



<u>POLICY NAME:</u>	Temporary Hourly Increase Policy	<b>Number:</b>	<b>404-070-004</b>
<u>DIVISION:</u>	Trial Division		
<u>RESPONSIBLE SECTION:</u>	Criminal and Juvenile	<b>Revised:</b>	September 30, 2023
		<b>Expires:</b>	November 30, 2023

***\*Effective 10/1/2023 – 11/30/2023  
this policy only applies to in-  
custody clients on the OJD  
Unrepresented list***

**PURPOSE:** Establishes criteria to increase the hourly rate for appointed counsel and investigators for persons that **are in-custody** and on the OJD Unrepresented list.

**AUTHORITY:** ORS 151.216(f)(B) and (C), 151.219

**APPLICABILITY:** This policy applies to Counsel and Investigators who agree to accept case(s) for clients who are **in custody**, financially qualified and entitled to representation by appointed Counsel at state expense and for whom the court has been unable to locate counsel.

**DEFINITIONS FOR PURPOSES OF THIS POLICY:**

**Appointed Counsel:** An attorney who is identified by OPDS, who is appointed by a court to represent a client at state expense and who may be contract or private bar counsel.

**Case Support Services (CSS):** Case related fees and expenses for preparation and presentation of the case for trial, negotiation, and sentencing that require preauthorization per ORS 135.055.

**Co-Counsel:** An attorney who is appointed by the court and approved by OPDS to assist in or share the responsibility of representing a client.

**Contract Administrator:** A person responsible for administering a contract with OPDS to provide services to persons qualifying for court appointed counsel.

**Counsel - Contract:** An attorney providing legal representation to persons qualifying for court appointed counsel pursuant to a contract with the PDSC.

**Counsel – Non-Contract:** An attorney who accepts case assignments to represent persons entitled to public defense services at an hourly rate.

**Increased Hourly Rate:** An hourly rate approved by the PDSC which exceeds the standard rate for attorneys appointed to cases from the Oregon Judicial Department (OJD) Unrepresented List and investigators providing services on those cases

**Investigator:** A person who is a qualified investigator, including a mitigator, and who engages in the business of obtaining or furnishing information to be used by Counsel in their legal representation of a client.

**MAC:** Maximum Attorney Caseload

**Routine Expense:** Reasonable fees and expenses associated with the representation of a person who is determined to be financially eligible and who is represented by court-appointed Counsel in the proceeding or on appeal that are required to be paid by the state and do not need preauthorization.

**Service Provider:** A licensed, certified, or otherwise authorized person or entity performing case related non-attorney services for preparation and presentation of the case for trial, negotiation, and sentencing.

**Unrepresented Person:** A person determined to be eligible for representation by court-appointed counsel at state expense and listed on the Oregon Judicial Department's "OPDS Unrepresented" list, hereinafter referred to as the "OJD Unrepresented List."

## **POLICY**

### **Temporary Policy to Increase Hourly Rate (Expires November 30, 2023)**

This temporary policy is adopted in response to a shortage of contracted public defense providers in the state of Oregon. A person who has been found eligible for court-appointed Counsel may be without Counsel because providers in the jurisdiction do not have capacity to take additional cases. Appointments made after November 30, 2023, are not eligible for the increased rate.

The Oregon Judicial Department, in collaboration with circuit courts throughout Oregon, maintains a list that includes only those clients who have active cases in the trial court and for whom the trial court, due to the capacity of local providers, conflicts or multiple Counsel withdrawals, cannot find contract Counsel to represent the person.

When a court requests assistance to locate representation for a qualified *in-custody* unrepresented person, OPDS will evaluate availability of qualified resources, locate counsel, and contact the court to confirm acceptance of the appointment. An attorney may request an adjustment in the hourly rate in certain circumstances (*e.g.*, new charges, increased severity of charged offenses). Any request for adjustment in the hourly rate must be submitted in writing using the form designated by OPDS.

### **OPDS must approve all increased hourly rates and adjustments under this policy.**

By accepting any public defense case assignment or related work, Counsel and other Service Providers agree to comply with all OPDS policies and procedures as may be amended from time to time.

### **Counsel and Investigator Hourly Rate Increase**

OPDS has established increased hourly rates for Counsel who accept case appointments from the OJD Unrepresented List and for Investigators who provide services on those cases. Both Counsel and Investigator must meet eligibility requirements established in this and any other OPDS policies. (See Hourly Rates for Unrepresented Persons)

### **Unrepresented Person**

A person is eligible for assignment of Counsel under this policy when all the following criteria apply:

1. Financially qualified and constitutionally or statutorily entitled to representation by appointed Counsel at state expense

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2. Client is ***in custody*** and listed on the OJD Unrepresented List. Appointments to cases other than ***those where the client is in custody*** and on the OJD Unrepresented List are not eligible for the rate increase unless authorized by OPDS.

### **Eligibility Criteria**

Counsel who meets the criteria below and who accepts a case appointed from the OJD Unrepresented List are eligible for a rate above the Guideline of Scheduled Amounts. OPDS has established Increased Hourly Rates which are ONLY applicable for cases appointed under this policy. Once approved, the rate would apply to all legal representation or investigation services for the duration of the case.

### **Non-Contract Counsel**

Non-Contract Counsel will be considered for assignment under this policy only when all the following criteria apply:

1. Within the previous two years, Counsel has submitted an Attorney Qualification form and has been approved by OPDS to accept appointments for specified case types.
2. Counsel does not currently provide public defense representation pursuant to an OPDS contract.
3. Counsel enters an agreement, as provided by OPDS to provide legal representation to eligible clients.

### **Contract Counsel less than 1.0 MAC**

Counsel contracted for less than 1.0 MAC will be considered for assignment under this policy only when all the following criteria apply:

1. Within the previous two years, Counsel has submitted an Attorney Qualification form and been approved by OPDS to accept appointments for specified case types.
2. Counsel, or a law firm that employs counsel, enters an agreement, as provided by OPDS, for Counsel to provide legal representation to eligible clients.
3. Counsel submits the form designated by OPDS certifying that they can accept appointment to the client and case(s) and continue to provide zealous representation to all of their public defense clients.

### **Contract Counsel at 1.0 MAC**

Counsel contracted for 1.0 MAC will be considered for assignment under this policy only when all the following criteria apply:

1. Within the previous two years, Counsel has submitted an Attorney Qualification form and been approved by OPDS to accept appointments for specified case types.
2. OPDS has confirmed through a review of Counsel's caseload reporting that Counsel has reached their contracted 1.0 MAC.
3. Counsel, or a law firm that employs counsel, enters an agreement, as provided by OPDS, for Counsel to provide legal representation to eligible clients.
4. Counsel submits the form designated by OPDS certifying that they can accept appointment to the client and case(s) and continue to provide zealous representation to all of their public defense clients.

### **Eligibility Criteria for Investigator**

Investigators who accept or who are currently providing services related to cases that were assigned to Counsel from the OJD Unrepresented List are eligible for a rate above the Guideline of Scheduled Amounts **AFTER October 20, 2022**. OPDS has established an Increased Hourly Rate which is ONLY applicable for services on cases assigned under this policy. Once approved, the rate would apply to all investigation services for the duration of the case.

Investigators who are employed by a Contract Administrator who perform services related to cases assigned under contract are not eligible for the Increased Hourly Rate.

## **Case Support Services and Invoice Submission**

Invoices for all fees and expenses payable should be submitted minimally every 90 days and are subject to review. OPDS shall determine whether the amount is necessary, reasonable, and properly payable from public funds. Counsel must submit all necessary and reasonable fees and expenses for legal representation consistent with the OPDS payment policy.

CSS requests for investigation for cases from the OJD Unrepresented List must use the long form.

Investigators who are providing services related to cases assigned from the OJD Unrepresented List must submit a separate invoice for services through October 19, 2022, and for services from October 20, 2022, forward.

## **Legal Representation Fee “Soft Caps”**

OPDS has established initial “soft caps” related to representation service fees for each case appointed from the OJD Unrepresented List and will monitor the amount of compensation paid to Counsel per case assignment.

The soft cap may be waived and an increased soft cap approved by OPDS. The representation soft cap applies only to Counsel service fees paid at the increased hourly rate. Any request for service fees over the initial or any subsequent soft cap must be preauthorized by OPDS prior to services for which total compensation may exceed the established limit.

OPDS will initially evaluate requests to exceed the initial and any subsequently approved soft cap for a case by first evaluating whether the hours spent on the case exceed the average expected time that “The Oregon Report”, prepared by the American Bar Association and Moss Adams and published in 2021, found should be expended on a typical case of that type.

For those cases that are expected to exceed both the initial and/or any subsequently established soft cap OPDS will consider requests from Counsel using criteria including, but not limited to, the following.

Case type

Whether multiple counsels are appointed to the case

Whether the case is likely to go to trial

Whether the case can be classified as an extraordinary case under OPDS standards

Any extraordinary pressure of time or other factors under which services were rendered

Whether more time is reasonably required for total processing than the average case, including pre-trial and post-trial hearings

Requests to exceed the applicable soft cap for a case type and any subsequently established soft cap must be submitted in writing using the form designated by OPDS.

## Hourly Rates for Unrepresented Persons

Effective October 1, 2023, for all appointments to in-custody unrepresented persons/cases.  
Expires November 30, 2023 – will not apply to new cases/appointments after this date.

Hourly Rate	“Soft Cap”	Case Type
\$164	\$10,000 to \$50,000	Misdemeanor, contempt, and probation violation; Class C felony and felony drug possession; Class A and B felony, juvenile delinquency, juvenile probation violations, habeas corpus, post-conviction relief, civil commitment, and Psychiatric Security Review Board cases; waiver co-counsel; discretionary co-counsel; material witness representation; fugitive/extradition; appeals
\$175	\$50,000	Ballot Measure 11 and felony sex offense; Juvenile delinquency cases in which underlying charge is equivalent to BM11 or felony sex offense.
\$200	\$75,000	Murder and Jessica’s Law (including mandatory co-counsel); capital appeals/PCR; cases subject to ORS 137.719 and ORS 137.690.

The investigation and mitigation rate on cases assigned under this program is \$75/hour.