

Senate Bill 397

Printed pursuant to Senate Interim Rule 213.28 by order of the President of the Senate in conformance with pre-session filing rules, indicating neither advocacy nor opposition on the part of the President (at the request of Senate Interim Committee on Judiciary and Ballot Measure 110 Implementation for Public Defense Services Commission)

SUMMARY

The following summary is not prepared by the sponsors of the measure and is not a part of the body thereof subject to consideration by the Legislative Assembly. It is an editor's brief statement of the essential features of the measure **as introduced**.

Provides that members of Public Defense Services Commission are entitled to per diem compensation for service on commission.

Removes designation of fees and expenses of appointed counsel in criminal case that require preauthorization as "nonroutine" expenses. Provides that such fees and expenses are those that require preauthorization under policy of commission.

A BILL FOR AN ACT

1
2 Relating to public defense; amending ORS 40.225, 135.055, 151.213 and 151.216.

3 **Be It Enacted by the People of the State of Oregon:**

4 **SECTION 1.** ORS 151.213 is amended to read:

5 151.213. (1) The Public Defense Services Commission is established in the judicial branch of state
6 government. Except for the appointment or removal of commission members, the commission and
7 employees of the commission are not subject to the exercise of administrative authority and super-
8 vision by the Chief Justice of the Supreme Court as the administrative head of the Judicial De-
9 partment.

10 (2) The commission consists of nine members appointed by order of the Chief Justice. In addition
11 to the nine appointed members, the Chief Justice serves as a nonvoting, ex officio member. The Chief
12 Justice shall appoint at least three persons who are not bar members, at least one person who was
13 formerly engaged in the provision of public defense services and at least one person who has been
14 formerly represented by a public defense provider in this state. All members must have a demon-
15 strated record of commitment to public defense. Except for the Chief Justice or a senior judge under
16 ORS 1.300, a member may not serve concurrently as a judge, a prosecuting attorney or an employee
17 of a law enforcement agency. A person who is primarily engaged in providing public defense services
18 may not serve as a member of the commission.

19 (3) The term of a member is four years beginning on the effective date of the order of the Chief
20 Justice appointing the member. A member is eligible for reappointment if qualified for membership
21 at the time of reappointment. A member may be removed from the commission by order of the Chief
22 Justice. If a vacancy occurs for any cause before the expiration of the term of a member, the Chief
23 Justice shall make an appointment to become immediately effective for the unexpired term.

24 (4) A chairperson and a vice chairperson shall be appointed by order of the Chief Justice every
25 two years with such functions as the commission may determine. A member is eligible for reap-
26 pointment as chairperson or vice chairperson.

27 (5) A majority of the voting members constitutes a quorum for the transaction of business.

28 (6) A member of the commission is *[not]* entitled to compensation for services as a member, *[but*

NOTE: Matter in **boldfaced** type in an amended section is new; matter *[italic and bracketed]* is existing law to be omitted. New sections are in **boldfaced** type.

1 *is entitled*] **and** to expenses, as provided in ORS 292.495 [(2)].

2 **SECTION 2.** ORS 40.225 is amended to read:

3 40.225. (1) As used in this section, unless the context requires otherwise:

4 (a) "Client" means:

5 (A) A person, public officer, corporation, association or other organization or entity, either
6 public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer
7 with a view to obtaining professional legal services from the lawyer.

8 (B) A person, public officer, corporation, association or other organization or entity, either
9 public or private, who consults a lawyer referral service with a view to obtaining professional legal
10 services from a lawyer.

11 (b) "Confidential communication" means a communication not intended to be disclosed to third
12 persons other than those to whom disclosure is in furtherance of the rendition of professional legal
13 services to the client or those reasonably necessary for the transmission of the communication.

14 (c) "Lawyer" means a person authorized, or reasonably believed by the client to be authorized,
15 to practice law in any state or nation.

16 (d) "Lawyer referral service" means an entity that, as a regular part of its business, refers po-
17 tential clients to lawyers, including but not limited to a public nonprofit entity sponsored or oper-
18 ated by the Oregon State Bar.

19 (e) "Representative of the client" means:

20 (A) A principal, an officer or a director of the client; or

21 (B) A person who has authority to obtain professional legal services, or to act on legal advice
22 rendered, on behalf of the client, or a person who, for the purpose of effectuating legal represen-
23 tation for the client, makes or receives a confidential communication while acting in the person's
24 scope of employment for the client.

25 (f) "Representative of the lawyer" means one employed to assist the lawyer in the rendition of
26 professional legal services, but does not include a physician making a physical or mental examina-
27 tion under ORCP 44.

28 (2) A client has a privilege to refuse to disclose and to prevent any other person from disclosing
29 confidential communications made for the purpose of facilitating the rendition of professional legal
30 services to the client:

31 (a) Between the client or the client's representative and the client's lawyer or a representative
32 of the lawyer;

33 (b) Between the client's lawyer and the lawyer's representative or the client's lawyer referral
34 service;

35 (c) By the client or the client's lawyer to a lawyer representing another in a matter of common
36 interest;

37 (d) Between representatives of the client or between the client and a representative of the cli-
38 ent;

39 (e) Between lawyers representing the client; or

40 (f) Between the client or a representative of the client and a lawyer referral service.

41 (3) The privilege created by this section may be claimed by the client, a guardian or conservator
42 of the client, the personal representative of a deceased client, or the successor, trustee, or similar
43 representative of a corporation, association, or other organization, whether or not in existence. The
44 person who was the lawyer or lawyer referral service or the lawyer's representative at the time of
45 the communication is presumed to have authority to claim the privilege but only on behalf of the

1 client.

2 (4) There is no privilege under this section:

3 (a) If the services of the lawyer or lawyer referral service were sought or obtained to enable
4 or aid anyone to commit or plan to commit what the client knew or reasonably should have known
5 to be a crime or fraud;

6 (b) As to a communication relevant to an issue between parties who claim through the same
7 deceased client, regardless of whether the claims are by testate or intestate succession or by inter
8 vivos transaction;

9 (c) As to a communication relevant to an issue of breach of duty by the lawyer or lawyer re-
10 ferral service to the client or by the client to the lawyer or lawyer referral service;

11 (d) As to a communication relevant to an issue concerning an attested document to which the
12 lawyer or lawyer referral service is an attesting witness; or

13 (e) As to a communication relevant to a matter of common interest between two or more clients
14 if the communication was made by any of them to a lawyer retained or consulted in common, when
15 offered in an action between any of the clients.

16 (5) Notwithstanding ORS 40.280, a privilege is maintained under this section for a communi-
17 cation made to the office of public defense services established under ORS 151.216 for the purpose
18 of seeking preauthorization for or payment of [*nonroutine*] fees or expenses under ORS 135.055.

19 (6) Notwithstanding subsection (4)(c) of this section and ORS 40.280, a privilege is maintained
20 under this section for a communication that is made to the office of public defense services estab-
21 lished under ORS 151.216 for the purpose of making, or providing information regarding, a complaint
22 against a lawyer providing public defense services.

23 (7) Notwithstanding ORS 40.280, a privilege is maintained under this section for a communi-
24 cation ordered to be disclosed under ORS 192.311 to 192.478.

25 **SECTION 3.** ORS 135.055 is amended to read:

26 135.055. (1) Counsel appointed pursuant to ORS 135.045 or 135.050 shall be paid fair compen-
27 sation for representation in the case:

28 (a) By the county, subject to the approval of the governing body of the county, in a proceeding
29 in a county or justice court.

30 (b) By the public defense services executive director from funds available for the purpose, in a
31 proceeding in a circuit court.

32 (2) Except for counsel appointed pursuant to contracts or counsel employed by the public de-
33 fense services executive director, compensation payable to appointed counsel under subsection (1)
34 of this section:

35 (a) In a proceeding in a county or justice court may not be less than \$30 per hour.

36 (b) In a proceeding in a circuit court is subject to the applicable compensation established under
37 ORS 151.216.

38 (3)(a) A person determined to be eligible for appointed counsel is entitled to necessary and
39 reasonable fees and expenses for investigation, preparation and presentation of the case for trial,
40 negotiation and sentencing. The person or the counsel for the person shall upon written request
41 secure preauthorization to incur fees and expenses that [*are not routine to representation but*] are
42 necessary and reasonable in the investigation, preparation and presentation of the case **and that**
43 **require preauthorization under a policy of the Public Defense Services Commission**, including
44 but not limited to [*nonroutine*] travel, photocopying or other reproduction of [*nonroutine*] documents,
45 necessary costs associated with obtaining the attendance of witnesses for the defense, investigator

1 fees and expenses, expert witness fees and expenses and fees for interpreters and assistive commu-
2 nication devices necessary for the purpose of communication between counsel and a client or wit-
3 ness in the case. Preauthorization to incur a fee or expense does not guarantee that a fee or
4 expense incurred pursuant to the preauthorization will be determined to be necessary or reasonable
5 when the fee or expense is submitted for payment.

6 (b) In a county or justice court, the request must be in the form of a motion to the court. The
7 motion must be accompanied by a supporting affidavit that sets out in detail the purpose of the re-
8 quested expenditure, the name of the service provider or other recipient of the funds, the dollar
9 amount of the requested expenditure that may not be exceeded without additional authorization and
10 the date or dates during which the service will be rendered or events will occur for which the ex-
11 penditure is requested.

12 (c) In a circuit court, the request must be in the form and contain the information that is re-
13 quired by the policies, procedures, standards and guidelines of the Public Defense Services Com-
14 mission. If the public defense services executive director denies a request for preauthorization to
15 incur [*nonroutine*] fees and expenses **subject to a preauthorization requirement**, the person mak-
16 ing the request may appeal the decision to the presiding judge of the circuit court. The presiding
17 judge has final authority to preauthorize incurring [*nonroutine*] fees and expenses under this para-
18 graph.

19 (d) Entitlement under subsection (7) of this section to payment for fees and expenses in circuit
20 court is subject to the policies, procedures, standards and guidelines adopted under ORS 151.216.
21 Entitlement to payment of [*nonroutine*] fees and expenses **subject to a preauthorization require-**
22 **ment** is dependent upon obtaining preauthorization from the court, if the case is in county or justice
23 court, or from the public defense services executive director, if the case is in circuit court, except
24 as otherwise provided in paragraph (c) of this subsection and in the policies, procedures, standards
25 and guidelines adopted under ORS 151.216. Fees and expenses shall be paid:

26 (A) By the county, in respect to a proceeding in a county or justice court.

27 (B) By the public defense services executive director from funds available for the purpose, in
28 respect to a proceeding in a circuit court.

29 (C) By the city, in respect to a proceeding in municipal court.

30 (4) Upon completion of all services by the counsel of a person determined to be eligible for ap-
31 pointed counsel, the counsel shall submit a statement of all necessary and reasonable fees and ex-
32 penses of investigation, preparation and presentation and, if counsel was appointed by the court, a
33 statement of all necessary and reasonable fees and expenses for legal representation, supported by
34 appropriate receipts or vouchers and certified by the counsel to be true and accurate.

35 (5) In a county or justice court, the total fees and expenses payable under this section must be
36 submitted to the court by counsel or other providers and are subject to the review of the court. The
37 court shall certify that such amount is fair reimbursement for fees and expenses for representation
38 in the case as provided in subsection (6) of this section. Upon certification and any verification as
39 provided under subsection (6) of this section, the amount of the fees and expenses approved by the
40 court and not already paid shall be paid by the county.

41 (6) In a county or justice court, the court shall certify to the administrative authority respon-
42 sible for paying fees and expenses under this section that the amount for payment is reasonable and
43 that the amount is properly payable out of public funds.

44 (7) In a circuit court, the total fees and expenses payable under this section must be submitted
45 to and are subject to review by the public defense services executive director. The public defense

1 services executive director shall determine whether the amount is necessary, reasonable and prop-
2 erly payable from public funds for fees and expenses for representation in the case as provided by
3 the policies, procedures, standards and guidelines of the Public Defense Services Commission. The
4 public defense services executive director shall pay the amount of the fees and expenses determined
5 necessary, reasonable and properly payable out of public funds. The court shall provide any infor-
6 mation identified and requested by the public defense services executive director as needed for au-
7 dit, statistical or any other purpose pertinent to ensure the proper disbursement of state funds or
8 pertinent to the provision of appointed counsel compensated at state expense.

9 (8) If the public defense services executive director denies, in whole or in part, fees and ex-
10 penses submitted for review and payment, the person who submitted the payment request may appeal
11 the decision to the presiding judge of the circuit court. The presiding judge or the designee of the
12 presiding judge shall review the public defense services executive director's decision for abuse of
13 discretion. The decision of the presiding judge or the designee of the presiding judge is final.

14 (9) The following may not be disclosed to the district attorney prior to the conclusion of a case:

15 (a) Requests and administrative or court orders for preauthorization to incur [*nonroutine*] fees
16 and expenses **subject to a preauthorization requirement** in the investigation, preparation and
17 presentation of the case; and

18 (b) Billings for such fees and expenses submitted by counsel or other providers.

19 (10) Notwithstanding subsection (9) of this section, the total amount of moneys determined to
20 be necessary and reasonable for [*nonroutine*] fees and expenses **subject to a preauthorization re-**
21 **quirement** may be disclosed to the district attorney at the conclusion of the trial in the circuit
22 court.

23 (11) As used in this section unless the context requires otherwise, "counsel" includes a legal
24 advisor appointed under ORS 135.045.

25 **SECTION 4.** ORS 151.216 is amended to read:

26 151.216. (1) The Public Defense Services Commission shall:

27 (a) Establish and maintain a public defense system that ensures the provision of public defense
28 services consistent with the Oregon Constitution, the United States Constitution and Oregon and
29 national standards of justice.

30 (b) Establish an office of public defense services and appoint a public defense services executive
31 director who serves at the pleasure of the commission.

32 (c) Adopt policies for contracting for public defense providers not employed by the office of
33 public defense services that:

34 (A) Ensure compensation, resources and caseloads are in accordance with national and regional
35 best practices;

36 (B) Promote policies for public defense provider compensation and resources that are compar-
37 able to prosecution compensation and resources;

38 (C) Ensure funding and resources to support required data collection and training requirements;
39 and

40 (D) Recognize the need to consider overhead costs that account for the cost of living and busi-
41 ness cost differences in each county or jurisdiction, including but not limited to rent, professional
42 membership dues, malpractice insurance and other insurance and other reasonable and usual oper-
43 ating costs.

44 (d) Establish operational and contracting systems that allow for oversight, ensure transparency
45 and stakeholder engagement and promote equity, inclusion and culturally specific representation.

1 (e) Review the caseload policies described in paragraph (c)(A) of this subsection annually, and
2 revise the policies as necessary and at least every four years.

3 (f) Adopt a statewide workload plan, based on the caseload policies described in paragraph (c)(A)
4 of this subsection, that takes into account the needs of each county or jurisdiction, practice struc-
5 ture and type of practice overseen by the office of public defense services.

6 (g) Submit the budget of the commission and the office of public defense services to the Legis-
7 lative Assembly after the budget is submitted to the commission by the director and approved by the
8 commission. The Chief Justice of the Supreme Court and the chairperson of the commission shall
9 present the budget to the Legislative Assembly.

10 (h) Review and approve any public defense services contract negotiated by the director before
11 the contract can become effective.

12 (i) Adopt a compensation plan, classification system and personnel plan for the office of public
13 defense services that are commensurate with other state agencies.

14 (j) Adopt policies, procedures, standards and guidelines regarding:

15 (A) The determination of financial eligibility of persons entitled to be represented by appointed
16 counsel at state expense;

17 (B) The appointment of counsel, including the appointment of counsel at state expense regard-
18 less of financial eligibility in juvenile delinquency matters;

19 (C) The fair compensation of counsel appointed to represent a person financially eligible for
20 appointed counsel at state expense;

21 (D) Appointed counsel compensation disputes;

22 (E) Any other costs associated with the representation of a person by appointed counsel in the
23 state courts that are required to be paid by the state under ORS 34.355, 135.055, 138.500, 138.590,
24 161.346, 161.348, 161.365, 419A.211, 419B.201, 419B.208, 419B.518, 419B.908, 419C.206, 419C.209,
25 419C.408, 419C.535, 426.100, 426.135, 426.250, 426.307, 427.265, 427.295, 436.265 or 436.315 or any
26 other provision of law that expressly provides for payment of such compensation, costs or expenses
27 by the commission;

28 (F) Professional qualifications for counsel appointed to represent public defense clients;

29 (G) Performance for legal representation;

30 (H) The contracting of public defense services;

31 (I) Contracting with expert witnesses to allow contracting with out-of-state expert witnesses
32 only if in-state expert witnesses are not available or are more expensive than out-of-state expert
33 witnesses; *[and]*

34 **(J) The types of fees and expenses subject to a preauthorization requirement; and**

35 *[(J)]* **(K)** Any other matters necessary to carry out the duties of the commission.

36 (k) Establish a peer review system for the approval of *[nonroutine]* fees and expenses **subject**
37 **to a preauthorization requirement** incurred in cases involving aggravated murder and the crimes
38 listed in ORS 137.700 and 137.707. The review shall be conducted by a panel of attorneys who
39 practice in the area of criminal defense.

40 (L) Establish a complaint process that allows district attorneys, criminal defense counsel and the
41 public to file complaints concerning the payment from public funds of *[nonroutine]* fees and expenses
42 **subject to a preauthorization requirement** incurred in cases.

43 (m) Reimburse the State Court Administrator from funds deposited in the Public Defense Ser-
44 vices Account established by ORS 151.225 for the costs of personnel and other costs associated with
45 location of eligibility verification and screening personnel pursuant to ORS 151.489 by the State

1 Court Administrator.

2 (2) Policies, procedures, standards and guidelines adopted by the commission supersede any
3 conflicting rules, policies or procedures of the Public Defender Committee, State Court Administra-
4 tor, circuit courts, the Court of Appeals, the Supreme Court and the Psychiatric Security Review
5 Board related to the exercise of the commission's administrative responsibilities under this section
6 and transferred duties, functions and powers as they occur.

7 (3) The commission may accept gifts, grants or contributions from any source, whether public
8 or private. However, the commission may not accept a gift, grant or contribution if acceptance
9 would create a conflict of interest. Moneys accepted under this subsection shall be deposited in the
10 Public Defense Services Account established by ORS 151.225 and expended for the purposes for
11 which given or granted.

12 (4) The commission may not:

13 (a) Make any decision regarding the handling of any individual case;

14 (b) Have access to any case file; or

15 (c) Interfere with the director or any member of the staff of the director in carrying out pro-
16 fessional duties involving the legal representation of public defense clients.

17
