circuit court has too few judges to handle the volume of cases before it. This compounds workload problems, as several consortium attorneys must appear in the same two courtrooms each morning waiting for their cases to be called, which further reduces time available to address other important case tasks for their appointed clients.

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<sup>689</sup> The Clackamas Indigent Defense Consortium offers limited “apprentice” subcontracts to new attorneys with less experience. The consortium’s *Apprentice 1* subcontract is for six months during which an attorney gets one misdemeanor case per week and is paid a set salary each month. Under the *Apprentice 2* subcontract, the new attorney’s caseload is still limited, but they are assigned to more cases including a mixture of C felonies and some probation violations, and the attorney is paid a set salary each month.

*b. Douglas County*

***Arneson and Stewart, P.C.*** Arneson and Stewart, P.C. is a private law firm of six attorneys. Attorneys employed by a private law firm are expressly allowed to maintain a private law practice, in addition to their appointed cases.<sup>690</sup> The firm estimates that 80% of the firm's work is appointed and the remainder is private cases.

**Table:** 2017 attorney caseloads, Arneson and Stewart PC

Attorney	Felony		Misdemeanor		Delinquency		Mental Health		Appeal		Total NAC%	Dep.	PV	Tmt. Ct.	TPR
	credits	NAC%	credits	NAC%	credits	NAC%	credits	NAC%	credits	NAC%					
Arneson 1	45	30.0%	35	8.8%	6	3.0%					41.8%	123	18		
Arneson 2	32	21.3%	32	8.0%	4	2.0%					31.3%	97	12		1
Arneson 3	19	12.7%	32	8.0%	11	5.5%					26.2%	126	14		1
Arneson 4	30	20.0%	19	4.8%							24.8%	61	1		3
Arneson 5	34	22.7%	6	1.5%							24.2%	166	15		10
Arneson 6			4	1.0%							1.0%				
<b>Total</b>	<b>160</b>	<b>106.7%</b>	<b>128</b>	<b>32.0%</b>	<b>21</b>	<b>10.5%</b>					<b>149.2%</b>	<b>573</b>	<b>60</b>		<b>15</b>

In 2017, the firm had five lawyers, adding a sixth who touched only four misdemeanor cases. Those five attorneys handled a felony, misdemeanor, and delinquency caseload requiring approximately 1.5 FTE attorneys under NAC standards, suggesting that the firm had a sufficient number of attorneys available to do the work. However, the lion's share of Arneson and Stewart, P.C.'s caseload each year is in representing children in dependency proceedings, along with the remaining 20% of the firm's overall practice involving privately retained cases.

***Richard A. Cremer, PC.*** Richard A. Cremer, PC is a private law firm of two attorneys. Attorneys employed by a private law firm are expressly allowed to maintain a private law practice, in addition to their appointed cases.<sup>691</sup>

**Table:** 2017 attorney caseloads, Cremer P.C.

Attorney	Felony		Misdemeanor		Delinquency		Mental Health		Appeal		Total NAC%	Dep.	PV	Tmt. Ct.	TPR
	credits	NAC%	credits	NAC%	credits	NAC%	credits	NAC%	credits	NAC%					
Cremer PC 1	122	81.3%	74	18.5%	8	4.0%					103.8%	134	40		5
Cremer PC 2	119	79.3%	57	14.3%	2	1.0%					94.6%		37		1
<b>Total</b>	<b>241</b>	<b>160.7%</b>	<b>131</b>	<b>32.8%</b>	<b>10</b>	<b>5.0%</b>					<b>198.4%</b>	<b>134</b>	<b>77</b>		<b>6</b>

<sup>690</sup> Public Defense Legal Services Contract, General Terms ¶ 1.4.4 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>691</sup> Public Defense Legal Services Contract, General Terms ¶ 1.4.4 (Jan. 1, 2018 to Dec. 31, 2019).



In 2017, the Cremer firm’s two attorneys shared the overall appointed caseload fairly equally. The assigned felony, misdemeanor, and delinquency caseload that year required approximately 1.9 FTE attorneys under NAC standards. However, one of the two attorneys also handled all of the firm’s dependency caseload and nearly all of the firm’s termination of parental rights cases – frequently mentioned by attorneys in Oregon as the equivalent of a death penalty case in terms of seriousness, complexity, and consequence to the client. Thus, the firm’s appointed caseload appears excessive and, to the extent either attorney maintains any private law practice, the firm’s overall caseload should be reduced further still.

**Roseburg Defense Consortium.** Roseburg Defense Consortium is a consortium of five private attorneys working out of their individual offices. Attorneys who participate in a consortium are expressly allowed to maintain a private law practice, in addition to their appointed cases.<sup>692</sup>

**Table:** 2017 attorney caseloads, Roseburg Defense Consortium

Attorney	Felony		Misdemeanor		Delinquency		Mental Health		Appeal		Total NAC%	Dep.	PV	Tmt. Ct.	TPR
	credits	NAC%	credits	NAC%	credits	NAC%	credits	NAC%	credits	NAC%					
RDC 1	47	31.3%	30	7.5%	2	1.0%					39.8%	219	24		3
RDC 2	45	30.0%	22	5.5%	2	1.0%	2	1.0%			37.5%	157	26		1
RDC 3	42	28.0%	23	5.8%	3	1.5%	1	0.5%			35.8%	197	24		5
RDC 4	43	28.7%	16	4.0%	3	1.5%					34.2%	234	16		2
RDC 5	42	28.0%	12	3.0%	2	1.0%	4	2.0%			34.0%	163	27		
Total	219	146.0%	103	25.8%	12	6.0%	7	3.5%			181.3%	970	117		11

The attorneys of the Roseburg Defense Consortium attempt to divide the appointed caseload evenly. This is reflected in the 2017 data, as the total felony, misdemeanor, delinquency, and mental health caseload was spread equitably between the five lawyers. With each attorney operating at 34% to 39.8% of NAC, it appears at first glance that the consortium attorneys had sufficient time available to handle their appointed caseload. However, in 2017, the lawyers also handled 970 dependencies, 117 probation violations, and 11 termination of parental rights cases.

In addition to taking appointed cases, all of the consortium attorneys maintain private practices of varying scope and size, thereby reducing their time available to handle the consortium’s caseload. For example, RDC Attorney 1 serves as municipal court judge in two towns in the county. RDC Attorney 5 spends about 10% of his time representing publicly appointed clients in municipal court cases in and around Douglas County and a small number of private retained clients, leaving 90% of his time available for cases appointed as a member of the consortium. RDC Attorney 4 often receives appointments in conflict cases in Jackson County, for which he travels to Medford between one and three days each month; this attorney estimates that about 25% of

<sup>692</sup> Public Defense Legal Services Contract, General Terms ¶ 1.4.5 (Jan. 1, 2018 to Dec. 31, 2019).

his time is spent outside Roseburg working in other counties. And RDC Attorney 3 estimates that approximately 40% of his overall time is devoted to appointed cases and 60% to retained work.

***Umpqua Valley Public Defender.*** Umpqua Valley Public Defender is a public defender office employing 12 attorneys. Attorneys employed by a public defender office are prohibited from practicing law outside of their appointed cases.<sup>693</sup>

**Table:** 2017 attorney caseloads, Umpqua Valley Public Defender

Attorney	Felony		Misdemeanor		Delinquency		Mental Health		Appeal		Total NAC%	Dep.	PV	Tmt. Ct.	TPR
	credits	NAC%	credits	NAC%	credits	NAC%	credits	NAC%	credits	NAC%					
[ none identified ]	12	8.0%	23	5.8%			1	0.5%			14.3%				
UVPD 1	205	136.7%	57	14.3%	1	0.5%	6	3.0%			<b>154.4%</b>		52		
UVPD 2	170	113.3%	57	14.3%	2	1.0%	4	2.0%			<b>130.6%</b>		63		
UVPD 3	110	73.3%	177	44.3%			3	1.5%			<b>119.1%</b>	20	160		
UVPD 4	153	102.0%	29	7.3%			1	0.5%			<b>109.8%</b>		64		
UVPD 5	126	84.0%	59	14.8%	18	9.0%	1	0.5%			<b>108.3%</b>		61		
UVPD 6	134	89.3%	48	12.0%	3	1.5%	1	0.5%			<b>103.3%</b>		40		
UVPD 7	87	58.0%	46	11.5%	35	17.5%	6	3.0%			90.0%	2	68		
UVPD 8	39	26.0%	180	45.0%			2	1.0%			72.0%	2	90		
UVPD 9	75	50.0%	71	17.8%	6	3.0%	1	0.5%			71.2%	163	27		7
UVPD 10	51	34.0%	48	12.0%	1	0.5%	1	0.5%			47.0%	2	209	142	
UVPD 11	16	10.7%	47	11.8%			3	1.5%			23.9%	169	1		7
UVPD 12					3	1.5%					1.5%	406	1		4
<b>Total</b>	<b>1178</b>	<b>785.3%</b>	<b>842</b>	<b>210.5%</b>	<b>69</b>	<b>34.5%</b>	<b>30</b>	<b>15.0%</b>			<b>1045%</b>	<b>764</b>	<b>836</b>	<b>142</b>	<b>18</b>

Of the 12 attorneys at this public defender office, one attorney is assigned a full-time dependency caseload, and another is assigned a “half-caseload” in addition to staffing all of the specialty court proceedings in the county. In essence, the office has 10.5 FTE attorneys available to handle the office’s total felony, misdemeanor, delinquency, and mental health caseload, which in 2017 required approximately 10.5 FTE attorneys under NAC standards. However, Umpqua Valley Public Defender also provided dependency, probation violation, and termination of parental rights representation – in addition to the specialty court representation already noted – that reduced the time attorneys had available to render effective representation to each of their clients.

Umpqua Valley Public Defender’s workload concerns are compounded by turnover among the attorney staff. To ensure novice attorneys have time to be trained and time to grow into their positions, as opposed to being handed a full caseload from the start, the office assigns a greater number of cases to the other more experienced lawyers. The office has few seasoned attorneys and a high number of attorneys with two or fewer years of experience. As a result, the supervising attorneys handle an outsized number of cases by comparison.

<sup>693</sup> Public Defense Legal Services Contract, General Terms ¶ 1.4.3 (Jan. 1, 2018 to Dec. 31, 2019).

*c. Grant & Harney counties*

**John B. Lamborn PC.** John B. Lamborn PC is a private law firm of two attorneys. Attorneys employed by a private law firm are expressly allowed to maintain a private law practice, in addition to their appointed cases.<sup>694</sup> Both attorneys say they spend approximately 95% of their time on their appointed caseloads.

**Table:** 2017 attorney caseloads, Lamborn P.C.

Attorney	Felony		Misdemeanor		Delinquency		Mental Health		Appeal		Total NAC%	Dep.	PV	Tmt. Ct.	TPR
	credits	NAC%	credits	NAC%	credits	NAC%	credits	NAC%	credits	NAC%					
Lamborn 1	73	48.7%	95	23.8%	3	1.5%	6	3.0%			76.9%	123	46		1
Lamborn 2	1	0.7%	28	7.0%			1	0.5%			8.2%	3	12		
Lamborn 3			19	4.8%							4.8%		7		
<b>Total</b>	<b>74</b>	<b>49.3%</b>	<b>142</b>	<b>35.5%</b>	<b>3</b>	<b>1.5%</b>	<b>7</b>	<b>3.5%</b>			<b>89.8%</b>	<b>126</b>	<b>65</b>		<b>1</b>

In 2017, although the caseload data shows three attorneys working for the Lamborn law firm, most of the firm’s appointed cases in both Grant and Harney counties were handled by a single attorney because there was turnover between two individuals employed as the firm’s associate attorney. Under national standards, the caseload required 0.9 FTE attorneys, before considering dependency cases and probation violations. By adding a second attorney at the end of 2017, it is possible that Lamborn PC had sufficient lawyers available to handle the 2018 caseload.

However, Lamborn PC’s repeated requests for additional funding from PDSC to hire a third attorney, primarily to help with dependency cases, suggests that *two* is an insufficient number of lawyers to handle the firm’s appointed caseload each year.

**Law Office of Robert S. Raschio PC.** Law Office of Robert S. Raschio PC is a private law firm of two attorneys.<sup>695</sup> Attorneys employed by a private law firm are expressly allowed to maintain a private law practice, in addition to their appointed cases.<sup>696</sup>

<sup>694</sup> Public Defense Legal Services Contract, General Terms ¶ 1.4.4 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>695</sup> At the time the 2018 & 2019 contract was awarded, OPDS showed the Raschio law firm as having four attorneys. See OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION, MEMBERSHIP DIRECTORY, OREGON PUBLIC DEFENSE CONTRACTS (Mar. 19, 2018).

<sup>696</sup> Public Defense Legal Services Contract, General Terms ¶ 1.4.4 (Jan. 1, 2018 to Dec. 31, 2019).

**Table:** 2017 attorney caseloads, Raschio P.C.

Attorney	Felony		Misdemeanor		Delinquency		Mental Health		Appeal		Total NAC%	Dep.	PV	Tmt. Ct.	TPR
	credits	NAC%	credits	NAC%	credits	NAC%	credits	NAC%	credits	NAC%					
Raschio 1	26	17.3%	17	4.3%	6	3.0%	3	1.5%			26.1%	38	23		
Raschio 2	10	6.7%	37	9.3%	1	0.5%	6	3.0%			19.4%	11	13		
Raschio 3	1	0.7%	18	4.5%			2	1.0%			6.2%	9	14		
Raschio 4	1	0.7%	18	4.5%	1	0.5%					5.7%	6	21		
<b>Total</b>	<b>38</b>	<b>25.3%</b>	<b>90</b>	<b>22.5%</b>	<b>8</b>	<b>4.0%</b>	<b>11</b>	<b>5.5%</b>			<b>57.3%</b>	<b>64</b>	<b>71</b>		

According to the data provided by OPDS, in 2017, the law firm's total caseload was handled by a total of four individual attorneys. That year, the firm was in transition as one associate left and the firm's owner recruited a new associate attorney to help handle the public defense caseload. Under national standards, the firm required approximately 0.5 FTE attorneys to handle its caseload from both Grant and Harney counties. However, the dependency and probation violation caseload reduced the time the attorneys have available for each case.

The two attorneys currently providing representation under the Law Office of Robert S. Raschio PC contract for Grant and Harney counties engage in other work outside of that contract. The firm's owner estimates that he spends about 10% of his time on management of his various offices and supervision. He operates a separate law office in Baker County, and in that law office he employs a different associate attorney. The Baker County law office is part of the Eagle Cap Defenders consortium, which holds a PDSC annual contract in Baker County, and the law firm's owner is the contract administrator for the Eagle Cap Defenders consortium. The firm's owner also takes conflict cases in Malheur County, 116 miles away, for which he is paid at the PDSC hourly rate, and he handles justice court cases in Grant County under a contract with the county. Finally, the firm's owner maintains a minimal private practice of mostly criminal work.

#### *d. Lane County*

***Lane County Defense Consortium.*** Lane County Defense Consortium is a consortium of approximately 12 private attorneys<sup>697</sup> working out of their individual offices. Attorneys who participate in a consortium are expressly allowed to maintain a private law practice, in addition to their appointed cases.<sup>698</sup>

<sup>697</sup> At the time the contract was awarded, OPDS showed the Lane County Defense Consortium as having 14 attorneys. See OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION, MEMBERSHIP DIRECTORY, OREGON PUBLIC DEFENSE CONTRACTS (Mar. 19, 2018). The consortium administrator provided a list of 13 attorneys, including the contract administrator, providing representation as of July 31, 2018. One of the consortium members who also served as its administrator left the consortium when he was appointed on September 25, 2018 to the Lane County Circuit Court. Jack Moran, *Eugene defense attorney named new state judge*, THE REGISTER-GUARD (Sept. 25, 2018).

<sup>698</sup> Public Defense Legal Services Contract, General Terms ¶ 1.4.5 (Jan. 1, 2018 to Dec. 31, 2019).

**Table:** 2017 attorney caseloads, Lane County Defense Consortium

Attorney	Felony		Misdemeanor		Delinquency		Mental Health		Appeal		Total NAC%	Dep.	PV	Tmt. Ct.	TPR
	credits	NAC%	credits	NAC%	credits	NAC%	credits	NAC%	credits	NAC%					
[ none identified ]	1	0.7%									0.7%				
LCDC 1	157	104.7%	51	12.8%							<b>117.4%</b>		21		
LCDC 2	144	96.0%	49	12.3%							<b>108.3%</b>		16		
LCDC 3	132	88.0%	51	12.8%							<b>100.8%</b>		10		
LCDC 4	134	89.3%	41	10.3%							99.6%		10		
LCDC 5	127	84.7%	53	13.3%							97.9%		12		
LCDC 6	81	54.0%	42	10.5%							64.5%		16		
LCDC 7	86	57.3%	28	7.0%							64.3%		4		
LCDC 8	80	53.3%	37	9.3%							62.6%		12		
LCDC 9	57	38.0%	19	4.8%							42.8%		10		
LCDC 10	44	29.3%	10	2.5%							31.8%				
LCDC 11	30	20.0%	33	8.3%							28.3%		7		
LCDC 12	34	22.7%	10	2.5%							25.2%		1		
LCDC 13	28	18.7%	11	2.8%							21.4%		1		
LCDC 14	10	6.7%	19	4.8%							11.4%		6		
LCDC 15	12	8.0%	1	0.3%							8.3%		1		
LCDC 16	6	4.0%									4.0%				
<b>Total</b>	<b>1163</b>	<b>775.3%</b>	<b>455</b>	<b>113.8%</b>							<b>889.1%</b>		<b>127</b>		

The 2017 caseload data shows that the consortium as a whole was assigned a caseload requiring 8.9 FTE attorneys under NAC standards. With 16 individual attorneys available, it may appear that the consortium had a sufficient number of attorneys to do the work, however, three of the attorneys had appointed caseloads in excess of national standards, before considering the probation violation cases to which they were assigned.

The already excessive caseloads are further compounded to the extent that the attorneys maintain private law practices, in addition to their appointed cases. For example, LCDC Attorney 3 says her appointed work is approximately one-third of her total practice. That is, with an appointed caseload that already required a 1.0 FTE attorney under NAC standards, this attorney’s combined public and private workload required 3.0 FTE attorneys.

As another example, LCDC Attorney 5 had an appointed caseload in 2017 that was at 97.9% of NAC standards – not excessive at first glance. However, Attorney 5 estimates that only 75% of his time is spent on consortium cases, with the other 25% of his time devoted to retained clients’ cases. Similarly, LCDC Attorney 8 says his consortium cases are about 50% of his overall caseload. However, that attorney had an appointed caseload at 62.6% of NAC standards, or 12.6% more than the lawyer had time available.

**Public Defender Services of Lane County.** Public Defender Services of Lane County is a public defender office employing 22 attorneys. In August 2018, there were two vacant full-time positions, 18 full-time attorneys paid annual salaries, and two part-time attorneys paid hourly (one working 10 hours per week, and the other 20 hours per week). When fully staffed, the office has 20.75 FTE attorneys. Attorneys employed by a public defender office are prohibited from practicing law outside of their appointed cases.<sup>699</sup>

**Table:** 2017 attorney caseloads, Public Defender Services of Lane County

Attorney	Felony		Misdemeanor		Delinquency		Mental Health		Appeal		Total NAC%	Dep.	PV	Tmt. Ct.	TPR
	credits	NAC%	credits	NAC%	credits	NAC%	credits	NAC%	credits	NAC%					
[ none identified ]	31	20.7%	24	6.0%							26.7%	2	7		
PDSLCL 1	253	168.7%	41	10.3%							<b>178.9%</b>		42		
PDSLCL 2	243	162.0%	55	13.8%							<b>175.8%</b>		137		
PDSLCL 3	230	153.3%	56	14.0%							<b>167.3%</b>		8		
PDSLCL 4	216	144.0%	35	8.8%	3	1.5%					<b>154.3%</b>		18		
PDSLCL 5	140	93.3%	67	16.8%			67	33.5%			<b>143.6%</b>		9		
PDSLCL 6	188	125.3%	36	9.0%							<b>134.3%</b>		26		
PDSLCL 7	170	113.3%	69	17.3%			3	1.5%			<b>132.1%</b>		15		
PDSLCL 8	174	116.0%	32	8.0%							<b>124.0%</b>		71		
PDSLCL 9	27	18.0%	362	90.5%							<b>108.5%</b>		15		
PDSLCL 10	132	88.0%	60	15.0%							<b>103.0%</b>	20	15	43	
PDSLCL 11	62	41.3%	198	49.5%							90.8%		12		
PDSLCL 12	104	69.3%	18	4.5%							73.8%		6		
PDSLCL 13	78	52.0%	22	5.5%							57.5%		1	38	
PDSLCL 14	6	4.0%	156	39.0%							43.0%		4		
PDSLCL 15	46	30.7%	29	7.3%	8	4.0%					41.9%	110	26	15	2
PDSLCL 16	45	30.0%	23	5.8%			7	3.5%			39.3%		4		
PDSLCL 17	19	12.7%	30	7.5%			1	0.5%			20.7%		8		
PDSLCL 18	19	12.7%	25	6.3%			3	1.5%			20.4%				
PDSLCL 19	24	16.0%	12	3.0%							19.0%		128		
PDSLCL 20	5	3.3%	1	0.3%	1	0.5%					4.1%	76	2		2
PDSLCL 21			5	1.3%							1.3%				
PDSLCL 22			1	0.3%							0.3%				
PDSLCL 23												208			
PDSLCL 24													1		
PDSLCL 25												410			6
<b>Total</b>	<b>2212</b>	<b>1475%</b>	<b>1357</b>	<b>339.2%</b>	<b>12</b>	<b>6.0%</b>	<b>81</b>	<b>40.5%</b>			<b>1860%</b>	<b>826</b>	<b>555</b>	<b>96</b>	<b>10</b>

This public defender office's 2017 caseload data suggests the office lacks sufficient attorneys to effectively handle the total number of cases to which it is assigned.

<sup>699</sup> Public Defense Legal Services Contract, General Terms ¶ 1.4.3 (Jan. 1, 2018 to Dec. 31, 2019).

In 2017, of the 25 individual attorneys that touched any cases, three attorneys’ caseloads are negligible and indicative of turnover at the office. Of the remaining 22 attorneys, ten attorneys had caseloads in excess of national standards. Those ten attorneys handled the work requiring 14.2 FTE attorneys under NAC standards. Consider further that both the director and assistant director handle reduced caseloads, in addition to their supervisory, administrative, and training duties. Thus, *more than half* of the office’s other 18.75 FTE attorneys in 2018 likely operate with excessive caseloads – and that is before accounting for representing clients in the office’s dependency, probation violation, specialty court, and termination of parental rights cases.

*e. Marion County*

**Marion County Association of Defenders, Limited.** Marion County Association of Defenders, Limited is a consortium of 44 private attorneys<sup>700</sup> working out of approximately 40 separate law firms, though ten of the attorneys are not actively accepting appointments. For analysis of caseloads, the consortium is best thought of as 34 attorneys. Attorneys who participate in a consortium are expressly allowed to maintain a private law practice, in addition to their appointed cases.<sup>701</sup>

**Table:** 2017 attorney caseloads, Marion County Association of Defenders

Attorney	Felony		Misdemeanor		Delinquency		Mental Health		Appeal		Total NAC%	Dep.	PV	Tmt. Ct.	TPR
	credits	NAC%	credits	NAC%	credits	NAC%	credits	NAC%	credits	NAC%					
MCAD 1	151	100.7%	164	41.0%							141.7%		85		
MCAD 2	137	91.3%	142	35.5%							126.8%		80		
MCAD 3	147	98.0%	91	22.8%							120.8%		78		
MCAD 4	116	77.3%	157	39.3%							116.6%		76		
MCAD 5	109	72.7%	128	32.0%							104.7%		94		
MCAD 6	91	60.7%	176	44.0%							104.7%		71		
MCAD 7	56	37.3%	257	64.2%							101.6%		150		
MCAD 8	108	72.0%	109	27.3%							99.3%		33		
MCAD 9	71	47.3%	198	49.5%							96.8%		49		
MCAD 10	104	69.3%	93	23.3%							92.6%		70		
MCAD 11	108	72.0%	71	17.8%							89.8%		63		
MCAD 12	116	77.3%	38	9.5%							86.8%		85		
MCAD 13	79	52.7%	131	32.8%							85.4%		50		
MCAD 14	104	69.3%	47	11.8%							81.1%		37		
MCAD 15	83	55.3%	98	24.5%							79.8%		68		
MCAD 16			289	72.2%							72.2%				

<sup>700</sup> At the time the contracts were awarded, OPDS showed the Marion County Association of Defenders, Limited as having 37 attorneys. See OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION, MEMBERSHIP DIRECTORY, OREGON PUBLIC DEFENSE CONTRACTS (Mar. 19, 2018).

<sup>701</sup> Public Defense Legal Services Contract, General Terms ¶ 1.4.5 (Jan. 1, 2018 to Dec. 31, 2019).

MCAD 17	95	63.3%	26	6.5%			69.8%	26
MCAD 18	87	58.0%	37	9.3%			67.3%	85
MCAD 19	77	51.3%	57	14.3%			65.6%	36
MCAD 20	14	9.3%	194	48.5%			57.8%	47
MCAD 21	13	8.7%	187	46.8%			55.4%	50
MCAD 22	64	42.7%	44	11.0%			53.7%	28
MCAD 23	15	10.0%	174	43.5%			53.5%	60
MCAD 24	50	33.3%	39	9.8%			43.1%	50
MCAD 25	2	1.3%	152	38.0%			39.3%	46
MCAD 26	48	32.0%	21	5.3%			37.3%	13
MCAD 27	5	3.3%	117	29.3%			32.6%	8
MCAD 28	7	4.7%	98	24.5%			29.2%	37
MCAD 29	43	28.7%			1	0.5%	29.2%	153
MCAD 30	38	25.3%	13	3.3%			28.6%	18
MCAD 31	26	17.3%	6	1.5%			18.8%	6
MCAD 32			49	12.3%			12.3%	13
MCAD 33	10	6.7%					6.7%	1
<b>Total</b>	<b>2174</b>	<b>1449%</b>	<b>3403</b>	<b>850.8%</b>	<b>1</b>	<b>0.5%</b>	<b>2301%</b>	<b>1766</b>

In 2017, a total of 33 attorneys took cases assigned to Marion County Association of Defenders, Limited. With a total caseload requiring approximately 23.0 FTE attorneys, it appears the consortium has a sufficient number of member attorneys to handle the overall work to which the consortium is assigned. This, of course, is before accounting for probation violations, which reduce the overall time available.

However, the consortium's caseload is not distributed evenly among the 33 individual attorneys. In fact, without considering probation violations, there were seven attorneys in 2017 who carried criminal caseloads in excess of national standards. Those seven attorneys handled work requiring approximately 8.2 FTE attorneys under NAC standards. To the extent that consortium attorneys maintain private law practices, in addition to their appointed cases, the time each attorney has available is reduced further still.

***Public Defender of Marion County.*** Public Defender of Marion County is a public defender office employing 13 attorneys.<sup>702</sup> Attorneys employed by a public defender office are prohibited from practicing law outside of their appointed cases.<sup>703</sup>

<sup>702</sup> At the time the contracts were awarded, OPDS showed the Public Defender of Marion County as having 12 attorneys. See OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION, MEMBERSHIP DIRECTORY, OREGON PUBLIC DEFENSE CONTRACTS (Mar. 19, 2018). Since that time, the office has added one attorney, bringing the total number of attorneys to 13.

<sup>703</sup> Public Defense Legal Services Contract, General Terms ¶ 1.4.3 (Jan. 1, 2018 to Dec. 31, 2019).



**Table:** 2017 attorney caseloads, Public Defender of Marion County

Attorney	Felony		Misdemeanor		Delinquency		Mental Health		Appeal		Total NAC%	Dep.	PV	Tmt. Ct.	TPR
	credits	NAC%	credits	NAC%	credits	NAC%	credits	NAC%	credits	NAC%					
PDMC 1	170	113.3%	58	14.5%							127.8%		56		
PDMC 2	136	90.7%	116	29.0%							119.7%		53		
PDMC 3	163	108.7%	31	7.8%			1	0.5%			116.9%		43		
PDMC 4	10	6.7%	18	4.5%			208	104.0%			115.2%		147		
PDMC 5	71	47.3%	184	46.0%			33	16.5%			109.8%		67		
PDMC 6	121	80.7%	25	6.3%			1	0.5%			87.4%		22		
PDMC 7	42	28.0%	188	47.0%			1	0.5%			75.5%		44		
PDMC 8	92	61.3%	33	8.3%							69.6%		36		
PDMC 9	92	61.3%	14	3.5%			2	1.0%			65.8%		11		
PDMC 10	28	18.7%	105	26.3%							44.9%		27		
PDMC 11	56	37.3%	13	3.3%							40.6%		6		
PDMC 12	23	15.3%	18	4.5%			4	2.0%			21.8%		3		
PDMC 13	16	10.7%	4	1.0%							11.7%		6		
<b>Total</b>	<b>1020</b>	<b>680.0%</b>	<b>807</b>	<b>201.8%</b>			<b>250</b>	<b>125.0%</b>			<b>1007%</b>		<b>521</b>		

In 2017, Public Defender of Marion County represented clients requiring a total of 10.0 FTE attorneys under NAC standards. With a total of 13 individual attorneys representing clients while employed at the office during 2017, it appears at first glance that the public defender office had a sufficient number of attorneys available to do the work. However, due to turnover, not all individual attorneys worked at the office for the full calendar year. In addition, the director carries a reduced caseload to permit time to handle administrative responsibilities.

Five individual attorneys had caseloads in excess of national standards in 2017. This public defender office’s attorneys expressed a common concern that their caseloads force them to schedule multiple cases for trial at once. PDMC Attorney 1 noted that she has been personally taxed by the excessive workload: “I have no life. I have friends and I try to see them, but I constantly cancel on them. I can’t sustain a romantic relationship. I don’t get to see my family. I’m very grateful for my work and my job, but is it worth it?”

Consider also PDMC Attorney 4, who is responsible for nearly all civil commitment cases and the majority of the office’s probation violations. In 2017, Attorney 4 had a caseload at 115.2% of NAC – and that is largely only considering her mental health caseload. When also considering her probation violation caseload, this attorney had even less time to handle each case effectively.

*f. Multnomah County*

**Liebowitz & Associates.** Liebowitz & Associates does not have a PDSC contract for 2018 & 2019, therefore they were not a part of this evaluation. However, it is useful to consider the caseloads of all Multnomah County contractors during the 2017 calendar year to fully analyze the appointed caseload of Multnomah County as a whole. Of note, some of the attorneys who participated in the Liebowitz & Associates contract with PDSC in 2017 are now constituent attorneys of other contractors, including the Portland Defense Consortium.

**Table:** 2017 attorney caseloads, L&A P.C.

Attorney	Felony		Misdemeanor		Delinquency		Mental Health		Appeal		Total NAC%	Dep.	PV	Tmt. Ct.	TPR
	credits	NAC%	credits	NAC%	credits	NAC%	credits	NAC%	credits	NAC%					
L&A 1	69	46.0%	14	3.5%							49.5%		164		
L&A 2	31	20.7%	67	16.8%							37.4%		159		
L&A 3	34	22.7%	7	1.8%							24.4%		331		
L&A 4	1	0.7%	47	11.8%							12.4%		55		
L&A 5			43	10.8%							10.8%		60		
L&A 6	2	1.3%	35	8.8%							10.1%		73		
L&A 7													1		
<b>Total</b>	<b>137</b>	<b>91.3%</b>	<b>213</b>	<b>53.3%</b>							<b>144.6%</b>		<b>843</b>		

**Metropolitan Public Defender Services, Inc.** Metropolitan Public Defender Services, Inc. is a public defender office with two office locations: one in Multnomah County, and one in Washington County. As of December 2018, the public defender office has a combined total of 69 attorneys.<sup>704</sup> Based in the Multnomah County office are the executive director, three attorneys handling capital murder cases, and 45 attorneys handling the Multnomah County workload. As of December 2018, these 45 attorneys include 12 attorneys in the Community Law Division, which receives funding from multiple sources in addition to PDSC and provides services beyond those required by the PDSC contract. In summary, there are 33 attorneys in the Multnomah County office that provide non-capital trial representation, and they are divided into four units: juveniles, misdemeanors, minor felonies, and major felonies. Attorneys employed by a public defender office are prohibited from practicing law outside of their appointed cases.<sup>705</sup>

<sup>704</sup> At the time the contract was awarded, OPDS showed Metropolitan Public Defender Services, Inc. as having a total of 69 attorneys: 45 including the executive director in Multnomah County, and 24 in Washington County. See OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION, MEMBERSHIP DIRECTORY, OREGON PUBLIC DEFENSE CONTRACTS (Mar. 19, 2018). Since that time: the three capital team attorneys have moved from the Washington County office to the Multnomah County office; the Multnomah County office has added one attorney position; and the Washington County office has lost one attorney position. There have been a significant number of attorney personnel changes in both offices.

<sup>705</sup> Public Defense Legal Services Contract, General Terms ¶ 1.4.3 (Jan. 1, 2018 to Dec. 31, 2019).

Metropolitan Public Defender Services, Inc. is a union office. Under the collective bargaining agreement, a normal work week for all union employees is defined as 40 hours per week,<sup>706</sup> and caseloads must be limited to prevent attorneys from violating the Code of Professional Responsibility.<sup>707</sup> Despite these terms in the collective bargaining agreement, attorney caseloads at this public defender office are troubling.

**Table:** 2017 attorney caseloads, Metropolitan Public Defender Service

Attorney	Felony		Misdemeanor		Delinquency		Mental Health		Appeal		Total NAC%	Dep.	PV	Tmt. Ct.	TPR
	credits	NAC%	credits	NAC%	credits	NAC%	credits	NAC%	credits	NAC%					
[ none identified ]	1	0.7%	45	11.3%							11.9%			15	
MPD 1	0	0.0%	1265	316.2%	10	5.0%	217	108.5%			<b>429.7%</b>	111	166	110	2
MPD 2	154	102.7%	355	88.7%			3	1.5%			<b>192.9%</b>		61		
MPD 3	238	158.7%	64	16.0%							<b>174.7%</b>		64		
MPD 4	211	140.7%	101	25.3%							<b>165.9%</b>		159		
MPD 5	130	86.7%	215	53.8%							<b>140.4%</b>		81		
MPD 6	126	84.0%	175	43.8%							<b>127.8%</b>		94		
MPD 7	188	125.3%	2	0.5%							<b>125.8%</b>		20		
MPD 8	14	9.3%	446	111.5%							<b>120.8%</b>		4		
MPD 9	174	116.0%	12	3.0%							<b>119.0%</b>		18		
MPD 10	140	93.3%	101	25.3%							<b>118.6%</b>		12		
MPD 11	120	80.0%	121	30.3%							<b>110.3%</b>		27		
MPD 12	108	72.0%	134	33.5%							<b>105.5%</b>		9		
MPD 13	153	102.0%	3	0.8%							<b>102.8%</b>		17		
MPD 14	73	48.7%	199	49.8%							98.4%		8		
MPD 15	118	78.7%	76	19.0%							97.7%		31		
MPD 16	3	2.0%	16	4.0%			178	89.0%			95.0%		199		
MPD 17	45	30.0%	218	54.5%			1	0.5%			85.0%		6		
MPD 18	88	58.7%	104	26.0%							84.7%		31		
MPD 19	84	56.0%	104	26.0%					4	2.0%	84.0%		332		
MPD 20	58	38.7%	151	37.8%							76.4%		496		
MPD 21	112	74.7%	4	1.0%					1	0.5%	76.2%		12		
MPD 22	112	74.7%	4	1.0%							75.7%		12		
MPD 23	62	41.3%	113	28.3%							69.6%		346		
MPD 24	11	7.3%	239	59.7%							67.1%		42		
MPD 25	56	37.3%	114	28.5%					2	1.0%	66.8%		6		
MPD 26	11	7.3%	237	59.2%							66.6%				
MPD 27	98	65.3%	2	0.5%							65.8%		5		
MPD 28	43	28.7%	120	30.0%					9	4.5%	63.2%		401		
MPD 29					15	7.5%	104	52.0%			59.5%	209	16		6
MPD 30	77	51.3%	5	1.3%							52.6%		10		

<sup>706</sup> Collective Bargaining Agreement Between: Metropolitan Public Defender Service, Inc. and AFSCME Public Defenders Local 3668, art. 1, § 5 (Aug. 31, 2018).

<sup>707</sup> Collective Bargaining Agreement Between: Metropolitan Public Defender Service, Inc. and AFSCME Public Defenders Local 3668, art. 25 (Aug. 31, 2018).

MPD 31	78	52.0%	2	0.5%	0	0.0%			52.5%	8			
MPD 32	11	7.3%	179	44.8%					52.1%		1		
MPD 33					18	9.0%	78	39.0%	48.0%	203	9	4	
MPD 34	16	10.7%	148	37.0%					47.7%		7		
MPD 35	69	46.0%	1	0.3%					46.2%		7		
MPD 36	68	45.3%							45.3%		7		
MPD 37	57	38.0%	27	6.8%					44.8%		18		
MPD 38	65	43.3%	1	0.3%					43.6%		10		
MPD 39					18	9.0%	63	31.5%	40.5%	139	8	1	
MPD 40	5	3.3%	142	35.5%					38.8%				
MPD 41					22	11.0%	55	27.5%	38.5%	193	3	6	
MPD 42	45	30.0%	20	5.0%					35.0%		7		
MPD 43	3	2.0%	131	32.8%					34.8%		52		
MPD 44	6	4.0%	122	30.5%					34.5%		2		
MPD 45	18	12.0%	59	14.8%					26.8%		24		
MPD 46	1	0.7%	86	21.5%					22.2%	501			
MPD 47	2	1.3%	82	20.5%					21.8%		9		
MPD 48			81	20.3%					20.3%				
MPD 49			3	0.8%	39	19.5%			20.3%	133	13	2	
MPD 50	2	1.3%	72	18.0%					19.3%				
MPD 51					35	17.5%			17.5%	173	30	2	
MPD 52	1	0.7%	66	16.5%					17.2%				
MPD 53			4	1.0%	31	15.5%			16.5%	55	5	1	
MPD 54	1	0.7%	25	6.3%	17	8.5%			15.4%	130	31	4	
MPD 55	17	11.3%			8	4.0%			15.3%	3			
MPD 56	19	12.7%	3	0.8%					13.4%		8		
MPD 57			0	0.0%	22	11.0%			11.0%	188	25	6	
MPD 58	7	4.7%	18	4.5%					9.2%		47		
MPD 59	1	0.7%	32	8.0%					8.7%				
MPD 60	6	4.0%	1	0.3%			3	1.5%	5.8%				
MPD 61	1	0.7%	9	2.3%					2.9%				
MPD 62	3	2.0%							2.0%				
MPD 63							2	1.0%	1.0%				
MPD 64			4	1.0%					1.0%		1		
MPD 65	0	0.0%							0.0%				
MPD 66											1		
<b>Total</b>	<b>3310</b>	<b>2207%</b>	<b>6063</b>	<b>1516%</b>	<b>235</b>	<b>118%</b>	<b>720</b>	<b>360%</b>	<b>4200%</b>	<b>1538</b>	<b>3532</b>	<b>111</b>	<b>34</b>

In 2017, a total of 66 attorneys took cases assigned to Metropolitan Public Defender Services, Inc. Many of those attorneys’ total caseloads were negligible, indicating high turn-over among the attorney staff that year.

Of the office’s attorneys taking cases in 2017, 13 attorneys had caseloads that were excessive on their face under national standards. In fact, MPD Attorney 1 handled a

caseload that was 429.7% of NAC standards. Considering only civil commitments, MPD Attorney 1 handled a mental health caseload in 2017 requiring 1.0 FTE attorney under NAC standards. This same attorney also represented 1,265 misdemeanor defendants in a single year – a misdemeanor caseload under national standards that alone requires 3.2 FTE attorneys. The lawyer also handled 111 dependencies, 166 probation violations, 110 specialty court proceedings, and 2 termination of parental rights cases – all cases not addressed by the NAC standards.

The remaining 12 attorneys with caseloads facially in excess of national standards handled a combined caseload in 2017 that required 16.0 FTE attorneys under NAC standards. For example, MPD Attorney 12 is an attorney in the minor felonies unit, where she handled a mixture of Class C and unclassified felonies and misdemeanors over the course of the year that placed her at 105.5% of NAC standards. MPD Attorney 12 says she does not have “enough time to adequately handle cases” assigned to her – “I’m unequivocal on that.” She believes she lacks the time needed for a sufficient degree of client contact in her cases and that her motions practice suffers as a result: “Being able to dive into the case law, having that substantial knowledge. I don’t have enough time to do that.” “I can guarantee that every lawyer on this floor [4th floor] will be here working this weekend and the next and the next.” Although MPD Attorney 12 was already operating at 105.5% of NAC standards in 2017, as of September 2018 the attorney says her caseload has *increased* from the year before.

Analysis against NAC standards can be a useful indicator of a contractor’s caseloads, but this does not tell the full story of the workload carried by the attorneys in this public defender office. That is, upon reviewing the table above, it would be incorrect to conclude that 13 lawyers carried excessive caseloads and the other 53 attorneys did not. This office’s lawyers are in universal agreement that they lack time to effectively represent their clients. This is particularly true of the misdemeanor unit attorneys, who face an “ethical crisis” due to the volume of cases handled that forces them to “triage” representation, and attorneys report that many clients “suffer from lack of attention” as a result.

The workload concerns of the public defender office attorneys are compounded by the policies and practices of other criminal justice system actors. For example, critical client risk assessment interviews are scheduled without regard to the appointed attorney’s availability, causing the office’s lawyers to deal with scheduling conflicts by frequently substituting for each other at court hearings and other appointments.

More directly in both misdemeanor and felony cases, the circuit court assigns trials and substantive hearings to judges through a cattle-call method of docketing, where hundreds of cases are scheduled before a single administering judge – the presiding judge for felonies, the chief criminal judge for misdemeanors – all at the same time. If each of the office’s lawyers were to continuously represent the clients to whom

they are appointed until the completion of each client's case, the court's scheduling inevitably would cause dozens of the office's lawyers to pack into the same two courtrooms together, waiting as cases are called one-by-one. However, Metropolitan Public Defender Services, Inc. does not practice continuous representation (often called "vertical" representation). Instead, whether because of excessive caseloads or the court's case docketing processes or a combination of the two, and despite Metropolitan Public Defender Services' best intentions, the office's attorneys regularly engage in horizontal representation in which a single misdemeanor attorney and a single felony attorney are assigned to "stand in" for the counsel of record at all of the office's cases that are set on the two cattle-call dockets each day. As discussed in the sidebar, horizontal representation raises serious ethical concerns and is prohibited under national standards.

## A QUICK WORD ON HORIZONTAL REPRESENTATION

If a defense attorney is appointed early in the criminal process, that attorney can effectively represent a client if given the time, training, and resources to do so. Time is especially important to develop a level of trust between counsel and the accused that the U.S. Supreme Court describes in *Powell v. Alabama* as partaking of the “inviolable character of the confessional.”<sup>708</sup> Yet, early appointment of counsel will not result in effective representation if that trust is breached. For example, what good is it from the defendant’s perspective if the lawyer provided early in the case is taken away and replaced with someone else? The “confessional” is not some article, like a sheet of paper, that can be passed from one attorney to another.

For this reason, national standards as summarized in ABA *Principle 7* require that the same attorney initially appointed to a case must continuously represent the client until the completion of the client’s case.<sup>709</sup> Commonly referred to as “vertical representation,” the continuous representation by the same attorney is contrasted with “horizontal representation” – a representational scheme where one attorney represents the client during one court proceeding before handing off the client’s case to another attorney to cover the next stage.<sup>710</sup>

As the American Bar Association explains, “horizontal representation” is uniformly implemented as a cost-saving measure in the face of excessive workloads, and to the detriment of clients. In fact, the ABA rejects the use of horizontal representation in any form, stating specifically that: “Counsel initially provided should continue to represent the defendant throughout the trial court proceedings and should preserve the defendant’s right to appeal, if necessary.”<sup>711</sup>

In explaining why horizontal representation is so harmful to clients, the ABA states:

Defendants are forced to rely on a series of lawyers and, instead of believing they have received fair treatment, may simply feel that they have been “processed by the system.” This form of representation may be inefficient as well, because each new attorney must begin by familiarizing himself or herself with the case and the client must be re-interviewed. Moreover, when a single attorney is not responsible for the case, the risk of substandard representation is probably increased. Appellate courts confronted with claims of ineffective assistance of counsel have commented critically on stage representation practices.<sup>712</sup>

<sup>708</sup> 287 U.S. 45, 61 (1932).

<sup>709</sup> AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 7 (Feb. 2002).

<sup>710</sup> AMERICAN BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE – PROVIDING DEFENSE SERVICES, commentary to standard 5-6.2 (3d ed. 1992).

<sup>711</sup> AMERICAN BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE – PROVIDING DEFENSE SERVICES, standard 5-6.2 (3d ed. 1992).

<sup>712</sup> AMERICAN BAR ASS’N, ABA STANDARDS FOR CRIMINAL JUSTICE – PROVIDING DEFENSE SERVICES, commentary to standard 5-6.2 (3d ed. 1992).

The nexus between the requirement that trial counsel be appointed as early as possible and the requirement that the attorney who is appointed initially then remains with that client's case through to completion is to ensure that the level of advocacy necessary to mount a meaningful defense commences as soon as possible. In systems relying on horizontal representation schemes, the delay in appointing the actual trial lawyer has negative consequences for the client as promising investigative leads can go cold, witnesses can become harder and harder to track down, and memories can fade.



**Multnomah Defenders, Inc.** Multnomah Defenders, Inc. is a public defender office employing 25 attorneys.<sup>713</sup> Attorneys employed by a public defender office are prohibited from practicing law outside of their appointed cases.<sup>714</sup>

Multnomah Defenders, Inc. is a union office. According to the collective bargaining agreement, a “normal workday” for full-time employment is 8 hours / 40 hours per week,<sup>715</sup> and workloads are theoretically limited:

The lawyers of MDI have the separate and distinct duty to provide ethically “adequate” legal services to their clients. *All* MDI staff have an interest in being reasonably able to proficiently complete the tasks to which they are assigned in the time allotted. It is the policy of MDI that it will not contract for, accept, nor assign to staff a workload which would be inconsistent with these obligations and goals.<sup>716</sup>

Despite this agreement, this public defender office’s attorney caseloads appear excessive when analyzed against national standards.

**Table:** 2017 attorney caseloads, Multnomah Defenders, Inc.

Attorney	Felony		Misdemeanor		Delinquency		Mental Health		Appeal		Total NAC%	Dep.	PV	Tmt. Ct.	TPR
	credits	NAC%	credits	NAC%	credits	NAC%	credits	NAC%	credits	NAC%					
MDI 1			1	0.3%					85	340.0%	340.3%				
MDI 2									60	240.0%	240.0%				
MDI 3			762	190.5%							190.5%		55		
MDI 4	146	97.3%	219	54.7%							152.1%		30		
MDI 5	69	46.0%	345	86.2%							132.2%		13		
MDI 6	89	59.3%	225	56.2%							115.6%		16		
MDI 7	157	104.7%	26	6.5%							111.2%		7		
MDI 8	16	10.7%	397	99.2%							109.9%		2		
MDI 9	17	11.3%	390	97.5%							108.8%		1		
MDI 10	5	3.3%	417	104.2%							107.6%		1		
MDI 11	153	102.0%	12	3.0%							105.0%		11		
MDI 12	142	94.7%	34	8.5%							103.2%		3		
MDI 13			407	101.7%							101.7%		2		
MDI 14			402	100.5%							100.5%				
MDI 15	11	7.3%	364	91.0%							98.3%		6		

<sup>713</sup> At the time the contract was awarded, OPDS showed Multnomah Defenders, Inc. as having 24 attorneys. *See* OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION, MEMBERSHIP DIRECTORY, OREGON PUBLIC DEFENSE CONTRACTS (Mar. 19, 2018). Since that time, three attorneys have left the office and four different attorneys have joined the office, bringing the total number of attorneys to 25.

<sup>714</sup> Public Defense Legal Services Contract, General Terms ¶ 1.4.3 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>715</sup> Collective Bargaining Agreement, By and Between Multnomah Defenders Inc. and Multnomah Defenders Inc., Local 2805 AFSCME Counsel 75, AFL-CIO, art. 10.2 (eff. through Jan. 31, 2020).

<sup>716</sup> Collective Bargaining Agreement, By and Between Multnomah Defenders Inc. and Multnomah Defenders Inc., Local 2805 AFSCME Counsel 75, AFL-CIO, art. 31.2 (eff. through Jan. 31, 2020).

MDI 16	125	83.3%	9	2.3%			85.6%		7			
MDI 17	113	75.3%	7	1.8%			77.1%		7			
MDI 18	37	24.7%	120	30.0%			54.7%		22			
MDI 19	46	30.7%					30.7%	217	6	4		
MDI 20	46	30.7%					30.7%	293	5	9		
MDI 21	40	26.7%					26.7%	194	6	3		
MDI 22	20	13.3%					13.3%	178	19	4		
MDI 23			2	0.5%			0.5%		1071			
MDI 24									7			
MDI 25									1			
<b>Total</b>	<b>1232</b>	<b>821.3%</b>	<b>4139</b>	<b>1035%</b>			<b>145</b>	<b>580.0%</b>	<b>2436%</b>	<b>883</b>	<b>1297</b>	<b>20</b>

Although this evaluation is focused on trial level representation, we note that Multnomah Defenders, Inc. assigns all appeals to two attorneys. In 2017, those two attorneys had an appellate caseload requiring 5.8 FTE attorneys under NAC standards. That means the office must expand its appellate unit by approximately four full-time attorneys to effectively advocate on behalf of clients in the appellate courts.

As regards the office's trial level attorneys, 12 attorneys had caseloads in 2017 in excess of national standards.<sup>717</sup> For example, MDI Attorney 3 handled 762 misdemeanor cases – almost double the annual maximum under NAC standards. MDI Attorney 4's felony caseload of 146 felonies required approximately 1.0 FTE attorney under NAC standards, but that attorney also had 219 misdemeanors and 30 probation violations.

Other attorneys have caseloads that, at first glance, do not appear excessive. However, when considering their work on case types not addressed by NAC standards, it is less clear whether the attorneys have sufficient time to handle all of their cases effectively. For example, MDI Attorney 20 handled 46 felonies in 2017, or 30.7% of NAC; but that same attorney also had 293 dependencies, 5 probation violations, and 9 termination of parental rights cases. Or, consider MDI Attorney 23, who alone handled the vast majority of the office's probation violation caseload. Although there is no NAC standard for probation violation representation, surely 1,071 cases are too many for any single attorney to handle effectively – that is more than four cases for every single working day of a year (52 weeks multiplied by 5 days per week yields 260 working days).

<sup>717</sup> Two attorneys – MDI Attorney 24 and MDI Attorney 25 – had negligible caseloads, respectively handling only seven cases and one case that year. Those attorneys do not factor into the analysis of the office's overall caseload.

**Portland Defense Consortium.** Portland Defense Consortium is a consortium of six separate law firms, that collectively have a total of 12 private attorneys.<sup>718</sup> Attorneys who participate in a consortium are expressly allowed to maintain a private law practice, in addition to their appointed cases.<sup>719</sup>

**Table:** 2017 attorney caseloads, Portland Defense Consortium

Attorney	Felony		Misdemeanor		Delinquency		Mental Health		Appeal		Total NAC%	Dep.	PV	Tmt. Ct.	TPR
	credits	NAC%	credits	NAC%	credits	NAC%	credits	NAC%	credits	NAC%					
[ none identified ]	6	4.0%									4.0%				
PDC 1	263	175.3%	34	8.5%							<b>183.8%</b>		31		
PDC 2	167	111.3%	19	4.8%							<b>116.1%</b>		23		
PDC 3	145	96.7%	8	2.0%							98.7%		20		
PDC 4	124	82.7%	24	6.0%							88.7%		15		
PDC 5	90	60.0%	9	2.3%							62.3%		7		
PDC 6	15	10.0%	204	51.0%							61.0%		13		
PDC 7	85	56.7%	11	2.8%							59.4%		4		
PDC 8	86	57.3%	8	2.0%							59.3%		6		
PDC 9	79	52.7%	9	2.3%							54.9%		7		
PDC 10	63	42.0%	3	0.8%							42.7%		7		
PDC 11	59	39.3%	5	1.3%							40.6%		6		
PDC 12	55	36.7%	6	1.5%							38.2%		5		
PDC 13	6	4.0%									4.0%				
<b>Total</b>	<b>1243</b>	<b>828.7%</b>	<b>340</b>	<b>85.0%</b>							<b>913.7%</b>		<b>144</b>		

In 2017, two consortium attorneys had caseloads in excess of national standards. Those two lawyers – PDC Attorney 1 and PDC Attorney 2 – carried a combined caseload requiring approximately 3.0 FTE attorneys.

To the extent Portland Defense Consortium attorneys also represent privately retained clients, their time available to handle their appointed caseload is reduced.

<sup>718</sup> At the time the contract was awarded, OPDS showed the Portland Defense Consortium as having 15 attorneys. See OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION, MEMBERSHIP DIRECTORY, OREGON PUBLIC DEFENSE CONTRACTS (Mar. 19, 2018). At that time, those 15 attorneys worked out of eight separate law firms. Since then, three attorneys have left the consortium, and two of the remaining attorneys have joined together in practice.

<sup>719</sup> Public Defense Legal Services Contract, General Terms ¶ 1.4.5 (Jan. 1, 2018 to Dec. 31, 2019).

*g. Umatilla & Morrow counties*

**Blue Mountain Defenders.** Blue Mountain Defenders is a consortium of eight private attorneys working out of their individual offices. Attorneys who participate in a consortium are expressly allowed to maintain a private law practice, in addition to their appointed cases.<sup>720</sup>

**Table:** 2017 attorney caseloads, Portland Defense Consortium

Attorney	Felony		Misdemeanor		Delinquency		Mental Health		Appeal		Total NAC%	Dep.	PV	Tmt. Ct.	TPR
	credits	NAC%	credits	NAC%	credits	NAC%	credits	NAC%	credits	NAC%					
BMD 1	215	143.3%	198	49.5%	10	5.0%	2	1.0%			<b>198.8%</b>	185	144		4
BMD 2	136	90.7%	92	23.0%	9	4.5%					<b>118.2%</b>	100	74		4
BMD 3	64	42.7%	34	8.5%	17	8.5%					59.7%	156	41		2
BMD 4	59	39.3%	45	11.3%	7	3.5%	2	1.0%			55.1%	5	23		
BMD 5	13	8.7%	2	0.5%							9.2%	54			3
BMD 6	2	1.3%	2	0.5%	8	4.0%					5.8%	78	3		1
BMD 7	2	1.3%									1.3%				
BMD 8												48			
BMD 9												15			
<b>Total</b>	<b>491</b>	<b>327.3%</b>	<b>373</b>	<b>93.3%</b>	<b>51</b>	<b>25.5%</b>	<b>4</b>	<b>2.0%</b>			<b>448.1%</b>	<b>641</b>	<b>285</b>		<b>14</b>

Two of the eight consortium attorneys – BMD Attorney 1 and BMD Attorney 2 – say they work nearly full-time in the consortium, with one estimating that nearly 95% of her time is spent on appointed cases; the other six consortium attorneys are part-time.<sup>721</sup> In 2017, the two “full-time” attorneys had caseloads in excess of national standards. In fact, BMD Attorney 1 alone handled a caseload requiring approximately 1.9 FTE attorneys under NAC standards, and that does not include the 185 dependency cases, 144 probation violations, and four termination of parental rights cases this attorney also handled that year. As a “part-time” consortium attorney, BMD Attorney 3 handled a caseload requiring approximately 0.6 FTE attorneys under NAC standards, but also handled 156 dependency cases, 41 probation violations, and two termination of parental rights cases in 2017.

To the extent Blue Mountain Defenders attorneys also represent privately retained clients, their time available to handle their appointed caseload is reduced.

<sup>720</sup> Public Defense Legal Services Contract, General Terms ¶ 1.4.5 (Jan. 1, 2018 to Dec. 31, 2019).

<sup>721</sup> A ninth attorney touched only two cases in 2017 and does not seem to have continued as a part-time member of the consortium in 2018.

**Intermountain Public Defender Inc.** Intermountain Public Defender Inc. is a public defender office employing nine attorneys. Attorneys employed by a public defender office are prohibited from practicing law outside of their appointed cases.<sup>722</sup>

**Table:** 2017 attorney caseloads, Intermountain Public Defender

Attorney	Felony		Misdemeanor		Delinquency		Mental Health		Appeal		Total NAC%	Dep.	PV	Tmt. Ct.	TPR
	credits	NAC%	credits	NAC%	credits	NAC%	credits	NAC%	credits	NAC%					
[ none identified ]															1
IPD 1	182	121.3%	82	20.5%	1	0.5%	18	9.0%			151.3%	2	140		
IPD 2	122	81.3%	121	30.3%	10	5.0%	2	1.0%			117.6%	31	155		
IPD 3	114	76.0%	144	36.0%			1	0.5%			112.5%	10	162		
IPD 4	144	96.0%	39	9.8%	9	4.5%	3	1.5%			111.8%	25	136		
IPD 5	28	18.7%	243	60.7%	2	1.0%					80.4%	18	217		
IPD 6	72	48.0%	21	5.3%			3	1.5%			54.7%	18	32		
IPD 7	1	0.7%	209	52.3%							52.9%	8	111		1
IPD 8	44	29.3%	11	2.8%	8	4.0%	2	1.0%			37.1%	41	14		1
IPD 9			123	30.8%							30.8%		54		
IPD 10	1	0.7%	26	6.5%			3	1.5%			8.7%	6	11		
IPD 11													2		
PDC 12	55	36.7%	6	1.5%							38.2%		5		
PDC 13	6	4.0%									4.0%				
<b>Total</b>	<b>708</b>	<b>472.0%</b>	<b>1019</b>	<b>254.8%</b>	<b>30</b>	<b>15.0%</b>	<b>32</b>	<b>16.0%</b>			<b>757.8%</b>	<b>159</b>	<b>1035</b>		<b>2</b>

In 2017, the office’s overall caseload required approximately 7.6 FTE attorneys under NAC standards. At first glance, an available nine attorneys suggests the office has a sufficient attorneys to handle the work. (Two individuals handled a negligible number of cases as the office had some amount of turnover in 2017.) However, the total caseload is not divided equally among the attorneys. Four of the office’s attorneys had caseloads in excess of national standards; their combined caseload required nearly an *additional* 1.0 FTE attorney to handle the work effectively under NAC standards. Moreover, the estimated 7.6 FTE attorneys does not yet account for the office’s other cases, including the 1,035 probation violation cases handled in 2017, that reduce the time available to effectively represent clients in felony, misdemeanor, delinquency, and mental health proceedings.

<sup>722</sup> Public Defense Legal Services Contract, General Terms ¶ 1.4.3 (Jan. 1, 2018 to Dec. 31, 2019).

# CHAPTER V

## FINDINGS & RECOMMENDATIONS

### A. FINDINGS

- 1. The State of Oregon has created a complex bureaucracy that collects a significant amount of indigent defense data, yet does not provide sufficient oversight or financial accountability. In some instances, the complex bureaucracy is itself a hindrance to effective assistance of counsel.**

The provision of the Sixth Amendment right to effective counsel is an obligation of the states under the due process clause of the Fourteenth Amendment.<sup>723</sup> The State of Oregon attempts to fulfill its Fourteenth Amendment obligation in trial courts primarily through an array of contracts let by the Public Defense Services Commission to public defender offices, private law firms, consortia of individual attorneys and law firms, non-profit organizations, and occasionally individual lawyers. Those contracts are administered by the Office of Public Defense Services.

PDSC/OPDS requires potential providers to submit lengthy and detailed proposals for contracts, but PDSC/OPDS does not and in practice cannot make use of the information provided by potential providers in those proposals. The PDSC/OPDS lacks information about and the ability to oversee the public defense system(s) as actually implemented. This results in, among other things, PDSC/OPDS failing to carry out its fiduciary duty to be an effective steward of taxpayer dollars.

PDSC/OPDS elicits proposals every two years from groups seeking a contract to provide public representation services. The proposal submitted by a group that has never before received a contract contains a list of the constituent attorneys, the case types that each attorney is intended to handle, and the percentage of the cases and compensation that each attorney is projected to receive; but there is nothing that binds the contractor to follow the projections contained in its proposal. The proposal submitted by a group that has previously received a contract contains far less information, but there is nothing that binds the contractor to follow the information it does provide in its proposal.

Further, once PDSC/OPDS awards contracts, the PDSC/OPDS contracts expressly allow the contractors to enter into side agreements and subcontracts, without notice to

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<sup>723</sup> Gideon v. Wainwright, 372 U.S. 335, 343-45 (1963).

or oversight by PDSC/OPDS. PDSC/OPDS does not require contractors to explain the manner in which the contractor assigns cases to its constituent individual attorneys.

Through these contracts, PDSC/OPDS devolves onto the contractors the decisions about the identity of the individual attorneys who provide the right to counsel, how those individual attorneys are appointed to the cases of specific defendants, and how and how much the individual attorneys are paid for their work.

As explained throughout this report, PDSC/OPDS does not have any way of knowing who the attorneys are or how many attorneys are providing the right to counsel on any given day. PDSC/OPDS does not require the contracting entities to explain how much money is spent on overhead and what is acquired, how much money is paid to a contract administrator and what services are provided in exchange, or how much money is paid to the constituent individual attorneys and what services those attorneys provide in exchange. PDSC/OPDS do not require contractors to explain the manner in which they assign cases to their constituent attorneys, and they have no way of monitoring or controlling the workloads of the individual attorneys. PDSC/OPDS's decision to affirmatively avoid securing this most basic information seems to arise from an effort to ensure that the individual lawyers who provide the right to counsel not be considered as employees of PDSC/OPDS under state and/or federal law.

The legislative budget cycle process and its interaction with PDSC/OPDS's contract cycle process further impede provision of effective assistance of counsel. Because of the timing of the Oregon legislative budget cycle, the most recent current data that PDSC/OPDS will have in preparing a budget will always be at least two years old at the beginning of a two-year contract and at least four years old at the end of that two-year contract. For example, PDSC/OPDS used information from the end of year 2015 and/or end of 1st quarter 2016 to prepare the budget used to fund the PDSC/OPDS contracts for January 1, 2018 through December 31, 2019. PDSC/OPDS contracts cannot budget for or be responsive to the actual number and type of cases that defense attorneys will be appointed to during the two-year contract period. PDSC/OPDS contracts cannot be responsive to legislative changes to the laws that take effect during the two-year contract period. PDSC/OPDS contracts cannot be responsive to changes in local practice that take effect during the two-year contract period, such as decisions by judges to change court scheduling or case allotment procedures and decisions by prosecutors to change charging practices.

The PDSC/OPDS contracts require contractor groups and the attorneys within them to abide by the PDSC *Qualification Standards for Court-Appointed Counsel* and by the Oregon State Bar's *Performance Standards for Criminal and Delinquency Cases*. The State of Oregon lacks any mechanism to evaluate whether contractors and individual attorneys comply with these standards.

***Selection & Qualifications.*** After a contractor is awarded a contract by PDSC/OPDS, the constituent attorneys in that contractor group may change at will. As a result, while PDSC/OPDS evaluates contractor proposals every two years and selects the contractors to whom it awards contracts, the State of Oregon lacks oversight of and information about the selection and qualifications of the attorneys who are actually appointed to represent financially eligible defendants. Though most contractors provide monthly reports to PDSC/OPDS of the specific cases and case types to which each of its attorneys was appointed during the preceding month, some contractors only provide these reports annually.

***Lack of qualifications and training when the same attorneys provide both criminal and civil representation.*** In many places in Oregon, PDSC/OPDS contracts with the same attorneys to provide criminal and civil representation. This leads to an ever-increasing number of conflicts in criminal cases. It also means that attorneys are often appointed to cases for which they lack adequate qualifications and training, because the laws, rules, and procedures in civil cases are dramatically different from those in criminal cases. This is especially true in more rural areas where only a small number of attorneys are under contract to provide all representation to financially eligible individuals.

***Workloads.*** Most contractors file monthly reports with PDSC/OPDS (though some contractors file these reports only annually) showing each case and case type to which each attorney was appointed during the reporting month and the dollar value claimed by the contractor under the contract for that case. This allows PDSC/OPDS to know the total number of “credits” assigned to each attorney in a given year. But PDSC/OPDS does not have any mechanism for knowing the number of actual cases being handled by each attorney at any point in time, nor the number of actual cases assigned to each attorney in a given year. Individual attorneys within the contracting groups, other than those in the 10 full-time public defender offices, are private attorneys who are free to maintain a private law practice and to accept whatever other employment they choose. The State of Oregon lacks oversight of and information about the additional work performed and additional number of cases handled by these private attorneys, beyond the cases to which they are appointed pursuant to the PDSC/OPDS contracts.

**2. The complex bureaucracy obscures an attorney compensation plan that is at root a fixed fee contract system that: pits appointed lawyers’ financial self-interest against the due process rights of their clients; and is prohibited by national public defense standards.**

The “case credits” system predominantly used by PDSC/OPDS pays contractors/attorneys a flat fee per case without regard to how much or how little time the case requires of the attorney. This compensation plan creates an incentive for attorneys



to handle as many cases as possible and to do so as quickly as possible, rather than focusing on their ethical duty of achieving the client's case-related goals. The "case credits" system and the related monthly reporting system result in some contractors and attorneys being paid for many months for work they are not doing (i.e., under quota). In other circumstances, the "case credits" system results in some contractors and attorneys doing work for many months for which they are not being paid (i.e., over quota).

PDSC/OPDS does not pay the same amount to all attorneys for representing individuals in the same types of cases, creating the strong likelihood that the effectiveness of the representation provided to each defendant varies from county to county, contractor to contractor, and attorney to attorney. For example, the dollar amount that PDSC/OPDS pays for an attorney to represent a person on a class A felony ranges from a low of \$1,090/credit to a high of \$1,303/credit through an annual contract. If an attorney is not appointed under an annual contract but is instead appointed on a case-by-case basis, PDSC/OPDS pays the attorney \$46/hour for that same class A felony (and for all non-capital murder cases). And, if an attorney participates in an annual contract that is a fixed value contract, the amount the attorney is paid to handle a given class A felony case depends on the total number of cases that the contractor was appointed to and then allocated to that individual attorney during the two years of the contract.

The "value" that PDSC/OPDS pays an annual contractor and the hourly rate that they pay an attorney appointed on a case-by-case basis do not take into consideration the cost of overhead expenses incurred by the contractor nor the individual attorney. PDSC/OPDS does not reimburse any attorney for overhead expenses. As a result, the fee that an individual attorney earns varies depending upon whether that attorney is employed by an entity that pays the attorney's overhead or the attorney must pay for overhead out of the compensation received from PDSC/OPDS.

PDSC/OPDS's expenditure of some funds in its contracts is opaque, unequal, and unaccountable. In an effort to overcome some of the problems of the "case credit" system, PDSC/OPDS has begun over the past few biennial contract cycles to award funding in some contracts that is not tied to case credits. They do so in three ways: line item offsets; fixed fee line items; and fixed value contracts.

***Line item offsets (investigation offset, or dependency offset).*** These are a dollar amount of funds that PDSC pays to a contractor and for which the contractor never has to provide any accounting at all. PDSC/OPDS receive no information whatsoever about how a contractor spends this money. Despite the name given to the offset, the contractor is not required to spend the funds for "investigation" or "dependency" representation.

***Fixed fee line items.*** These are a dollar amount of funds that PDSC/OPDS pays to a contractor, in exchange for which the contractor provides a particular type of representation or a particular service. For example, providing representation to all of the financially eligible persons whose cases are in a drug court, or providing an attorney to be present during all arraignments where a circuit court has set up a special process that handles all arraignments together, or serving as a resource about issues particular to veterans or children. PDSC/OPDS receives no information whatsoever about how a contractor spends this money. Despite the name given to the line item, the contractor is not required to spend the funds for the particular item named.

***Fixed value contracts.*** These are contracts that PDSC/OPDS award to some contractors in some counties that pay the contractor a fixed total dollar amount each month, in exchange for which the contractor represents all financially eligible persons in all case types in the jurisdiction. The contract estimates the maximum total number of cases to which PDSC/OPDS estimates the contractor will be appointed, and the contractor is required to file a report at the end of each year of the contract detailing the number and types of cases to which the contractor was actually appointed. But rarely ever is any adjustment made to the amount of money the contractor is paid. These fixed value contracts create an incentive for an attorney to handle as few cases as possible (thereby earning a greater amount of money for a lesser amount of work) and devote as few hours as possible to each case (thereby earning a greater amount of money for a lesser amount of work). PDSC/OPDS receive no information about the number of hours that a contractor devotes to representing financially eligible persons in exchange for the money PDSC/OPDS pays that contractor.

At the July 2000 meeting of the American Bar Association, the ABA House of Delegates adopted a resolution reaffirming the core values of the legal profession.<sup>724</sup> The resolution calls on lawyers to maintain “undivided loyalty” to the client and to “avoid conflicts of interest” with the client. Fixed fee contracts, in which a lawyer earns the same pay no matter how many cases he is required to handle, create financial incentives for a lawyer to dispose of cases as quickly as possible, rather than as effectively as possible for the client. Even where the defendant has a winnable case, the lawyer’s incentive nevertheless is to resolve it by plea. The attorney is not rewarded with additional pay for the additional work involved in zealous advocacy. Instead, the attorney is hurt financially the more he does for his clients.

Further, “[c]ontracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual, or complex cases, and separately fund expert, investigative, and

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<sup>724</sup> American Bar Ass’n, ABA House of Delegates, Resolution 10-F (July 2000), *available at* <http://www.americanbar.org/groups/leadership/2000dailyjournal10.html>.

other litigation support services.”<sup>725</sup> A federal court in 2013 called the use of fixed fee contracts an “[i]ntentional choice[.]” of government that purposely leaves “the defenders compensation at such a paltry level that even a brief meeting [with clients] at the outset of the representation would likely make the venture unprofitable.”<sup>726</sup>

**3. The composition of the Public Defense Services Commission does not adhere to national standards, in that all commissioners are appointed by the judiciary, while the legislative and executive branches of government have no equal voice in the commission’s affairs.**

In the 1979 case of *Ferri v. Ackerman*, the United States Supreme Court states that “independence” of appointed counsel to act as an adversary is an “indispensable element” of “effective representation.”<sup>727</sup> Two years later, the Court determined in *Polk County v. Dodson* that states have a “constitutional obligation . . . to respect the professional independence of the public defenders whom it engages.”<sup>728</sup> Observing that “a defense lawyer best serves the public not by acting on the State’s behalf or in concert with it, but rather by advancing ‘the undivided interests of the client,’”<sup>729</sup> the Court also noted that “a public defender is not amenable to administrative direction in the same sense as other state employees” because he “works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client.”<sup>730</sup> This is confirmed in *Strickland v. Washington*, where the Court states that “independence of counsel” is “constitutionally protected” and that “[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.”<sup>731</sup>

Heeding these admonitions from the Court, national standards call for independence of the defense function. The first of the *ABA Ten Principles of a Public Defense Delivery System* explains that in a properly constituted system “[t]he public defense function, including the selection, funding, and payment of defense counsel, is independent.”<sup>732</sup> National standards agree that the best way to protect defense counsel independence is by establishing an independent public defender commission. Compiling these standards, the commentary to *ABA Principle 1* explains that, in order to “safeguard in-

<sup>725</sup> AMERICAN BAR ASS’N, *ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM*, commentary to Principle 8 (Feb. 2002).

<sup>726</sup> Memorandum of Decision at 15, *Wilbur v. City of Mount Vernon*, No. C11-1100RSL, (W.D. Wash., filed Dec. 4, 2013), available at <http://sixthamendment.org/wp-content/uploads/2013/12/Wilbur-Decision.pdf>.

<sup>727</sup> 444 U.S. 193, 204 (1979).

<sup>728</sup> 454 U.S. 312, 321-22 (1981).

<sup>729</sup> 454 U.S. 312, 318-19 (1981) (quoting *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979)).

<sup>730</sup> 454 U.S. 312, 321 (1981).

<sup>731</sup> 466 U.S. 668, 686 (1984).

<sup>732</sup> AMERICAN BAR ASS’N, *ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM*, Principle 1 (Feb. 2002).

dependence and to promote the efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems.”<sup>733</sup>

Importantly, the commission should be made up of members selected by diverse appointing authorities, so that no single branch of government has the ability to usurp power over the chief defender or exert outsized influence over the delivery of public defense services. The earliest *Guidelines for Legal Defense Systems in the United States*<sup>734</sup> explain:

A special Defender Commission should be established for every defender system, whether public or private.

The Commission should consist of from nine to thirteen members, depending upon the size of the community, the number of identifiable factions or components of the client population, and judgments as to which non-client groups should be represented.

Commission members should be selected under the following criteria:

- (a) The primary consideration in establishing the composition of the Commission should be ensuring the independence of the Defender Director.
- (b) The members of the Commission should represent a diversity of factions in order to ensure insulation from partisan politics.
- (c) No single branch of government should have a majority of votes on the Commission.
- (d) Organizations concerned with the problems of the client community should be represented on the Commission.
- (e) A majority of the Commission should consist of practicing attorneys.
- (f) The Commission should not include judges, prosecutors, or law enforcement officials.

Members of the Commission should serve staggered terms in order to ensure continuity and avoid upheaval.<sup>735</sup>

Oregon’s Public Defense Services Commission does not comply with these national standards, and critically its makeup institutionalizes judicial interference in the provision of defense services.

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<sup>733</sup> AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, commentary to Principle 1 (Feb. 2002).

<sup>734</sup> NATIONAL STUDY COMMISSION ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES (1976). The *NSC Guidelines* were created in 1976 in consultation with the United States Department of Justice under a DOJ Law Enforcement Assistance Administration (LEAA) grant.

<sup>735</sup> NATIONAL STUDY COMMISSION ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, guideline 2.10 (1976).

The legislative and executive branches of Oregon government are excluded from holding any stake in or responsibility for the success of the public defense system, as are members of the client community, academicians, researchers, minority constituents, and others who might have much to contribute. The Chief Justice certainly could choose to appoint persons from these stakeholder groups, but nothing requires their participation or that their input be considered. Instead, the people who set all public defense policy in Oregon’s state courts serve entirely at the pleasure of the judiciary, and they are chosen not even by a broad group of the judiciary but rather by a single justice.

None of this is to suggest any nefarious conduct or motive on behalf of the Oregon Chief Justice. To the contrary, there is every reason to believe that the current and any future Chief Justice fully desires for the PDSC to properly carry out its work. It is simply the case that policies regarding the provision of the Sixth Amendment right to counsel should not be controlled by a single branch of government, and “[t]he public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel.”<sup>736</sup> As the American Bar Association explains, “[r]emoving oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense.”<sup>737</sup>

**4. The Public Defense Services Commission lacks the necessary statutory scope to ensure the state’s Fourteenth Amendment obligation to provide effective Sixth Amendment assistance of counsel in every courthouse in Oregon.**

Again, providing the Sixth Amendment right to effective assistance of counsel is an obligation of the states – not local governments – under the due process clause of the Fourteenth Amendment.<sup>738</sup> The U.S. Supreme Court has never directly announced

<sup>736</sup> AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, commentary to Principle 1 (Feb. 2002).

<sup>737</sup> AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, commentary to Principle 1 (Feb. 2002). Indeed, a recent report of the Ad Hoc Committee to Review the Criminal Justice Act, appointed by United States Supreme Court Chief Justice Roberts to evaluate the provision of the right to counsel in the federal courts, concluded that the provision of the Sixth Amendment right to counsel in the federal courts must be removed from the oversight of the judiciary. In the words of that report:

After two years of study, this Committee unanimously believes that the federal defense program should be governed by an independent entity with the same mission as frontline defenders. Current governance of the program by the Judicial Conference of the United States and management by the Administrative Office of the U.S. Courts, with their different missions and competing budgetary needs, has led to fundamental fissures and inequities in a system that nearly 250,000 people each year depend upon for effective representation in federal court.

2017 REPORT OF THE AD HOC COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT at xxvi (2017).

<sup>738</sup> Gideon v. Wainwright, 372 U.S. 335, 343-45 (1963).

whether it is unconstitutional for a state to delegate this responsibility to its counties and cities. When a state chooses to place this responsibility on local governments though, the state must guarantee not only that those local governments are capable of providing adequate representation but also that they are in fact doing so.<sup>739</sup> The State of Oregon has no oversight of and provides no funding for the right to counsel of defendants charged with misdemeanors in justice and municipal courts because PDSC/OPDS is responsible only for the public defense system in the state established trial courts<sup>740</sup> – that is, the circuit courts.<sup>741</sup> PDSC/OPDS is not responsible for public defense services in the justice and municipal courts. The counties and cities that choose to establish these courts are responsible for funding and administering them<sup>742</sup> and also for providing the right to counsel where it is required.<sup>743</sup>

Justice courts, where they exist, have jurisdiction over all misdemeanors under state law and county ordinance – excluding designated drug-related misdemeanors<sup>744</sup> – that are committed or triable anywhere in the county within which the court is located.<sup>745</sup> Municipal courts have jurisdiction over those misdemeanors under state law and city ordinance that are committed or triable within the city that established the court,<sup>746</sup> excluding designated drug-related misdemeanors.<sup>747</sup>

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<sup>739</sup> Cf. *Robertson v. Jackson*, 972 F.2d 529, 533 (4th Cir. 1992) (although administration of a food stamp program was turned over to local authorities, “ultimate responsibility” . . . remains at the state level.); *Osmunson v. State*, 17 P.3d 236, 241 (Idaho 2000) (where a duty has been delegated to a local agency, the state maintains “ultimate responsibility” and must step in if the local agency cannot provide the necessary services); *Claremont School Dist. v. Governor*, 794 A.2d 744 (N.H. 2002) (“While the State may delegate [to local school districts] its duty to provide a constitutionally adequate education, the State may not abdicate its duty in the process.”); Letter and white paper from American Civil Liberties Union Foundation *et al* to the Nevada Supreme Court, regarding Obligation of States in Providing Constitutionally-Mandated Right to Counsel Services (Sept. 2, 2008) (“While a state may delegate obligations imposed by the constitution, ‘it must do so in a manner that does not abdicate the constitutional duty it owes to the people.’”), available at [http://www.nlada.net/sites/default/files/nv\\_delegationwhitepaper09022008.pdf](http://www.nlada.net/sites/default/files/nv_delegationwhitepaper09022008.pdf).

<sup>740</sup> OR. REV. STAT. §§ 151.216(1)(a), 151.219 (2017).

<sup>741</sup> OR. CONST. original art. VII, § 9 (given the status of a statute and subject to change by statute, pursuant to OR. CONST. art. VII, § 2); OR. REV. STAT. §§ 1.001, 1.185, 1.187 (2017).

<sup>742</sup> OR. REV. STAT. §§ 51.010, 51.020, 51.210, 221.336 (2017).

<sup>743</sup> OR. REV. STAT. §§ 135.055(3)(d)(A), 151.010 (2017) (counties’ justice courts); OR. REV. STAT. § 135.055(3)(d)(C) (2017) (cities’ municipal courts).

<sup>744</sup> Justice courts and municipal courts cannot exercise jurisdiction over any “designated drug-related misdemeanor,” which is possession of Schedule I, Schedule II, methadone, oxycodone, heroin, meth, and cocaine. OR. REV. STAT. § 423.478 (2017).

<sup>745</sup> OR. REV. STAT. § 51.050 (2017).

<sup>746</sup> OR. REV. STAT. § 221.339 (2017).

<sup>747</sup> Justice courts and municipal courts cannot exercise jurisdiction over any “designated drug-related misdemeanor,” which is possession of Schedule I, Schedule II, methadone, oxycodone, heroin, meth, and cocaine. OR. REV. STAT. § 423.478 (2017).

All of the state law misdemeanors adjudicated in the justice and municipal courts carry jail time as a possible punishment,<sup>748</sup> and county and city misdemeanors may carry jail time as a possible punishment.<sup>749</sup> Accordingly, any defendant who cannot afford to hire his own attorney is entitled under both federal and state law to have counsel provided at public expense.<sup>750</sup> Yet the State of Oregon has no mechanism to know whether it is fulfilling its obligation to provide counsel to the poor who face incarceration in the justice and municipal courts.

In those counties where justice or municipal courts exist, law enforcement officers typically make the decision in the first instance whether to arrest or issue a citation to an alleged offender. When a law enforcement officer decides to issue a citation, that officer also chooses whether to cite the offender to appear in the state circuit court or in the justice/municipal court. This means that two defendants charged with committing exactly the same offense may be prosecuted in different courts and receive (or not receive) different assistance of counsel. Once the prosecuting attorney becomes aware of an offense, that prosecutor similarly has discretion as to the court in which the case will go forward. A district attorney in one county advised that he decides whether to prosecute in circuit court or in justice court based on whether he foresees the case being appealed. In another county, the district attorney is said to prosecute in justice court those misdemeanor cases that will earn revenue for the county. The assistance of counsel that a defendant receives should not be arbitrarily decided at the discretion of law enforcement officers or prosecutors.

Misdemeanors matter. For most people, our nation's misdemeanor courts are the place of initial contact with our criminal justice systems. Much of a citizenry's confidence in the courts as a whole – their faith in the state's ability to dispense justice fairly and effectively – is framed through these initial encounters. Although a misdemeanor conviction carries less incarceration time than a felony, the collateral consequences can be just as great.<sup>751</sup> Going to jail for even a few days may result in a person's loss of

<sup>748</sup> OR. REV. STAT. §§ 161.545, 161.555, 161.615, 161.635 (2017).

<sup>749</sup> OR. REV. STAT. §§ 203.035, 203.810 (county misdemeanors), 221.914 (city misdemeanors) (2017).

<sup>750</sup> U.S. CONST. amend. VI; OR. CONST. art. I, § 11; *Alabama v. Shelton*, 505 U.S. 654 (2002); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Stevenson v. Holzman*, 458 P.2d 414, 418-19 (Or. 1969).

<sup>751</sup> Collateral consequences are those things that automatically happen to a defendant when he is convicted of a crime, even though they are not contained as part of the sentence that is publicly imposed on the defendant in court. In 2009, the American Bar Association attempted to compile, for the first time, an exhaustive listing of the collateral consequences of a felony conviction that arise under federal laws. AMERICAN BAR ASS'N, INTERNAL EXILE, COLLATERAL CONSEQUENCES OF CONVICTION IN FEDERAL LAWS AND REGULATIONS (Jan. 2009). In explaining the limitations of that report, the ABA noted:

[I]t does not include the many collateral consequences contained in state laws and regulations, or in state-controlled federal benefit programs such as welfare, food stamps, and public housing. Moreover, it does not include court-imposed conditions of probation and parole that may have a collateral effect on travel, employment, and other family matters, or civil forfeiture provisions that are often triggered by an arrest. . . . People with criminal convictions who served time in prison may have significant difficulty due to gaps in work experience on a resume in a job application. More and more frequently potential employers

professional licenses, exclusion from public housing, inability to secure student loans, or even deportation. A misdemeanor conviction and jail term may contribute to the break-up of the family, the loss of a job, or other consequences that may increase the need for both government-sponsored social services and future court hearings (e.g., matters involving parental rights) at taxpayers' expense.

## B. RECOMMENDATIONS

### **1. The Oregon legislature should amend the statute establishing the Public Defense Services Commission to ensure that the commission members are appointed by diverse authorities such no single branch of government has a majority of appointments.**

Again, NSC *Guideline 2.10* states that state public defender oversight commission members should be selected under the following criteria: “(a) The primary consideration in establishing the composition of the Commission should be ensuring the independence of the Defender Director; (b) The members of the Commission should represent a diversity of factions in order to ensure insulation from partisan politics; (c) No single branch of government should have a majority of votes on the Commission; (d) Organizations concerned with the problems of the client community should be represented on the Commission; [and] (e) A majority of the Commission should consist of practicing attorneys.”<sup>752</sup>

In practice, jurisdictions with indigent defense commissions generally give an equal number of appointments to the executive, legislative, and judicial branches of government.<sup>753</sup> To fill out the remainder of appointments, governments often give responsibility for one or two positions to the state bar association. Many jurisdictions try to have a voice from communities most affected by the indigent defense function represented on the commission (for example, the African-American Bar in Louisiana). Jurisdictions have also found that giving appointments to the deans of accredited law schools can create nexuses that help the indigent defense commissions (for example, law schools can help with standards-drafting, training facilities, etc.).<sup>754</sup> Appointments by non-governmental organizations generally must go through a confirmation process by an official branch of state government.

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and landlords are requesting and using background check information, including arrest and conviction records in their decisions regarding jobs and leases independent of statutory requirements.

*Id.* at 11.

<sup>752</sup> NATIONAL STUDY COMMISSION ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, guideline 2.10 (1976).

<sup>753</sup> For example: Connecticut, Idaho, Indiana, Louisiana, Maryland, Massachusetts, Michigan, Montana, New Hampshire, New Mexico, New York, North Carolina, North Dakota, South Carolina, Texas, Utah, and Virginia.

<sup>754</sup> For example: Kentucky and New Mexico.



Examples of indigent defense commission appointments from other states include:<sup>755</sup>

- **Michigan.** The Michigan Indigent Defense Commission (MIDC) is a 15-member commission. The governor appoints all members of MIDC based on recommendations submitted by: the Senate Majority Leader (2 appointees); Speaker of the House of Representatives (2); Chief Justice (1); Criminal Defense Attorney Association of Michigan (3); Michigan Judges Association (1); Michigan District Judges Association (1); State Bar of Michigan (1); a bar association advocating for minority interests (1); former prosecutor recommended by Prosecuting Attorney’s Association of Michigan (1); local units of government (1); and one member of the general public. The Chief Justice of the Supreme Court serves as an ex officio member of the MIDC without vote.<sup>756</sup>
- **New Mexico.** The New Mexico Public Defender Department is an 11-member commission appointed by diverse authorities: Governor (1 appointee); Chief Justice (3); dean of University of New Mexico School of Law (3); Speaker of the House of Representatives (1); Senate President (1); and the majority floor leaders of each chamber (one each).<sup>757</sup>
- **North Carolina.** The North Carolina Office of Indigent Defense Services (IDS) is an independent 13-member commission appointed by: Chief Justice (1 appointee, current or retired judge); Governor (1 non-attorney); President Pro Tempore of the Senate (1 attorney); Speaker of the House of Representatives (1 attorney); North Carolina Public Defenders Association (1 attorney); North Carolina State Bar (1 attorney); North Carolina Bar Association (1 attorney); North Carolina Academy of Trial Lawyers (1 attorney); North Carolina Association of Black Lawyers (1 attorney); North Carolina Association of Women Lawyers (1 attorney); and the IDS Commission itself (3 appointments – one non-attorney, one judge, and one Native American).<sup>758</sup>
- **North Dakota.** The North Dakota Commission on Legal Counsel for Indigents (CLCI) is a seven-person commission appointed by: Governor (2 appointees, one from a county of less than 10,000 people); House of Representatives (1); Senate (1); Chief Justice (2 appointees, one being from a county of less than 10,000 people); and North Dakota State Bar Association (1).<sup>759</sup>

<sup>755</sup> For ease of discussion, the Sixth Amendment Center points to specific jurisdictions, but Oregon stakeholders can browse how each state funds and administers the right to counsel on the 6AC website at <http://sixthamendment.org/the-right-to-counsel/state-indigent-defense-systems/>.

<sup>756</sup> MICH. COMP. LAWS § 780.987(1)(a) – (k) (2017).

<sup>757</sup> N.M. STAT. § 31-15-2.1(A) (2018).

<sup>758</sup> N.C. GEN. STAT. § 7A-498.4 (b)(1) - (11) (2016).

<sup>759</sup> N.D. CENT. CODE § 54-61-01(2) (2018).

However Oregon decides to realign the PDSC, it should continue to ban voting members of the commission from being a sitting judge, current prosecuting attorney, current law enforcement employee, or person engaged in providing public defense services, or employees of any of those positions.<sup>760</sup>

**2. Although PDSC currently has extensive regulatory authority to promulgate and enforce standards, the Oregon legislature should direct PDSC to promulgate and enforce specific right to counsel standards.**

Louisiana delineates its commission and central office's overall power by statutorily requiring the promulgation of specific standards in the following areas: attorney qualification standards;<sup>761</sup> attorney performance guidelines;<sup>762</sup> attorney supervision

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<sup>760</sup> This complies with the NSC *Guideline 2.10* directive that: "Commission should not include judges, prosecutors or law enforcement officials." These prohibitions are only on sitting judges and prosecutors. States often find former judges and former law enforcement officials to make very good commission members.

Additionally, more and more states have found it a conflict to have any member who stands to benefit financially from the policies of the commission. For example, Louisiana's statute directs that "[p]ersons appointed to the board shall have significant experience in the defense of criminal proceedings or shall have demonstrated a strong commitment to quality representation in indigent defense matters. No person shall be appointed to the board that has received compensation to be an elected judge, elected official, judicial officer, prosecutor, law enforcement official, indigent defense provider, or employees of all such persons, within a two-year period prior to appointment. No active part-time, full-time, contract or court-appointed indigent defense provider, or active employees of such persons, may be appointed to serve on the board as a voting member. No person having an official responsibility to the board, administratively or financially, or their employee shall be appointed to the board until two years have expired from the time the person held such position and the date of appointment to the board." LA. REV. STAT. ANN. § 15:148(B)(2) (2016).

<sup>761</sup> LA. REV. STAT. ANN. § 15:148(B)(2) (2016) ("Creating mandatory qualification standards for public defenders that ensure that the public defender services are provided by competent counsel. Those standards shall ensure that public defenders are qualified to handle specific case types which shall take into consideration the level of education and experience that is necessary to competently handle certain cases and case types such as juvenile delinquency, capital, appellate, and other case types in order to provide effective assistance of counsel. Qualification standards shall include all of the following: (a) The specific training programs that must be completed to qualify for each type of case. (b) The number of years the public defender has spent in the practice of law in good standing with the Louisiana State Bar Association.").

<sup>762</sup> LA. REV. STAT. ANN. § 15:148(B)(1)(e) (2016) ("Performance of public defenders in all assigned public defense cases. The board shall adopt general standards and guidelines that alert defense counsel to courses of action that may be necessary, advisable, or appropriate to a competent defense including performance standards in the nature of job descriptions."); LA. REV. STAT. ANN. § 15:148(B)(10) (2016) ("Creating separate performance standards and guidelines for attorney performance in capital case representation, juvenile delinquency, appellate, and any other subspecialties of criminal defense practice as well as children in need of care cases determined to be feasible, practicable, and appropriate by the board.").

protocols;<sup>763</sup> time sufficiency standards;<sup>764</sup> continuity of services standards whereby the same attorney provides representation from appointment through disposition;<sup>765</sup> client communication protocols;<sup>766</sup> and data collection standards.<sup>767</sup>

Michigan is even more direct with their statutory language. The Michigan Indigent Defense Commission “shall establish minimum standards, rules, and procedures to effectuate the following:

- The delivery of indigent criminal defense services shall be independent of the judiciary but ensure that the judges of this state are permitted and encouraged to contribute information and advice concerning that delivery of indigent criminal defense services.
- If the caseload is sufficiently high, indigent criminal defense services may consist of both an indigent criminal defender office and the active participation of other members of the state bar.
- Trial courts shall assure that each criminal defendant is advised of his or her right to counsel. All adults, except those appearing with retained counsel or those who have made an informed waiver of counsel, shall be screened for eligibility under this act, and counsel shall be assigned as soon as an indigent adult is determined to be eligible for indigent criminal defense services.”<sup>768</sup>

<sup>763</sup> LA. REV. STAT. ANN. § 15:148(B)(1)(d) (2016) (“Performance supervision protocols. The board shall adopt standards and guidelines to ensure that all defense attorneys providing public defender services undergo periodic review of their work against the performance standards and guidelines in a fair and consistent manner throughout the state, including creating a uniform evaluation protocol.”).

<sup>764</sup> LA. REV. STAT. ANN. § 15:148(B)(1)(a) (2016) (“Manageable public defender workloads that permit the rendering of competent representation through an empirically based case weighting system that does not count all cases of similar case type equally but rather denotes the actual amount of attorney effort needed to bring a specific case to an appropriate disposition. In determining an appropriate workload monitoring system, the board shall take into consideration all of the following: (i) The variations in public defense practices and procedures in rural, urban, and suburban jurisdictions; (ii) Factors such as prosecutorial and judicial processing practices, trial rates, sentencing practices, attorney experience, extent and quality of supervision, and availability of investigative, social worker, and support staff.; (iii) Client enhancers specific to each client such as the presence of mental illness.”).

<sup>765</sup> LA. REV. STAT. ANN. § 15:148(B)(1)(b) (2016) (“Continuity of representation. The board shall adopt standards and guidelines which ensure that each district devises a plan to provide that, to the extent feasible and practicable, the same attorney handles a case from appointment contact through completion at the district level in all cases.”).

<sup>766</sup> LA. REV. STAT. ANN. § 15:148(B)(1)(c) (2016) (“Documentation of communication. The board shall adopt standards and guidelines to ensure that defense attorneys providing public defender services provide documentation of communications with clients regarding the frequency of attorney client communications as required by rules adopted by the board.”).

<sup>767</sup> LA. REV. STAT. ANN. § 15:148(B)(11) (2016) (“Ensuring data, including workload, is collected and maintained in a uniform and timely manner throughout the state to allow the board sound data to support resource needs.”).

<sup>768</sup> MICH. COMP. LAWS § 780.991(1)(a) - (c) (2017).

The Michigan statutory language continues on to require the Michigan Indigent Defense Commission to implement minimum standards, rules, and procedures that adhere to the following principles:

- “Defense counsel is provided sufficient time and a space where attorney-client confidentiality is safeguarded for meetings with defense counsel’s client.
- Defense counsel’s workload is controlled to permit effective representation. Economic disincentives or incentives that impair defense counsel’s ability to provide effective representation shall be avoided. The MIDC may develop workload controls to enhance defense counsel’s ability to provide effective representation.
- Defense counsel’s ability, training, and experience match the nature and complexity of the case to which he or she is appointed.
- The same defense counsel continuously represents and personally appears at every court appearance throughout the pendency of the case. However, indigent criminal defense systems may exempt ministerial, nonsubstantive tasks, and hearings from this prescription.
- Defense counsel is required to attend continuing legal education relevant to counsel’s indigent defense clients.
- Defense counsel is systematically reviewed at the local level for efficiency and for effective representation according to MIDC standards.”<sup>769</sup>

Of particular note is how an Oregon indigent defense commission may deal with ensuring attorneys have sufficient time to zealously advocate for their defendants. PDSC/OPDS should be authorized to create workload standards that require attorney time tracking against specific performance criteria to garner a more accurate projection of what it actually takes to handle each component of a client’s advocacy needs, based on each type of case – a far more accurate method of measuring (and thereby limiting) workload than any other available. More than that, however, tracking time enables policymakers to tie specific variables (such as “time meeting with the client in person”) not only to specific case outcomes and dispositions, but also to systemic outcomes (like recidivism rates, or the rate of former clients now employed and contributing to the tax base).<sup>770</sup>

<sup>769</sup> MICH. COMP. LAWS § 780.991(2)(a) - (f) (2017).

<sup>770</sup> In September 2013, the Montana Office of the State Public Defender filed a motion seeking to decline new cases in two courts of limited jurisdiction. Though the lower court found in October of that year that it did not have the authority to grant relief, a subsequent appeal was put on hold to allow for a political resolve. Because they had significant time-based data, the office received significant funding to resolve the excessive caseload issues. *See* David Carroll, *Montana caseload challenge results in a significant increase in resources*, SIXTH AMENDMENT CENTER (Apr. 17, 2014), available at <http://sixthamendment.org/montana-caseload-challenge-results-in-a-significant-increase-in-resources/>.

The Louisiana legislature codified this by requiring the Louisiana Public Defender Board to develop an empirical case-weighting system (a term of art requiring time-tracking). Delineating the areas requiring uniform standards, it states the LPDB must create a:

Manageable public defender workloads that permit the rendering of competent representation through an empirically based case weighting system that does not count all cases of similar case type equally but rather denotes the actual amount of attorney effort needed to bring a specific case to an appropriate disposition. In determining an appropriate workload monitoring system, the board shall take into consideration all of the following: (i) The variations in public defense practices and procedures in rural, urban, and suburban jurisdictions; (ii) Factors such as prosecutorial and judicial processing practices, trial rates, sentencing practices, attorney experience, extent and quality of supervision, and availability of investigative, social worker, and support staff; and, (iii) Client enhancers specific to each client such as the presence of mental illness.<sup>771</sup>

**3. The State of Oregon should require that services be provided free of conflicts of interest, as is constitutionally required, by abolishing fixed fee contracting and other forms of compensation that produce financial disincentives for public defense lawyers to provide effective assistance of counsel.**

The contracts currently used in Oregon cause conflicts of interest between the indigent defense attorney’s financial self-interest and the legal interests of the indigent defendant. The contracts also cause concurrent conflicts of interest between indigent defendants, and between the indigent defendants and the attorney’s retained clients. Oregon should follow the lead of other states that have banned these practices, including:

- **Idaho.** County commissioners may provide representation by contracting with a defense attorney “provided that the terms of the contract shall not include any pricing structure that charges or pays a single fixed fee for the services and expenses of the attorney.”<sup>772</sup>
- **Michigan.** The Michigan Indigent Defense Commission is statutorily barred from approving local indigent defense plans that provide “[e]conomic disincentives or incentives that impair defense counsel’s ability to provide effective representation.”<sup>773</sup>

<sup>771</sup> LA. REV. STAT. ANN. § 15:148(1)(a) (2017).

<sup>772</sup> IDAHO CODE § 19-859 (2018).

<sup>773</sup> MICH. COMP. LAWS § 780-991(2)(b) (2017).

- *Nevada*. Announcing that the “competent representation of indigents is vital to our system of justice,” the Nevada Supreme Court banned the use of flat fee contracts that fail to provide for the costs of investigation and expert witnesses and required that contracts must allow for extra fees in extraordinary cases.<sup>774</sup>
  - *Washington*. The Washington *Rules of Professional Conduct* decree that “A lawyer shall not: (1) make or participate in making an agreement with a governmental entity for the delivery of indigent defense services if the terms of the agreement obligate the contracting lawyer or law firm: (i) to bear the cost of providing conflict counsel; or (ii) to bear the cost of providing investigation or expert services, unless a fair and reasonable amount for such costs is specifically designated in the agreement in a manner that does not adversely affect the income or compensation allocated to the lawyer, law firm, or law firm personnel.”<sup>775</sup>
- 4. With the abolition of fixed fee contracting, PDSC/OPDS should pay private lawyers at an hourly rate that accounts for both actual overhead and a reasonable fee, and/or hire government employed attorneys for trial level services. OPDS should have the appropriate resources to provide oversight of such a private attorney and state public defender employee system.**

*a. Private attorney compensation*

All national standards require that “counsel should be paid a reasonable fee in addition to actual overhead and expenses.”<sup>776</sup> There is also a significant amount of state caselaw that requires states to pay attorneys a reasonable fee in addition to overhead expenses, including:

- *Kansas*. In 1987, the Kansas Supreme Court determined that the state has an “obligation to pay appointed counsel such sums as will fairly compensate the attorney, not at the top rate an attorney might charge, but at a rate which is not confiscatory, considering overhead and expenses.”<sup>777</sup> Testimony was taken in the case that the average overhead rate of attorneys in Kansas in 1987 was \$30 per hour. Kansas now compensates public defense attorneys at \$80 per hour.
- *Alaska*. “We thus conclude that requiring an attorney to represent an indigent criminal defendant for only nominal compensation unfairly burdens the

<sup>774</sup> Order, *In re Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT No. 411 (Nev., filed July 23, 2015).

<sup>775</sup> WASH. R. PROF. CONDUCT 1.8(m)(1).

<sup>776</sup> AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, commentary to Principle 8 (Feb. 2002).

<sup>777</sup> State *ex rel* Stephan v. Smith, 747 P.2d 816, 242 Kan. 336, 383 (Kan. 1987).

attorney by disproportionately placing the cost of a program intended to benefit the public upon the attorney rather than upon the citizenry as a whole.”<sup>778</sup>

So stated the Alaska Supreme Court in 1987 in determining that Alaska’s constitution “does not permit the state to deny reasonable compensation to an attorney who is appointed to assist the state in discharging its constitutional burden,” because doing so would be taking “private property for a public purpose without just compensation.” Importantly – and unlike the Kansas Court before them – the Alaska Court determined that appointed cases did not simply merit a reasonable fee and overhead, but rather the fair market rate of an average private case. The assigned counsel compensation rate was subsequently set at \$60 per hour.

- ***West Virginia.*** The West Virginia Supreme Court determined in 1989 that court appointed attorneys in that state were forced to “involuntarily subsidize the State with out-of-pocket cash,”<sup>779</sup> because the then-current rates did not cover attorney overhead. A 25-year-old survey of more than 250 West Virginia lawyers who were taking appointed cases (i.e., not a survey of all private attorneys, but of only those accepting public cases) determined that in 1989 the average hourly overhead was \$35 per hour. “Perhaps the most serious defect of the present system,” the West Virginia Court determined, “is that the low hourly fee may prompt an appointed lawyer to advise a client to plead guilty, although the same lawyer would advise a paying client in a similar case to demand a jury trial.” The Court subsequently raised the hourly rate to cover both a reasonable fee and overhead, setting the rate at \$45 per hour (for out of court work) and \$65 per hour (for in court representation) in 1990.
- ***Mississippi.*** In 1990, the Mississippi Supreme Court determined that indigent defense attorneys are entitled to “reimbursement of actual expenses” in addition to a reasonable sum, and defined “actual expenses” to include “all actual costs to the lawyer for the purpose of keeping his or her door open to handle this case.”<sup>780</sup> This allows defense attorneys in Mississippi to receive a “pro rata share of actual overhead.” The Mississippi State Bar determined that overhead costs 25 years ago in that state were \$34.86, although the court eventually settled on an overhead rate of \$25 per hour.
- ***Oklahoma.*** In the same year as the Mississippi decision, the Oklahoma Supreme Court echoed the 1987 Kansas decision in finding that state government “has an obligation to pay appointed lawyers sums which will fairly compensate the lawyer, not at the top rate which a lawyer might charge, but at a rate which is not confiscatory, after considering overhead and expenses.”<sup>781</sup>

<sup>778</sup> DeLisio v. Alaska Superior Court, 740 P.2d 437, 443 (Alaska 1987).

<sup>779</sup> Jewell v. Maynard, 383 S.E.2d 536, 540 (W. Va. 1989).

<sup>780</sup> Wilson v. State, 574 So.2d 1338, 1340 (Miss. 1990).

<sup>781</sup> State v. Lynch, 796 P.2d 1150, 1161 (Okla. 1990).

Based on the existing salary structure for Oklahoma district attorneys, the Court determined a reasonable appointed counsel fee to be between \$14.63 and \$29.26 (based on experience) and “[a]s a matter of course, when the district attorneys’ ... salaries are raised by the Legislature so, too, would the hourly rate of compensation for defense counsel.” In addition to this reasonable fee, and in order “to place the counsel for the defense on an equal footing with counsel for the prosecution,” the Oklahoma Court also determined that a “provision must be made for compensation of defense counsel’s reasonable overhead and out of pocket expenses.” The Court found that the two lawyers involved in the case at dispute should be paid their actual overhead costs. The overhead costs for the Oklahoma attorneys in 1989 were respectively \$50.88 per hour and \$48.00 per hour. This is in addition to the reasonable fee, making the total compensation rate between \$62.63 and \$80.14.

- **Alabama.** In 1993, the Alabama Court of Criminal Appeals determined that indigent defense attorneys were entitled to overhead expenses (set at \$30 per hour) in addition to a reasonable fee.<sup>782</sup> When the Attorney General in that state issued an opinion against paying the overhead rate and the state comptroller subsequently stopped paying it, the issue went to the Alabama Supreme Court, which determined that assigned counsel are entitled to a reasonable fee in addition to overhead expenses.<sup>783</sup> After this litigation, the Alabama legislature increased the hourly rate to \$70 per hour.

In 2000 and without any litigation, the South Dakota Supreme Court set public counsel compensation hourly rates at \$67 per hour. To ensure that attorneys are perpetually paid both a reasonable fee and overhead, the court also mandated that “court-appointed attorney fees will increase annually in an amount equal to the cost of living increase that state employees receive each year from the legislature.” Assigned counsel compensation in South Dakota now stands at \$90 per hour.<sup>784</sup> For comparison purposes, a \$90 hourly fee in South Dakota in 2014 – the year the South Dakota legislature enacted its \$90 hourly fee for court-appointed counsel – is equivalent to a \$124.12 hourly fee in Oregon in 2018.<sup>785</sup>

<sup>782</sup> *May v. State*, 672 So. 2d 1307, 1308 (Ala. Crim. App. 1993).

<sup>783</sup> *Wright v. Childree*, 972 So. 2d 771, 780-81 (Ala. 2006).

<sup>784</sup> Letter from Greg Sattizahn, State Court Administrator, South Dakota Unified Judicial System, to Thomas Barnett, State Bar of South Dakota (Nov. 15, 2017), *pursuant to* South Dakota Unified Judicial System policy on court-appointed attorney fees.

<sup>785</sup> According to *CPI Inflation Calculator*, U.S. BUREAU OF LABOR STATISTICS, [https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm) (last visited Dec. 12, 2018), what cost \$90 in January 2014 would cost \$96.97 in November 2018. For comparison purposes, the cost of living in Oregon City, Oregon, is 28% higher than in Sioux Falls, South Dakota. See *Cost of Living Calculator*, Payscale, <https://www.payscale.com/cost-of-living-calculator/Oregon-Oregon-City/South-Dakota-Sioux-Falls> (last visited Dec. 12, 2018). Thus, a \$96.97 hourly wage in South Dakota is equivalent to \$124.12 in Oregon.



PDSC/OPDS should be required to establish a private attorney assigned counsel system and to determine compensation rates (provided they can advocate for the necessary resources in the state budget process), as is the predominant norm in the majority of state-funded/state-administered indigent defense states.<sup>786</sup>

<sup>786</sup> Those states that fund 100% of indigent defense services and that administer services at the state level through an independent agency and that set rates through the normal budget process through that state agency tend (but not always) to have reasonable rates that increase with some regularity over time. There are currently 25 states that fund and administer indigent defense services entirely at the state level.

Thirteen of these states (52%) allow the state run agency to determine assigned counsel compensation rates: Arkansas – hourly rates by case type, ranging from \$50 to \$100, ARKANSAS PUBLIC DEFENDER COMMISSION, PAYMENT & EXPENSE REIMBURSEMENT GUIDELINES (Aug. 2012); Connecticut – hourly rates by case type, ranging from \$50 to \$100, and also fixed fees by case type, OFFICE OF DIRECTOR OF ASSIGNED COUNSEL, CONN. DIV’N OF PUB. DEFENDER SERV., GUIDELINES FOR ASSIGNED COUNSEL – CRIMINAL (July 1, 2011); Delaware – hourly rates by case type and geographic location, ranging from \$60 to \$90, with maximum of 125 hours per case, and also fixed fees by case type and geographic location, DELAWARE OFFICE OF CONFLICTS COUNSEL, POLICIES AND PROCEDURES GOVERNING ATTORNEY BILLING AND COMPENSATION (June 27, 2017); Kentucky – fixed fee by case type, Kentucky Department of Public Advocacy; Louisiana – varies by parish/court/judge, Louisiana Public Defender Board; Maine – \$60 hourly rate, with maximum fee per case based on case type, CODE ME. R. 94-649 ch 301 §§ 2, 4 (2016); Maryland – \$90 hourly rate, with maximum fee per case based on case type, MD. REGS. CODE § 14.06.02.06 (2017), and “As the annual budget permits, panel attorneys will be compensated at the same hourly rate at which federal panel attorneys are compensated for indigent criminal defense representation, effective July 1, 2007,” MD. REGS. CODE § 14.06.02.06.A. (2017); Minnesota – varies by judicial district, fixed monthly fee for specified number of cases, Minnesota Board of Public Defense; Missouri – fixed fee by case type, plus fixed daily fee for trial, MISSOURI STATE PUBLIC DEFENDER, MSPD CASE CONTRACTING PANEL ATTORNEY CONTRACT RATES (June 10, 2016); Montana – \$62.50 hourly rate, with maximum 150 hours billing monthly, Montana State Public Defender (per email), *see also* MONTANA STATE PUBLIC DEFENDER, FEE SCHEDULE (Oct. 3, 2016); New Mexico – two-year contracts let in response to Request for Proposal, NEW MEXICO PUBLIC DEFENDER DEPARTMENT, CONTRACT COUNSEL LEGAL SERVICES, Policy 200-007 (2012); North Carolina – hourly rates by case type, ranging from \$55 to \$90, and also fixed fee by case type in 6-county pilot, and also fixed fee contracts for a minimum to maximum number of cases, NORTH CAROLINA OFFICE OF INDIGENT DEFENSE SERVICES, PRIVATE ASSIGNED COUNSEL RATES (Nov. 1, 2017), NORTH CAROLINA OFFICE OF INDIGENT DEFENSE SERVICES, DISTRICT COURT FEE SCHEDULE (June 1, 2017); and North Dakota – \$75 hourly rate, with maximum fee per case based on case type, and also fixed fee monthly contracts, NORTH DAKOTA COMMISSION ON LEGAL COUNSEL FOR INDIGENTS, POLICY ON PAYMENT OF EXTRAORDINARY ATTORNEY FEES (undated).

Three of these states (12%) set rates by court rule or administrative order: Colorado – hourly rates by case type, ranging from \$70 to \$90, with maximum fee per case based on case type, Chief Justice Directive 04-04 at Att. D(1) (Colo. Nov. 2014); Rhode Island – hourly rates by case type, ranging from \$30 to \$100, with maximum fee per case based on case type, Executive Order 2013-07 (R.I. July 15, 2013); and Vermont – \$50 hourly rate, with maximum fee per case based on case type, Admin. Order 4, § 6 (Vt.)

In five of these states (20%), assigned counsel compensation is set by statute: Alabama – \$70 hourly rate, with maximum fee per case based on case type, ALA. CODE §§ 15-12-21(d), 15-12-22(c) (2016); Florida – fixed fee by case type, ranging from \$375 to \$25,000, General Appropriations Act, 2017 Fla. Laws. Ch. 2017-70 § 4 Specific Appropriation 782 (rate of compensation reviewed by legislature as part of the General Appropriations Act); Hawaii – hourly rates by case type, ranging from \$60 to \$90, with maximum fee per case based on case type, HAW. REV. STAT. §§ 571-87(b),(c), 802-5(b) (2017); Massachusetts – hourly rates by case type, ranging from \$53 to \$100, with maximum hours billable yearly, MASS. GEN. LAWS ch. 211D, § 11 (2017); and West Virginia – \$65 hourly rate in court and \$45 out of court, with maximum fee per case based on case type, W. VA. CODE § 29-21-13a (2017).

*b. State government employee*

Conflict of interest rules require that each public defender office can only provide one attorney in a given case. Therefore, the State of Oregon must always have ample numbers of private attorneys in each jurisdiction to represent, for example, co-defendants in the same case. All defendants have an equal right to effective assistance of counsel regardless of whether they are represented by a private attorney or a state public defender employee. Moreover, neither model guarantees constitutionally adequate right to counsel services to the accused in all cases. Simply put, the model does not matter.

Caveats aside, PDSC/OPDS should determine whether effective use of taxpayer resources and other efficiencies call for public defender offices staffed by salaried state employee attorneys to provide right to counsel services in certain jurisdictions. Governmental public defender offices need not be exclusive to a single county or judicial circuit.

For example, the Office of the Colorado State Public Defender administers 22 regional defender offices across the state, each staffed with full-time attorneys and substantive support staff.<sup>787</sup> In cases of conflict, direct services are provided by private attorneys appointed to individual cases and overseen by the Office of the Alternate Defense Counsel, a separate statewide agency from the Colorado State Public Defender.<sup>788</sup>

Montana maintains a single public defense delivery system in which 11 regional directors employed by the Office of the State Public Defender (OSPD) each determine the indigent defense delivery model used in their respective regions in consultation with OSPD.<sup>789</sup> Montana is the fourth largest state geographically but with one of the smallest state populations (it ranks 48th of the 50 states in state population density), so it adopted a flexible indigent defense delivery system in which a region can make

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Finally, in four of these states (16%), assigned counsel compensation is established under multiple authorities: Alaska – \$75 hourly rate with maximum fee of \$1,000 per case, ALASKA R. CT. ADMIN. 12(e) (5)(B), and hourly rates ranging from \$60 to \$85 by experience of attorney with maximum fee per case based on case type and also fixed fees, Office of Public Advocacy; Iowa – hourly rate by case type ranging from \$60 to \$70, IOWA CODE § 815.7 (2017), with maximum fee per case based on case type and maximum hours billable daily, IOWA ADMIN CODE R. 493-12.5(1),-12.6 (2017), and the State Public Defender is required to review the maximum fee per case limits “at least every three years,” IOWA CODE § 13B.4(4)(a) (2017); New Hampshire – fixed fee per case “unit,” New Hampshire Judicial Council, Contract Attorney Unit Schedule (FY 2018), and hourly rate ranging from \$60 to \$100 by case type with maximum fee per case based on case type, N.H. R. SUP. CT. 47; and Virginia – up to \$90 hourly rate, Supreme Court of Virginia, Chart of Allowances (Feb. 1, 2018), with maximum fee per case based on case type, VA. CODE ANN. § 19.2-163 (2016).

<sup>787</sup> See generally COLO. CONST., art. II, § 16; Colo. Rev. Stat. §§ 21-1-101 through 21-1-106 (state public defender) and §§ 21-2-101 through 21-2-107 (alternate defense counsel) (2017).

<sup>788</sup> *Id.*

<sup>789</sup> See generally MONT. CONST., art. II, § 24; MONT. CODE ANN. §§ 47-1-101 through 47-1-216 (2017).

efficient use of both public and private attorneys. Each region now has salaried government attorneys and qualified private attorneys who enter into memoranda of understanding with OSPD to handle conflict and overload cases from the primary system.

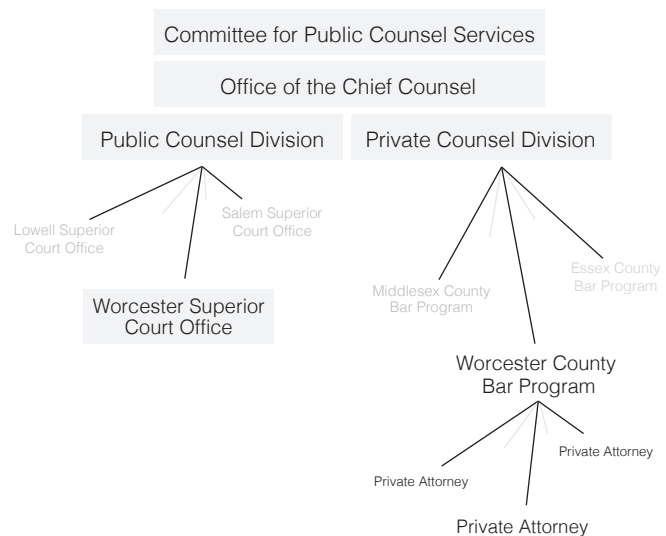
*c. State oversight structure*

No matter the method used in each jurisdiction – private attorneys paid a reasonable hourly fee or state public defender employees paid annual salaries or some combination of the two – PDSC/OPDS has a fiduciary duty to taxpayers to exercise oversight of the system they have established to provide the Sixth Amendment right to counsel.<sup>790</sup>

The Massachusetts Committee for Public Counsel Services (CPCS)<sup>791</sup> offers a best practice model for overseeing a combined private attorney and state government employee right to counsel system. The CPCS board appoints a chief counsel to run the agency from its central office in Boston. Traditionally, since its founding in 1983, CPCS has used the assigned counsel model to provide the bulk of its representational needs, with public defender offices handling only the most serious cases and juvenile delinquency cases in the more urban areas of the state.

More than 2,000 private attorneys handle direct services on behalf of CPCS statewide. Of the 2,000 attorneys participating in the statewide panel, more than 600 are certified to handle cases in Superior Court (cases involving more than 2.5 years in jail). Of those certified for Superior Court work, 150 attorneys are certified even further still to handle murder cases. And as implied, the certification requirements increase with each level of court.

**Chart: Massachusetts Structure**



<sup>790</sup> To the extent there is concern regarding the level of oversight of private attorneys providing representation under contract, the legislature should address those concerns. See “A quick note on the question of employees and independent contractors” at page 75.

<sup>791</sup> See generally MASS. CONST. art. XII; MASS. GEN. LAWS ch. 211D, §§ 1 through 16 (2018).

But, while the minimum standards for certification are promulgated at the state level, the initial screening of attorney applicants is handled locally.<sup>792</sup> Private attorneys accepting public case-assignments are agreeing to abide by CPCS' *Performance Guidelines Governing Representation of Indigents in Criminal Cases*.<sup>793</sup> But, as with most everything else in the Massachusetts assigned counsel program, the direct review of ongoing attorney performance is also handled locally. CPCS contracts with private attorneys to serve as supervisors for other private attorneys handling direct case-assignments. This includes a requirement to allow the local bar advocate to review case files and conduct court observations.

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<sup>792</sup> CPCS maintains annual contracts with non-profit bar advocate programs in each county. Those bar advocate programs in turn select a volunteer board to review attorney applications using CPCS' minimum statewide qualification standards. (The composition of the local volunteer boards is also done according to statewide standards promulgated by CPCS.)

<sup>793</sup> COMMITTEE FOR PUBLIC COUNSEL SERVICES, ASSIGNED COUNSEL MANUAL: POLICIES AND PROCEDURES ¶ 4.B. (Jan. 2018), available at <https://www.publiccounsel.net/wp-content/uploads/Assigned-Counsel-Manual.pdf>.



