Susan Mandiberg: Good morning and welcome to the March 26th, 2025 meeting of the Oregon Public Defense Commission. My name is Susan Mandiberg. I am vice chair of the commission, and I'm chairing this meeting in the absence of our chair, Jennifer Nash. We have a number of items to cover on the agenda today. One is an action item. At the moment, we don't have a quorum. And if we don't have one by that time in the agenda, we won't be able to cover it. But we will be able to get the briefings and have some discussion on the non-action items. Before we get started, I wanted other commissioners and members of the public to know that we still have two vacant commissioner positions. Both of these vacancies are voting members. That does not change the quorum rules.

We still need five voting members present. Both positions are nominated and appointed by the governor. One is for a person who has been a practitioner specializing in juvenile area, and one is a general position with no special areas of expertise attached to it. So, any member of the public can try to be nominated for that, can apply. So, if anyone is interested in applying to be a member of the commission, please go to the commission home portion of the OPDC website for instructions about how to apply. And with that, we'll turn to public comment. As noted on the meeting agendas and schedules portion of the OPDC website, each comment will be limited to three minutes, which I will monitor.

And in my discretion, I can give more time if that's required, or I can limit the time even more. We only have a small number of people applying, so that probably won't be necessary. As noted on the agenda, comments must be directly related to agenda items. And I can exercise discretion to interrupt and limit comments to such material. I know that the people who are giving public comments today have received the agenda ahead of time and been reminded of that limitation. So, with that, let me make sure I have nothing else I have to say. Yeah, we can start with public comment. And the first person who has signed up is Addie Smith. Ms. Smith, are you with us?

Addie Smith: I'm here. I did not receive the agenda items. If I did, I must have missed it. I received the virtual invite, but I did not receive an agenda item. I'm going to try to go back to the email because I am certain that my comments… I don't see the…

Susan Mandiberg: I believe Ms. Hoaglin sent you a copy of the agenda yesterday. At least that's my information. But if you like, we can put you to the end of the list while you look at your email and listen to the other public comments first. And then have you come on later. Would that be okay?

Addie Smith: Yes, that's fine.

[Crosstalk 00:03:34]

Addie Smith: …come back to me, because I'm looking at her email… Commission meeting agenda. Okay.

Susan Mandiberg: All right, so I'll give you a chance to look at that agenda, and we'll go on with the others and hear what you have to say after. Okay?

Addie Smith: One moment before you do that. Can you just tell me what…or can you tell the whole public what the agenda items are? Because I'm looking at the actual agenda is what I have an attachment of, the agenda, and it says public comment, unrepresented persons in Oregon courts, action item, audit, committee member confirmation, proposed policy contract changes, briefing, briefing, adjourn. So, what…?

Susan Mandiberg: Those are all the agenda items. So, if you have something to say about unrepresented persons…

Addie Smith: Okay, then I do.

Susan Mandiberg: Or the audit committee or proposed policy contract changes, those are the things you can talk about.

Addie Smith: Okay. I'll let you come back to me. That's fine.

Susan Mandiberg: Sounds great. Thank you, Ms. Smith. Next up is Carl Macpherson.

Carl Macpherson: Good morning, Vice Chair Mandiberg, members of the committee, Executive Director Kampfe. My name is Carl Macpherson. I'm the executive director of the Metropolitan Public Defender and a member of Public Defenders of Oregon. I want to give feedback and public comment on the contract policies. I also provided written feedback, as did PDO. We have concerns in that several policies assign less value to the work that public defenders are actually doing on behalf of our clients in each case. This decrease in value increases the workload disparities that already exist between full time providers and the state trial division and hourly providers which are also the most expensive delivery models in Oregon.

For example, estimates based on publicly available information is that the program is roughly three times more expensive per case than nonprofits. In terms of the policies, we agree with the cocounsel policy in when and how cocounsels are assigned. The policy is silent, however, as to whether each cocounsel will receive full credit for the representation, which they should. In a cocounsel situation, both counsel have to read all of the discovery, visit their

client, attend all court appearances, prepare for trial, be present during trial, etc. The only potential time datings is when a cocounsel alternate jail visits, or split motions that need to be prepared and filed, or divide aspects of the trial. That does not overcome the fact that both cocounsel are spending a significant amount of time on the case. And because generally cocounsels are assigned either because of the complicated nature of the case or for supervision or training to be able to get them ready for the next type of case, both cocounsels should receive full credit.

So, we're asking the policy be clear one that. In terms of the policies that deal with partial [Distortion 00:06:36] for early withdrawal, warrant status, and second or subsequent attorneys, we disagree with those policies as currently written. All of them have the same fatal flaw. They do not consider nor take into account the actual time an attorney spends on a case. I would point you to supplemental material, pages 29 through 30, which indicates a time chart. When you consider the current contracts and what they contemplate an attorney would do per case and the number of hours, 300 MAC when you consider 1578 hours is what the commission has adopted means 5.25 hours per misdemeanor. In trial heavy jurisdictions, cases where…jurisdictions where cases are actually going to trial and being prepared for trial, the attorneys are spending more than 5.25 hours on every case.

So, that needs to be accounted for in all these areas. When you give partial credit, you're devaluing the fact that people are spending time on case. And the way partial funding, in our opinion, should be allocated is based on actual time spent. Which can be done through estimates rather than arbitrary timelines as to whether you're on a case a week, or 15 days, or 30 days, or 60 days. It should be based on time. We have concerns about some of the feedback that was given based on those arbitrary timelines, and one is the idea that attorneys don't really work on their cases in the first seven days. That's just patently false. At MPD and Washington County based on information we have from Kevin Barton, MPD downloads discovery within 24 hours on 86% of our cases. And part of the reason that is because we're contractually obligated to visit a client within 48 hours of appointment, and many of our clients are held. So, we have to start not only with discovery review and investigation but also preparing preventative detention and pretrial release.

So, that's just a false statement. I also want to indicate that there are significant discovery issues that we have particularly in Multnomah County. So, having a timeline based on discovery time when discovery is received is complicated. In 2025 alone, we've had at least 31 cases dismissed on defense motion in Multnomah County, and many of those were due to discovery violations. So, I know I'm over time.

Susan Mandiberg: Yep.

Carl Macpherson: Thank you very much for allowing me to go over. I appreciate it.

Susan Mandiberg: Thank you. Mr. Oborn. Is Mr. Oborn here? Clint Oborn? Okay. Is Reid Kajikawa here?

Reid Kajikawa: I am.

Susan Mandiberg: Okay. Please go ahead. I have started the time.

Reid Kajikawa: Thank you, Acting Chair Mandiberg, members of the commission. My name is Reid Kajikawa. I'm a supervising attorney at Public Defender Services of Lane County. I'm here on behalf of Ms. Plumber [Phonetic 00:09:31], who is our executive director, and the attorneys at our public defense nonprofit. And I'd like to comment on the proposed policy contract changes. Most importantly, those policies that allow OPDC to prorate the value of cases that we work on. 20 years ago when I set out on this career, the caseloads were really, really high. And the directors of the public defense firms that I worked for were forced to make a choice, and they could pay everyone a little bit more and require them to take more cases or to use the available contract dollars we had to hire more attorneys and try to reduce the caseload.

Most of the time that resulted in public defenders making less money, and it was spread across different jurisdictions. Most of the contract proposals that we're seeing in this session seem to look backwards for a solution rather than forwards to solutions to what we have been calling the unrepresented crises. I'd like to ask or emphasize to the commission that we believe that it's important that the commission is clear about the language that it's using to describe these policies. And with the exception for the reduced caseload, of the reduced MAC for first year attorneys, these contract proposals are being discussed as ways to increase capacity. These are policy choices that you are making that are specifically designed to increase caseloads by allowing OPDC to internally and arbitrary devalue the work that we do on cases. I'm not going to belabor the excellent points that Mr. Macpherson has made, but these are policy choices that require public defenders to handle more cases to satisfy their contracts. We're not increasing capacity.

We're turning up the dial on the public defender caseloads. We believe that this sends a wrong message to other decision makers, and we believe it sends a wrong message to the public. That message that you're sending is that we can solve this unrepresented crises by increasing caseloads for contracted attorneys who are already taking the lions share of the cases and being compensated the least. OPDC needs to be pushing back on that narrative rather than feeding into

it. We cannot solve this crises by doing what we've always done. I'd like to point out that in Lane County, a number of factors have contributed to us avoiding…serendipitously avoiding the bulk of the unrepresented crises. In 2022 we received emergency funding to hire additional attorneys, which kept us ahead of the increase in case numbers and helped us deal with the back log that came from COVID-19.

Allowing the public defense nonprofit to have these extra attorneys allowed us to get ahead of this problem and stay ahead of the increase in filings that we've been seeing recently. If we are running at maximum capacity 100% of the time, the system breaks. And if we are not running at maximum capacity 100% of the time then we can absorb workload when people move on to other jobs, to go on federally protective leaves, or take different career paths. I understand, and I get that the legislature, the executive, and the public are hyper focused on the number of unrepresented citizens in Oregon, and I've heard that all of the work that you've been doing and that we have been doing doesn't make a dent in that number. And I think that message ignores the fact that thousands of cases are being poured onto that pile every day and that the primary contract providers, be they nonprofit providers or consortium members, we absorb the lions share of those cases, diverting them from that pile.

Susan Mandiberg: Excuse me, Mr. Kajikawa. I think you've met your three minutes. Thank you so much for your time.

Reid Kajikawa: Thank you for the time.

Susan Mandiberg: Okay. Ms. Reding ?

Stacey Reding: Good morning. Vice Chair Mandiberg, members of the commission, my name is Stacey Reding. I am a public defender with over 17 years of experience, the executive director of MDI in downtown Portland, and a member of the Public Defenders of Oregon. First, I would like to commend the agency for proposing the reduced caseload program for attorneys who are new to criminal defense practice in Oregon. We know from both the American Bar Association's Oregon project study from 2022 and the National Center for State Courts study from 2023 that 300 misdemeanors in one year is too many for even experienced attorneys to provide competent representation to their clients. Much less, an attorney new to the practice of criminal law.

Reducing that number is a step in the right direction towards enshrining ethical legal practice in our contracts. Page 17 of the supplemental materials for this morning's meeting contains a helpful table that lines up Oregon's arbitrary maximum attorney capacity per case type against ethical guidelines, as well as Washington state's future caseloads. The proposed contract compliance policy

seeking to financially penalize providers who are under 95% of that arbitrary contractual maximum fails to acknowledge the differences between MAC and an ethical caseload. The gap between the maximum attorney caseload and an ethical caseload is far too wide in misdemeanors and minor felonies. Firms that take a higher proportion of misdemeanors and minor felonies will be unfairly burdened.

The proposal also does not account for attorneys who are off case pickup because of statutorily protected leave like parental leave. In order for us to solve the unrepresented persons crises, we know that we must grow our public defense workforce by both recruiting new defenders to our practice and retaining the excellent defenders who we have. Pushing caseloads beyond the ethical brink may look like a tempting short-term solution, but it will only push lawyers out of this work and worsen the crises in the long-term. Thank you.

Susan Mandiberg: Thank you very much. Clint Oborn I think is here now. We apologize for not giving you the correct link, Mr. Oborn.

Clint Oborn: No, I was having firewall issues as well. So, thank you. I appreciate it.

Susan Mandiberg: Okay. And I am in a second going to… Go ahead and start, and I'll start your three minutes.

Clint Oborn: So, members of the commission, my name is Clint Oborn. I've been involved in public defense for 15 years. I'm currently the executive director of Southern Oregon Public Defender in Jackson and Josephine Counties. I'm also a member of Public Defense of Oregon. I personally [Inaudible 00:16:51] for increased transparency and trust in government. That said, I do praise the agency's reduced caseload policy for first year attorneys. It's a great step in the right direction, just as Ms. Reding has stated. I'd also like to address two other proposed policies. The attorney warrant removal policy and the vacancy policy. The attorney warrant removal policy appears innocuous on its own and might make sense under a workload model that we all hope to adopt. However, when read in conjunction with the partial weighting regarding early withdrawal policy and under the MAC model, it gives nominal consideration for due diligence.

An affected attorney will have reviewed charging instruments, read police reports, viewed body cam footage, and began an investigation of their own early in a case in anticipation of court and prosecution created deadlines for cases. Additionally, ethical client centered representation does not end at the issuance of a warrant. Just yesterday I witnessed an attorney who had spent days early on in a case consulting with his client and then used this last weekend preparing for a trial just to show up for day of trial this week, and the client failed to appear. This proposed policy would penalize providers in this situations

by offering either one credit for two trial preparations or partial credit for the entire trial preparation he's already done. Second, the vacancy policy.

I appreciate the original creation of this policy from October of 2023. However, the current trajectory of this new draft policy fails to account for the knowledge that the agency has gained in the last 18 months. The agency has learned that some places are harder to recruit to, for reasons from geography, to politics, to distance from a law school, to time into the year and should account for this factor in their policies. For example, in southern Oregon, it is apparently so difficult to recruit from outside the system that the agency, despite having specifically hired a recruiter for just such a purpose upon their own vacancy this month, first made efforts to contact attorneys at the public defenders office, exploiting the immense salary gap between state employees and contracted nonprofit defense offices to refill their ranks.

If the agency is not going to provide recruitment assistance or real incentives even when they create the vacancy in the contracting entity then at least please improve this policy. Three potential ideas – one, the agency should define and designate areas of difficult recruitment of need for recruitment and maintain 90-day funding for those locales, as well as position authority for those locations for up to 120 days. i.e. crises counties, rural counties, similar situations. Idea number two, prioritize vacancy allowance for those bringing providers from outside the system. The agency should maintain or responsively reallocate hiring position authority for entities that bring in attorneys from outside the system, not simply allowing the rearrangement of deck chairs to look more full. Idea number three, designate position authority and availability for entities to hire at time of Bar passage. Define and designate a set number of FTE to be available based on projected need in that area or county. And lastly, a separate but concerning issue at the agency is considered in regards to the vacancy policy, they consider…

Susan Mandiberg: You've reached your three minutes. I wonder if you could submit your ideas in writing so that we could look at them.

Clint Oborn: I will do so. Thank you.

Susan Mandiberg: Thank you very much. Ms. Smith, are you ready?

Addie Smith: Yes, I'm ready. Thank you for coming back to me, Vice Chair Mandiberg.

Susan Mandiberg: And I'm going to start your three minutes now.

Addie Smith: I want to say really quickly… And I'm glad that you had the opportunity for the director of the Metropolitan Public Defense Commission come on first to talk

about how attorneys are supposed to go and meet with their clients 48 hours…within 48 hours or something to that effect…

[Crosstalk 00:20:42]

Susan Mandiberg: Excuse me, Ms. Smith. But what agenda item does this apply to?

Addie Smith: That is regarding the first one.

Susan Mandiberg: Unrepresented persons crisis? Okay, thank you.

Addie Smith: Right. So, when they go and meet with these unrepresented people, when the attorneys go and meet with these unrepresented people, he said according to Kevin Barton that Metropolitan Public Defense Commission attorneys go within 48 hours, and that's false. That is not true. And so I want to clear that up. But I also want to talk about one of the things that Director Kampfe said in her statements before the House, I think, for House Bill 5031, regarding the indigent defense. Now, if you plan on interrupting me, that's fine. I have a meeting with Senator Broadman, and I'm going to talk with him coming up here soon. I'm just not going to keep trying to fight for speaking for indigent defense people, especially black people who are being discriminated against by the attorney that are being contracted by OPDC.

I want to say that these attorneys… And I said this to Senator Broadman. When they are representing these indigent defense…these people, these people who have been arrested who can't afford an attorney, often times they are not showing up for court. And when they don't show up for court, the attorneys for the DA's office, for Kevin Barton's office, in Washington County Circuit Court, will go forward before that judge and will get motions passed without that person having an attorney present to represent them. And those attorneys in Washington County all need to be terminated by OPDC. It is time for those attorneys to go. And I want to be able to say those attorneys' names that are not showing up to court who have…

[Crosstalk 00:23:03]

Susan Mandiberg: Ms. Smith, I'm not going to allow you to say attorneys' names.

Addie Smith: Of course. I'll let Senator Broadman know. That's fine. And rest assured, I don't… I'm not going to allow OPDC off the hook or to get away with contracting poor performing attorneys. The accountability must be had somewhere, and it is likely going to be had with Oregon Public Defense Commission.

[Crosstalk 00:23:30]

Susan Mandiberg: Your three minutes are…

[Crosstalk 00:23:34]

Addie Smith: Thank you, Vice Chair Mandiberg.

Susan Mandiberg: Okay, thank you. All right. The next thing on the agenda is an update by Director Kampfe and Madeline Ferrando on the unrepresented persons in Oregon courts. Go ahead.

Jessica Kampfe: Good morning, Acting Chair Mandiberg, members of the commission. My name is Jessica Kampfe, executive director of the Oregon Public Defense Commission. We're going to start by reviewing the most recent information about unrepresented persons. Included in your material is also the Oregon Judicial Department's latest report on this topic. Next slide please, Mara. First, we're sharing with you the statewide trends for unrepresented persons, and so you can see that the unrepresented statewide, the unrepresented in custody has remained largely stable. But because of the focus that we have on identifying representation for people who are in custody and at the most vulnerable, we do continue to see growth in the out of custody population across the state.

More and more, we are starting to look at the unrepresented population in Oregon at the county level because we are really seeing that county specific information charging practices, court practices, public defense staffing practices have a pretty big impact on this population. And so we've also sliced this data differently to show you at the county level. Next slide, Mara. So, looking at all counties out of custody pre-trial population and excluding Multnomah and Washington County, we actually are seeing a drop in the out of custody unrepresented population. If we do the reverse and look just at Multnomah and Washington Counties, that's where we're really seeing that increase in the out of custody pre-trial population. So, Multnomah and Washington Counties are driving that statewide increase in the out of custody unrepresented population where we are getting a better handle on addressing this issue in the other four crises counties. Next slide please.

We're reporting to you all also on the THIP expenditures. The Temporary Hourly Increase Program. We're reporting the monthly expenditures on that. This program is currently set to expire at the end of June and will do so unless there is funding allocated from the legislature to extend it. Currently we have had 318 lawyers provide representation to clients under this program, representing over 8,000 cases for 5,400 clients. The total expenditures to date have been in excess of 55 million dollars. The information reported to you in this graph is invoices

that have been paid. So, this is money that has gone out the door. It does not account for invoices that are in the queue. Next slide please.

Our Betschart assignment coordinators have been using a Nintex form since early this summer in order to track the cases that OPDC is facilitating appointment on. And they have helped facilitate appointment on over 1,800 total cases for over 1,200 clients. This is for assignment coordinators that work at OPDC doing this work. We can see that the majority of cases that they've appointed or helped find appointment are in the top six crises counties, which makes a lot of sense. They are primarily focused on the in custody appointments. We have published a memorandum that explains what the tiered prioritization is for those cases.

And you can see where the cases are being assigned. So, about 200 cases have gone to contracted attorneys. That may be contracted attorneys in the county, or it may be contracted attorneys in a neighboring county. About 800 have gone to hourly providers, and our trial division has accepted appointment on 262. When we break this out over time, we'll see that there is actually a significant increase in the trial division's role. Next slide please. And that is all that we have for our unrepresented presentation today. It is an abbreviated presentation because of our budget hearings last week.

Susan Mandiberg: Thank you, Director Kampfe. Does anyone have any comments or questions? Yeah, Rob. You're muted, Rob. We can't hear you.

Robert Harris: Thank you, Director Kampfe. A couple questions on Multnomah/Washington County unrepresented problem, which it's interesting that that's driving the actual overall increase. Do we know whether or not that increase…? It seems like it's gone up a little bit within the last couple months within those two counties. I can think of several reasons why, and it probably is a combination. Are we under contracted in those counties, and/or have the filings gone up in those counties, and we haven't increased capacity accordingly? And/or do we have vacancies among some of the contract providers which means they are under their MAC contract numbers? Or is it a utilization by attorney? Are the attorneys taking close to MAC? So, it could be any one of those things. It's probably a combination. But do you have a feel for that? My first question really is do we have enough contractors there? Do we have enough contract positions there? There may be some vacancies, but do we have enough contract positions there? Because some of the stuff flows from that.

Jessica Kampfe: Thank you, Commissioner Harris, for the question. I do not know the answer. We do have Maddie Ferrando with us. She may be able to provide some data for your question. If not, I would suggest that we could look into it and get you a more detailed answer.

Robert Harris: Thanks. Because it seems like if we can deal with that problem, the overall state numbers will start to come down, too. Because right now we're heading in the wrong direction, and we have been since the start of this budget cycle at least.

Susan Mandiberg: Mr. Reinhard, you had your hand up.

Brook Reinhard: Yes, I just had a quick question about THIP. It makes sense that you can only track expenditures for what's already been invoices. The THIP cases total, is that completed THIP cases? In other words, does it make the math of total THIP cases divided by the numbers to figure out a per price, or does that THIP case not include the total invoiced on those cases?

Jessica Kampfe: I'm sorry, Commissioner Reinhard. I did not understand that question.

Brook Reinhard: I'll say it again. I think from the data you showed, there were about 8,300 THIP cases. Was that already closed, or is that total THIP cases, some of which are still open?

Jessica Kampfe: Thank you. I understand now. That's total THIP cases that have been invoiced on. So, there may be open THIP cases where people haven't invoiced us yet, and they are not included. And so some of those cases are going to be closed. Some of them are going to be open. But those are THIP cases on which we have actually paid an invoice.

Brook Reinhard: Okay, thank you. That's helpful.

Susan Mandiberg: Ms. Ferrando, did you have anything to add on either of those issues?

Maddie Ferrando: No. Jessi answered that question perfectly.

Susan Mandiberg: Great. Any other questions or comments on this issue? Okay, let's go on. The next thing on the agenda is the action item. We do not have a quorum. And I don't see any reason why we should get a briefing on this without being able to act on it. But Director Kampfe, if you feel differently, please weigh in.

Jessica Kampfe: No, I do not feel differently. We do want to have our audit committee fully staffed, so we'll be bringing this back in April for your consideration.

Susan Mandiberg: And, Mr. Martin, thank you for attending. I'm sorry we can't get to your issue. We appreciate your presence, and I'm sure you have other things you'd rather be doing.

Scott Martin: Thank you. I appreciate it. I'll see you back in May. Thank you.

Susan Mandiberg: All right. The next thing on the agenda… That actually brings us back to the correct time more or less. Is the proposed policy contract changes. Director Kampfe, go ahead.

Jessica Kampfe: Thank you, Chair Mandiberg. My plan is to run through slides on all of the proposed policy changes and then defer to the commission for discussion. Because there's a lot of policies here, I think we won't get through them all if we stop for discussion one at a time. But if that does not work for the commission, please let me know. This is a briefing on the proposed contract policy changes. These are draft policies. We are hoping to be able to revise them and bring them back to the commission in May for adoption if the commission wants to move forward with them. Next slide please. So, here is our estimated timeline. And we are currently at the March 26th commission meeting briefing with an anticipated approval date of May 16th, and there would be opportunity for us to incorporate any revisions that the commission has for us between now and the 16th. Next slide please.

The first policy that we're discussing is partial weighting for early withdraw. Currently the agency does provide some partial weighting for early withdrawal, but it's all within the first month of appointment. And that is in part because of the MAC model gives the weight of the case…assigns the weight of the case in the month in which it's appointed. We are making a proposal, and that proposal would partially weight cases based on how long the case had been open, as well as the case type. And so you can see here what the partial weighting proposal is in terms of by case type and how long the case has been open. Next slide please.

The agency notes that there are data considerations that we wanted to discuss with you all. There will be a need to utilize existing logic for withdrawals and adjust for new timelines and case types. There is limitations with imposing this. Essentially the MAC weight on a case is assigned at the date on which a case is opened. And if somebody withdraws 90 days into the case, we would be removing MAC case weight from three months prior to when the withdraw occurs, which is logic that is different than the way that our MAC model currently works. We are anticipating that this could increase capacity in the contracts by up to three percent, which statewide is the equivalent of 19 MAC positions. The greatest impacts we are anticipating are within the minor felony and Measure 11 caseloads.

The warrant removal policy, as noted by Mr. Oborn, works in conjunction with the partial weighting policy. So, currently our MAC model assigns all of the weight at the time of appointment and only uses that partial weighting 30 days after. And lawyers remain on cases for 180 days following the issuance of a

bench warrant. That 180-day timeline is a legacy policy from our pay per case model that was never changed. The proposed changes in the warrant removal policy would apply that same partial weighting requirement and do it based on the date that the warrant is issued. And it would change the timeline from 180 days down to 90 days. Next slide please.

Looking at the data, we are currently seeing that… This is sort of what we're seeing in terms of warrant cases that exist within our current open caseload reporting. So, you can see the bulk of warrants are on the misdemeanor caseload. Next slide, please. Current cocounsel. The contract doesn't currently provide any guidance on when to assign cocounsel. And under our contract, every lawyer on a case gets equal MAC credit. So, we are giving 100% credit to both primary and cocounsel. The proposed policy change would require cocounsel on murder, Jessica Law, and life sentences, and juvenile waiver cases. And then cocounsel in other instances would have to be approved by OPDC. That approval would be presumptive for some case types, specifically third strike case types and murder II case types. But it would be on a case by case basis for other case types based on the severity of the charges, novel issues, attorney development mentorship, and local counsel. Next slide.

There are some considerations here that are important around training and reporting. So, our current caseload reports do have a column for cocounsel. But that column has not been a mandatory column for contractors to fill out in the current caseload reports, so we would have to make that a mandatory column and do training around that. And we do have concerns about how our verification process would work. Currently we're using emails for notification, which is a pretty clunky way to deal with that. So, we would need to look at some other ways to do that verification work. Next slide.

Oh, I thought we had a data slide on this. Okay. Our second or subsequent attorneys for the proposed contract policy change… So, currently every attorney appointed to a case receives full MAC weight under the model. So, if there is a first lawyer appointed on the case and they withdraw after 30 days, they're going to get the full weight of the case, and then the second lawyer, and the third lawyer, and the fourth lawyer, they all each get full weight on the case. The proposed contract change would say that a subsequent attorney following the withdraw of a prior lawyer within the same firm would receive 50% of the case weight. So, there are some limitations in this that I think are really important. Second or subsequent lawyer wouldn't have an impact on cases where the lawyer is…the first lawyer is still on the case. And so we heard concern from juvenile providers about sibling cases. Because there is no withdraw there, it would not impact those sibling cases. Additionally, the partial weight only applies when the case is reassigned within the same law firm. There are assumptions that the agency is making there, that a law firm has, one,

a case management system, so they're already going to have all of the discovery downloaded within that case management system. That they're going to have the same legal assistant or investigator that they'll be able to work with on the case so that you don't lose as much work that's already been started as you do when you transfer a case from a lawyer practicing from one law firm to another law firm. We also heard concerns that it would make it hard to get subsequent attorney on cases where there's a conflict if we applied the rule to lawyers practicing at different law firms. That conflict cases would be harder to get coverage on. The rule also has prioritization in it, so it tells the entity that the first way that a case should be reassigned is within the same law firm. You're expected to keep your client's cases if you want, the law firm is.

And then within the same contract entity. So, that really applies mostly to consortia. So, if it's a case that's assigned to a consortia…in one provider in the consortia, if that provider can no longer represent the client then it would be reassigned within the consortia to another member of that consortia before moving to, say, state trial division, or hourly, or a nonprofit firm. And then finally the next layer would be within the same judicial district. And that is in part because we weight MAC greater for attorneys out of district who are taking cases in district, so that helps protect with that extra weighting. Next slide.

This will require new logic for us to identify cases within the same law firm. Especially for consortia. So, the way that our contracts caseload reports currently work, an entity tells us all of the lawyers that are practicing within that entity. So, for… When the entity is itself a law firm… So, the nonprofit public defenders offices. We know all of the lawyers practicing within that law firm. Similarly, if we're directly contracting with a private law firm, they have a direct contract with the state. Then we know all of the lawyers practicing within that law firm. However, our current contracts for consortias, we just know all the lawyers practicing within the consortia. We don't know if some of those lawyers are grouped together in the same law firm or not. So, we would need to make changes to be able to know within the consortia model which lawyers are practicing within the same law firm. And we are currently working on data to identify how many attorneys report an appointment on the same case within the same month. So, we are working to refine that data. Next policy please.

Actually, going back one, please, Mara. Maddie? Were you able to pull up information I think mostly on the cocounsel question about how many cases within our system we're seeing cocounsel on? I think it was in the memorandum. It was several hundred.

Maddie Ferrando: Yes. So, since July of 2023, our criminal contractors have reported around 129,000 new appointments. And they have indicated on those appointments that 791 of them had a cocounsel.

Jessica Kampfe: And, Maddie, do you have data on the primary case types on which we're seeing those cocounsels reported?

Maddie Ferrando: Yes, so there was… Actually a large majority of them were on misdemeanor cases. And I think some of the resource council said that could be supervision.

Jessica Kampfe: Thank you. Okay, next slide please. Thanks, Mara. Contract compliance. So, this policy would really tighten up our contract compliance. So, currently OPD notifies a contractor when it reasonably believes there has been a breach and develops a corrective action plan. We reserve the right to withhold a portion of subsequent payments. But withhold means that we then pay that money at a later date when the contractor remedies the issue. And if the caseload variance is more than 15% above or below MAC for six consecutive months, we might adjust the number of FTE in a contract unless an exception applies. The most commonly applied exception is that the contractor cites the rules of professional conduct as the reason why they are above or below. Chair Mandiberg, I see Commissioner Lininger is raising his hand.

Susan Mandiberg: I didn't want to interrupt you. Tom, did you have a question about contract compliance or one of the earlier slides?

Tom Lininger: It was one of the earlier slides. I apologize. I think the yellow hand doesn't contrast starkly enough with my background here, so I took a while. I noticed that the proposed contract provision for cocounsel requires approval from OPDC, and there are certain circumstances in which… There is presumptive approval in certain categories of cases – murder, Jessica's Law, things like that. But I wonder if you could explain a bit about the criteria used to determine the circumstances in which cocounsel would be approved. I think the comment by Mr. Macpherson made me interested in knowing that we have a consistent approach and knowing what that approach is. Thanks very much.

Jessica Kampfe: Thank you, Commissioner. Right now we have no policy on cocounsel, so we don't have any requirements on when it's approved. So, this would be a policy where none currently exists, and it would be required in certain case types that cocounsel be used. We did initially come at this thinking that we would want to expand the case types and have it basically be all case types where somebody is looking at a life sentence, that they would be required to have cocounsel on the case. We heard from a lot of providers that they're not appropriately resources particularly in rural and frontier communities to be able to consistently have cocounsel on all of those case types, and that it might have unintended consequences of not being able to provide representation to people. So, we narrowed the scope of the case types where cocounsel would be mandatory.

And then for that sort of second tier of life sentence cases, the murder II, the third strike sex case, made cocounsel presumptive.

So, if somebody requested it, it would be approved by OPDC without any further layers of inquiry because we assume that it is appropriate to have cocounsel on a case of that nature. And then the criteria for which cocounsel would be reviewed is still relatively vague in the policy. It is basically by how serious the case is, how complex the case is, if there is a need for training and oversight. We do need to flesh that out more and give more specifics, but it should help us identify when people are using cocounsel as a training tool as opposed to using cocounsel because the case complexity requires two lawyers on the case.

Susan Mandiberg: Brook, is your question also on cocounsel?

Brook Reinhard: Cocounsel, yes. I have several questions at the end, but if I can ask the cocounsel ones now, I think it makes sense based on the previous question. Two questions. First of all, is there currently a policy about how cocounsel duties should be presumptively assigned? I don't mean OPDC micromanaging it. But in my experience there are often vast expectation gaps between what a first and second chair cocounsel is supposed to do, and it would be really helpful if there was a model OPDC policy on it so that providers know in general what's expected of them. I'm not suggesting micromanaging, just general guidance. Is there a policy currently?

Jessica Kampfe: Commissioner Reinhard, I'm not 100% sure. I know that our trust [Inaudible 00:50:08] development team has been working on this issue, and I want to say it's in the attorney performance standards that they're working towards developing. It might be in the attorney qualification standards. So, it is certainly under development.

Brook Reinhard: Okay. And t hen the other question is would it be possible to tag training cocounsels differently than complexity cocounsels to use lack of a better term? Because when I hear from the data that the primary type of cocounsel is misdemeanors, I think that's probably because of the SPPE requirements of the Oregon State Bar for people taking the alternative pathways. They can't actually be primary on a case until they get their formal Bar licensure, so they need someone else who's qualified. But that data is going to look really messy. Because when I think cocounsel, the first thing I think of is a complex case. But I don't want members of the public or the legislature to think that OPDC is overspending on misdemeanors when in reality on misdemeanors what we're doing is we're building up qualifications so that this future attorney workforce can be well trained. On the other hand, if it's a murder I, or murder II, or J Law,

that cocounsel is there because the case is complex enough I need that cocounsel. So, is there a way to tag those separately?

Jessica Kampfe: So, currently no. So, our current caseload reporting… Any attorney who lists a case in their caseload reporting gets the case weight for that case. We have a cocounsel column in our caseload reports, which is a yes, no, check the box column. But it is not a required field. I think it's a field that a lot of providers use for internal tracking of their cases more than a field that the agency uses. So, we are, as it is with our current caseload reports, going to have to do training with caseload reporters in order to make that a mandatory field and get people the information they need to be consistently filling it out. The way that it currently exists does not have further specification in it. So, it doesn't say what type of cocounsel this is.

And I think you're asking really good questions around implementation. So, if we are adopting a process whereby OPDC has to approve cocounsel under certain requirements, and so we're sending them back something saying, "This is approved because of a need to qualify somebody," or, "This is approved for a complex case," what would be the mechanism by which we would track that information. I think we would need to work with our IT department and our data team to figure out how we could create a mechanism. Because in lieu of adopting a more formal mechanism, the default tends to be email, which is not great for collecting data.

Susan Mandiberg: Does anybody else have anything to ask or say about cocounsel? Since we have interrupted. This is a good time to get that out of the way. I have something, but Rob Harris first.

Robert Harris: Thanks. I was going to wait, but maybe we can finish this particular subject. A couple of questions. Because we are not going to have a list of mandatory cocounsel cases, and these are going to be on the higher level cases, is that going to actually increase the number of cocounsel MAC that we are utilizing? Because if a lot of these cocounsels were misdemeanors and now a lot are going to be J Laws and murder cases, those are going to be higher level MAC. So, have you done that calculation? Number one. And I don't expect an answer right now, but I'd ask you to do that calculation. And the next answer is also sort of a MAC calculation. But right now I believe the agency could still issue multiple credits for complex cases without necessarily doing cocounsel. If that is still the case, are you going to not…no longer going to be issuing multiple complex case credits and instead just assigning cocounsel? How do those two interact with each other is what I'm asking. And have you done the calculation on that?

Jessica Kampfe: I'll defer on your first question and offer to get back to you. I don't know if we've done the calculation on what number of complex cases currently have

cocounsel assigned to them and whether or not we would expect to see an increase as a result of the policy. But with regard to your second question, we don't currently have a policy change in front of the commission on modifying the complex case policy. If the commission would like the agency to take up that as a potential policy change, we certainly could.

Susan Mandiberg: So, my only comment… And then we'll keep going. Is that I think it's going to be very important if this policy gets adopted to be sure that the approval of cocounsel, especially on the discretionary cases, is done efficiently and expediently. I don't want to see us getting into another situation similar to the Haymit [Phonetic 00:55:42] situation where people are waiting even 30 days to get cocounsel approved on cases where cocounsel is necessary in order to adequately represent the client. So, I hope that you're paying attention to systems that'll be able to do this efficiently if it's adopted.

Jessica Kampfe: Thank you. If it's all right with the commission, I'm going to pivot back to contract compliance. So, the new contract compliance policy would clarify the expectation based on caseload. It creates a process for notifying contractors of a breach and specifies elements that would go into a performance plan. It also gives the agency more flexibility in corrective action. So, currently the corrective action that we have available to us is that we could withhold a portion of a payment until a change is made. This would actually allow us to reduce the funds from one to five percent incrementally as a potential corrective action.

The reason the agency looked at that one to five percent is because the administrative fee on our contracts is one to five percent, so that was an area we could do enforcement without reducing MAC or FTE in contracts. If the performance issue is… If it is…they're out of…the variance on the MAC utilization is great enough, we could think about reducing FTE within a contract in order to bring the MAC utilization closer to 100%. That would really be appropriate in communities where we may be over contracted for the case filings. So, if we're seeing a consistent trend of case filings being down, reducing the FTE, and the reverse.

If we're seeing a trend of being under contracted in a community, increasing the FTE and contracts. For performance issues, reducing an attorney's qualifications. So, if we're hearing that somebody has been appointed on a measure 11 client, they're not doing the type of things that one would expect, and the performance plan has not resulted in an ability to get them to meet expectations, reducing their qualifications from major felony qualified down to whatever the appropriate qualification would be. Requiring that contractors use additional mentoring or oversight. And then finally, termination of the contract. Next slide please.

This proposal is around reduced caseload for first year attorneys. Currently under our MAC model, it's built on a 300 misdemeanor caseload standard that applies to all lawyers regardless of how long they've been practicing law. The proposed change for first year attorneys on criminal contracts would allow the entity to notify the agency that somebody qualified for the reduced caseload program, and then the agency would lower their maximum attorney caseload to 200 misdemeanors while they continued to meet requirements of that program. Once they no longer meet the requirements of that program, they would go to the standard MAC model. Next slide please.

So, implementing this would require new logic for us to be able to identify and track these lawyers, as well as the start and end date for their eligibility in this program. It would create sort of a subset of lawyers, and we would need to be able to tell who fits within that subset and who no longer fits within that subset. What we're seeing with… We don't necessarily know who is a first year lawyer because we don't ask that question. So, we had to use some proxies to be able to estimate with our current population who would fit within the program. So, what we looked at was lawyers who have a 2024 Bar number and an attorney qualification level as a level one misdemeanor qualified lawyer as a proxy to say that this is a lawyer within their first year of practice. So, looking at the lawyers that fit currently, we have about 20, and 8 of them had a utilization rate under our current contracts at or below 60%. 11 have a utilization rate over 100%.

And 1 has as utilization rate below 50%. With regard to the 11, the trend that we're seeing is that many brand new layers I think are coming into an open caseload. And so we're seeing people above the 100% utilization rate within their first two months in a contract. And what we suspect is happening is that somebody has left a law firm, and a new lawyer has come in and inherited 40 open cases on their first day. And so we're seeing that spike in utilization, but it does tend to drop off over time because they're not picking up at the same rate as other lawyers are within the law firm. So, when we crafted the policy, we did control for that by removing the over 100%, and then that showed that the average was I think 75% utilization.

Next slide please. Vacancy funding. Our currently model fully compensates providers for the first 60 days that an attorney position is vacant. And then allows some providers to have extended vacancies that can be partially funded at 72,000 a year prorated monthly for up to an additional 60 days to fill the vacancy. The proposed policy would immediately decrease compensation, so the provider would need to tell us when the lawyer is leaving. And then the compensation would be coming into effect the day after the lawyer left the law firm. It would decrease the compensation down to 50% for the first 60 days. And the provider would still have authority to fill the position. And then for the next 30 days, there would be no compensation, but there would be position

authority to hire as long as they are actively recruiting for the position. That would give the agency some flexibility to move these vacant positions to people that are actively recruiting if a person has a vacancy that they are no longer actively recruiting for.

The policy…it's not written in here, but it also clarifies that we would immediately remove funding for non-attorney funded vacancies, so that is investigators and social workers. And once that funding is removed, the entity would be able to use the PAE process if they need to say hire an investigator during the time period in which they don't have one and there's not a funded position in their office. Next slide.

Additional thoughts. This isn't part of the policies that we have had vetted for meetings, but it is something we wanted to put in front of the commission for initial thoughts and if the commission would like us to, we can work on developing policy around. So, currently under our contracts we have a 15% variance. So, lawyers who are 15% below MAC, we don't really start talking to them about what's going on in their communities until they are more than 15% below MAC for an extended period of time. Similarly, we don't compensate lawyers for being above MAC if they are within 15% above MAC. And we are not talking to them about what's going on in your community that's causing you to be above MAC. So, we could say…we could eliminate the 15% variance from our criminal and juvenile contracts.

I would note that would not impact our PCRP contracts. The PCRP contracts have since their inception had a 15% variance in them because they're an open caseload model, which MAC is not an open caseload model. And in fact, the 15% variance that is in the MAC model came from the PCRP model. So, we would not change it in the PCRP model where it has been longstanding practice. But for the criminal and juvenile contracts, we could eliminate the 15% variance. At which point the contracts would assume 100% utilization, and contractors who are either above or below the 100% utilization would fall within the context of the contract compliance policy. Corrective actions for people who are above 100% utilization could enable the agency to contract for more than 100% MAC. This is…

What we are currently seeing happening is that we have contractors who use 100% of their MAC and then take additional cases hourly. And so they fill out a form that says, "I can ethically represent more clients." And they take additional cases under the hourly program. And we have heard from some providers that they don't want to deal with the agency hourly, but they would take more cases if they could have additional contract funding to take cases. And so this would allow contractors who wanted to take more than 100% of their MAC utilization to do it under the contract program instead of having to switch to the hourly

program to do it. So, I think there's a lot to think about here, but we wanted to flag this for the commission as food for thought and something that we could work up to bring to you in more detail in the May commission meeting. I think that is the end of my slides, and I see several commissioners with hands up.

Susan Mandiberg: Let me say before we get to comments or questions, we have a little less than ten minutes before we do have to stop this discussion for a briefing by Presiding Judge Guptill from Washington County. So, we'll need to be efficient with this. So, Commissioner Buckley, go ahead.

Peter Buckley: Thank you. Yes. I'm still kind of struggling… What's the timeline to get to a workload model? We're doing a lot of work around MAC still, and I know we've got to squeeze every penny out of MAC while we have it. But what's our timeline to get to the workload model?

Jessica Kampfe: Thank you, Commissioner Buckley. The commission adopted a workload model when it adopted the six-year plan to get us to a workload model. We know at that time that it would require significant investments in order to switch to a workload model. And our budget has been…the governor's authorized budget or recommended budget is based on a MAC model. So it will not be this biennium that we get to a workload model. The legislative budget starts at a current service level budget, which is built on a MAC model. And then the governor's recommended budget is also built on the MAC model. So, we're moving to a workload model this biennium.

Peter Buckley: Thanks. And just real quick, the data about Washington/Multnomah is really startling to me. Could we get the per capita information? How many public defenders per capita there are in Multnomah and Washington County? Because it seems to me we spend a lot of time on MAC, which we need to to make sure it's all working, but we also need to work with Multnomah and Washington to figure out what's going on, why is the crises so large in those two counties.

Jessica Kampfe: I will ask our data team to look into that.

Peter Buckley: Thank you.

Susan Mandiberg: Before I call on anybody else, Judge Guptill, I see that you're here. We have a couple more questions left over from our last discussion. Do you mind waiting? I see you're nodding your head.

Rebecca Guptill: I don't mind waiting at all. I just was a little bit early and thought I'd sit in for a few minutes before.

Susan Mandiberg: Okay. Thank you very much. Commissioner Reinhard?

Brook Reinhard: Thank you. So, a couple more questions unrelated to cocounsel since we already talked about that. Director Kampfe, you talked about the withdraw policy changing from 180 days to 90 days. I agree, the 180 is a relic of previous contracts and is kind of a weird term in there in the first place. Attorneys even under this new policy could still withdraw right away if they were reasonably confident their client is not coming back, right? It's just at 90 days it's a hard stop regardless?

Jessica Kampfe: That's correct.

Brook Reinhard: Okay. I'm glad to hear that. And like Commissioner Buckley emphasized, I think the open caseload models, it's far more relevant for how long cases stay in the wind with warrants. I think it doesn't matter very much for other case types unless I'm missing something. It doesn't affect MAC at all, whether there are cases out on warrant, does it?

Jessica Kampfe: Only if the commission adopts the partial weighting for early withdraw and a warrant is defined as a part of…a type of early withdraw. Then it would have some MAC impact. But they only… There is only a MAC impact if those policies are adopted in conjunction with each other.

Brook Reinhard: I see. Okay. Two more questions. First, the 50% credit for second attorney if they're in the same firm. I understand what the commission is trying to do. Since I ran a public defenders office, I could tell you that usually when it's a second attorney it's because there's a relationship breakdown problem with the client. And what I'm mostly worried about is the real problem clients like… It was not infrequent to reassign attorneys when a client would sexually harass a lawyer, for example. Those clients are far harder. And if you give a 50% credit, the firms are just going to do the logical thing and withdraw entirely from the case. And I think that's going to exacerbate the problem here. I'm a little worried about the unintended effects of this policy, but I understand what you're trying to do. I agree, it's easier once a firm has a case.

It's not the same sort of external workload of bringing in discovery. But I worry about who the actual demographic is of clients who need representation by another attorney in the office unrelated to a conflict, which obviously wouldn't be the same firm anyway. And then finally, the 100% utilization rate… I really worry about not having that 15% cushion both for folks who go above because we know THIP is more expensive than law firms doing it if they can take more than 100%. And it's real hard on a month to month basis to even this out when you're talking J Laws and other things that cause things to bounce up and down. And the second part, as Mr. Kajikawa pointed out in his comments, 100% I understand why it needs to be there, but law firms having a cushion if they're at

85% so they can absorb a lot more the next month if they need to…I think it makes more sense to have that variance, and I've appreciated the flexibility. I understand OPDC is under political constraints on this, but I would oppose moving to that. Not that I have a vote but as a comment. Thank you. That's all I have.

Susan Mandiberg: Let me say I think… Director Kampfe, you suggested that we would be looking at these proposals again in a work session and have time for more discussion?

Jessica Kampfe: We have an upcoming work session in April, and we can make this the focus of…

[Crosstalk 01:13:09]

Susan Mandiberg: Because I have some questions, too, and I see that Commissioner Harris has some questions, but we're almost out of time. What I'd like to propose is after people think about these and look at the written material, if people have questions, or comments, or suggestions…if you could write those out and submit them to Mara, and Mara will make them available to Director Kampfe, and she and her staff can work on those and come up with answers. And we can have all those ready for discussion at the work session. I would like to suggest that that would be a more efficient way of proceeding. And if Commissioner Harris is willing to do that, I'm happy to give him two more minutes for whatever he wants to say today.

Robert Harris: Thank you, Chair Mandiberg. I agree with that. Actually I was going to mention that a lot of these things were more comments on my part, but I wanted to give sort of a meta comment, which is that some of these policies increase maximum capacity, and some decrease maximum capacity. The one being the first year training. And what I would like to suggest that I will be looking for, as a [Inaudible 01:14:33] comment is that we not decrease overall maximum capacity with these changes. To do so would be a tin ear given the circumstances that we're facing with this crises.

And so for instance, if you can scrape a little bit of extra maximum capacity in some of these policy…reasonable changes, you could apply them to the first year reduction. But I would like to see any analysis at the end of the day from the agency being what's the overall impact on these changes to maximum capacity. Not that we can reach maximum capacity because we have turnover, and we have training. I get that. But theoretical maximum capacity at least. Thanks.

Susan Mandiberg: Definitely a challenge. Thank you, Director Kampfe, for a thorough presentation. And…

Jessica Kampfe: Thank you.

Susan Mandiberg: …we're all looking forward to hearing from Judge Guptill, and you've got the chair. There you go. Okay.

Rebecca Guptill: Well, thank you for having me again present to you. I hope I have some useful information. At least information that can be utilized in some fashion by the commission going forward. I just want to give you a little bit of an update about kind of what's going on in Washington County so that you have an idea of the lay of the land currently. Right now there are a couple different things that I think are having an impact that it's hard to quantify exactly what that impact is overall on our situation here. But I believe when I spoke with you all before, I might have talked about our jail capacity being down. Washington County Sheriff's Office has been understaffed for a while. Since the pandemic actually. They never were able to fully reopen all of the pods in our jail. And I say that because obviously we are the start of the Betschart case.

We are the original county that kind of came to know in terms of having the unrepresented crises with in-custody defendants. But we've never been at full jail capacity. And that has kind of hidden, I think, part of the problem in our county in terms of the unrepresented crises for in-custody defendants. So, while we still have in-custody defendants that we are frantically trying to find counsel for, it would be a much higher number of in-custody defendants but for the fact that we have forced releases of a…to a large degree. So, right now we have a significant number of forced releases still, but one additional pod in our jail has reopened based on increased staffing through the sheriff's office. And that has increased the number of forced releases happening. What that has been done is just to give actual statistics…

The failure to appear rate in Washington County… If somebody is on monitored pre-trial release they appear. If they're on just a security release, the traditional, "You must pay X percentage of security," it's 7.41%. No release agreement at all… So, pre-trial they've been cited to appear. It's a 9.25% failure to appear rate. Conditional release, 14.17. Recognizance release, 15.17. When you get to forced releases…if it's a forced conditional release, the failure to appear rate is 34.2%. And if it's just a straight forced release, it's a failure to appear rate of 34.37%. So, what we have found is that we at approximately a 50% failure to appear rate at the law enforcement center for essentially initial arraignments on cases. And I say that because we have a significant number of forced releases.

And this is just the failure to appear rate on the initial arraignments. But what it's led to is we have a higher failure to appear rate on all of our cases at different stages, and that creates a lot of churn within our system. And so I am very interested in the open caseloads on failures to appear and what that

impact is. And just because I understand there's the contractual agreement for how long you keep a case open because people might reappear, but it is a large percentage of cases that are actually in that failure to appear warrant status. And so I just want to draw attention to that issue. If we were to get all the way up to a full jail capacity, we would have a significant Betschart crises in terms of trying to find counsel for in-custody defendants.

We have benefited from this lack of jail capacity on one level, and we are then actually suffering because of it on a different level when it comes to the warrants that are being issued and the cases that are essentially out there in warrant status with counsel on them potentially in that process. So, that's one piece that I want to kind of draw attention to that I think is a little bit unique to Washington County. I know that I've heard in the news that Multnomah County keeps saying, "Oh, we're reaching jail capacity. We might have to release defendants." It's been happening since 2020 here. I also wanted to mention that sometimes I find that I have to get very involved in very specific cases in terms of prioritization. I'm going to give an example just because I think it's informative. Last week I had a gentleman come in, and he was just…

He was out of custody, three B misdemeanors. Nothing serious in terms of the level of his charges. He had a dog that was at the heart of his charges, and so there was a dog forfeiture hearing that happens within a certain…very quick timeline. Of course he's unrepresented. He has appeared for court. He's definitely in a situation where he has some mental health issues very prominently displayed. And of course no attorney. And it is a matter of some urgency, but it's not something that at the initial stages of a case would be at all understood based on the charges themselves from the law enforcement center standpoint, verifier's standpoint, the standpoint of anyone who's looking to assign counsel. So, that's the type of case that I often times will find myself having to say, "Okay, you might not know that this case needs attention quickly, but it does need attention quickly."

And luckily I have a standing meeting with our representatives at OPDC to try to kind of highlight cases that really need attention in that way. But it takes up time, obviously, from a judicial standpoint to say, "Okay, I need to kind of look at these cases and say this one, for whatever reason, needs more attention and needs to get an attorney more quickly," than what I will tell you as of last Wednesday was 717 defendants in Washington County who are without counsel. And I don't know… I always feel mixed feelings about saying, "Okay, this case needs to get more attention," when there is all these other people out there, and I just don't know all of their circumstances. But when the cases do come to kind of a head in front of me and I see that there is a need for it…

Or another judge reaches out and says, "[Inaudible 01:21:54] this case. Here's the specific set of circumstances. I think we need to prioritize this." We do get involved when we try to draw attention to those. But it takes up time that none of us should be necessarily having to deal with that. And same with sometimes when we have a case where it's an attorney who's qualified… And I heard Director Kampfe talking earlier about kind of people taking cases out of their contract or above their MAC. We do have people who are able to take those cases at say a B felony level when they don't contract for that, but there does seem to be… I think when I testified I think I called it red tape. I do think that there is a difficulty there in terms of how you plug this attorney into this case, that they should be able to take and they want to take.

And maybe it's outside of their MAC or their contract. But how do we manage to allow for that within the system? And so that's something that concerns me. There's also been some red tape with the Bar. So, we have one or two firms here in our county who are working to get SPPE programs started, which I think will be very beneficial on the low level cases to adding capacity in terms of our community. Because I don't think we've added much, if any, capacity in terms of the number of attorneys in our community during the past year. But the SPPE program is something where I think we can bring people in truly from elsewhere to hopefully add that capacity. And yet there are huge delays in terms of the Bar actually getting the temporary Bar numbers…that moving. And so that's just something I would want to highlight.

Maybe if there could be some ability to communicate with the Bar about trying to speed up that process at least provisionally. If there is a problem and you have to say, "Okay, now we see that there is a problem. We're going to rescind it." But on maybe a probationary level trying to speed up that process of approving SPPE candidates to get started. That would be, I think, huge for Washington County. I look at the number of attorneys. And, again, I haven't seen a huge increase. I know with the state trial court division, I really had high hopes that we would suddenly have this influx of attorneys. But I saw by the numbers and by just seeing people who I already recognize that a lot of that was poaching from other contractors in the state and in the community.

And so I just have not seen the influx of new attorneys that I had hoped for over the past year. I think one problem that I have heard from community members, it is from consortia where…and private firms where they want to hire people, but people are hesitant to take jobs if they don't know if the job is still going to be there. So, those are a few things that I just wanted to kind of bring up to everyone. I really want to answer questions or to talk more about whatever you're interested in hearing more about from a Washington kind of perspective.

Susan Mandiberg: Thank you so much, Judge Guptill. Extremely interesting statistics.

[Crosstalk 01:25:08]

Susan Mandiberg: Does anyone have questions or comments they'd like to ask the judge? Commissioner Buckley?

Peter Buckley: Thank you. Your Honor, I don't know if you were able to read the editorials in "The Oregonian" this past week. One was from DAs, and the other one was from public defenders. If you did read those, if you had any thoughts on it. One area in particular that I'm interested in is giving judges the opportunity to make the decision on diversion rather than having district attorneys do it. What is your thoughts on that? Do you think that would help you in your role as a judge in Washington County?

Rebecca Guptill: I think it could. It may not. I think giving judges some additional control is not necessarily a bad thing in terms of the ability to resolve cases. I think the area that I would find more useful would actually be talking about settlement conferences and the authority to handle your own settlement conferences and to clarify that aspect of things. Because the statute involving settlement conferences talks about the judge who hears a settlement conference cannot then be the sentencing judge. And currently in our county, there has been back and forth about that specific issue. Diversions most of the time are not… We have a lot of diversionary programs.

We have a lot of early case resolution programs. We're doing a lot to try to resolve the low hanging fruit. But to me, if you could give judges more authority in the settlement arena, that would be beneficial to us. And this is off topic, but I realize I should mention last year our criminal case filings were up 17.9% overall. Our population was up as well, but it's up year after year, and our total case filings were up over 17% in all areas. So, it's not just criminal filings. It's entirely. So, anything we can get that helps us to resolve the cases is really crucial to us at this point. And I would just highlight this settlement conference statute really would be where I would try to amend things if you wanted to give judges the ability to resolve cases.

Peter Buckley: Thank you. That's very helpful.

Susan Mandiberg: Commissioner Reinhard?

Brook Reinhard: Good morning, Judge Guptill.

Rebecca Guptill: Good morning.

Brook Reinhard: I have a nerdy lawyer question for you.

Rebecca Guptill: Okay.

Brook Reinhard: I'm not sure which statute you're talking about. Because I know a settlement judge can't be a trial judge, but I was unaware of a statute that says a settlement judge can't do sentencing because that's one of the best things about getting a settlement judge…

[Crosstalk 01:27:40]

Brook Reinhard: Is it an ORAP, or is it a statute?

Rebecca Guptill: It's a statute, and I'm going to try to pull it up for you right now.

Brook Reinhard: I don't mean to put you on the spot if you…

Rebecca Guptill: No, you're totally fine.

Brook Reinhard: I was just surprised to hear that.

Rebecca Guptill: Yeah. And obviously different counties may interpret things differently. In ORS 147512… I think that's the one that we're talking about. Oh, no, that's different. Specifically critical stages.

Brook Reinhard: I don't mind following up with you via email.

Rebecca Guptill: Yeah, yeah, yeah.

[Crosstalk 01:28:20]

Rebecca Guptill: So, it is an ongoing conversation specifically with our DA's office. And if you read the statute, their interpretation is not necessarily incorrect, and it is a bit unclear. But it is being used currently to kind of push back on the plea to the sheet if you are the assigned judge. So, we switched to individual docketing September 1st, and we have a separate settlement conference rotation. But it's being used to kind of push back on whether or not the assigned judge can resolve things. I think I can pull it up for you. Let me just… It might take a moment.

Brook Reinhard: Sure. So, while you're doing that, is that an example of…?

Rebecca Guptill: Yeah.

Brook Reinhard: …where a DA decision on policies is negatively impacting the ability of resolutions to take place?

Rebecca Guptill: Perhaps, yeah. But we're pushing back on some of it. We're adapting to kind of their interpretation to figure out how to have our settlement conferences be the most affective. It's nothing new. The reality is that Washington County is different than Multnomah County in a lot of ways, and part of it is that we've always had I'm going to say a stronger district attorney's office in terms of their approach. And as someone who lives here, I see the pros and the cons in that approach. And I did defense work before, so I understand what those implications are. So, yeah. So, part of it is obviously that we… So, we are talking about 135432. Yeah. So, there is a part… So, the trial judge may not participate. There's that piece.

Then when you get to B…subsection B, any other judge as requested by both prosecution and the defense or at the direction of the presiding judge may participate in plea discussions. Participation by a judge in the plea discussions process shall be advisory and shall in no way bind the parties. If you read through it, their interpretation is fairly strict about what it means. And so in those judicial settlement conferences, they're really requiring people to plea to the sheet if they're going to resolve unless they agree to something different. And then they're also pushing back on having the assigned judges be a part of those plea discussions. So, there's kind of a multifold situation that's happening there. We are actually having a lot of success with our settlement conference docket, so I don't want to suggest that we're not properly utilizing that or having success there. But there is a fairly strict interpretation of 135432 that's occurring currently.

Brook Reinhard: Got you.

Susan Mandiberg: Judge Guptill, thank you very much for your participation.

Rebecca Guptill: Yeah, absolutely.

Susan Mandiberg: We appreciate your time.

Rebecca Guptill: Yeah, thank you so much. It's my pleasure. I'm happy to answer questions after the fact, too, if anyone has any and to provide any additional information that would be useful.

Susan Mandiberg: We may take you up on that. Thank you.

Rebecca Guptill: Thank you. Have a great day.

Susan Mandiberg: Okay. We've come to the briefing on public records training. I saw that Todd Albert was here. I see his… There he is. Sorry that we're running a little late, but we're looking forward to your training.

Todd Albert: No worries. Thank you so much for having me. I'm ready to get going if you all are, too. Wonderful. Well, I will jump into the slides, introduce myself along the way. We have limited time to talk about a very large, and broad, and complex but often ambiguous topic, as those of you that have dealt with it know. So, let's just go ahead and get started. Okay. Hopefully at this point you are all seeing my slides. Excellent. Well, good morning, everyone. My name is Todd Albert. I am the public records advocate for the State of Oregon. Before we get into exactly who I am and what that means, I just wanted to say a few things. The first is that I welcome your questions throughout the presentation.

Again, we don't have a lot of time. I'm really going to try to hit the high notes. But certainly if you're thinking about it, it's an issue that we should address, and one of your colleagues is probably thinking about it, too. So, either please just raise your hand digitally… Hopefully I'll be able to see that. If I seem to be ignoring a hand, it's not intentional. Someone just let me know or just go ahead and unmute and ask me your question. I understand there have also been questions related to public meetings and public meetings law. And despite the obvious and frequent intersection between the two, I'm really only authorized to speak about the public records law. I do deal with the public meetings law for our own counsel, which makes me just knowledgeable enough to be dangerous. But unfortunately, I really don't have any useful answers for you in that realm, nor am I permitted to give them.

I would direct you to the Oregon Government Ethics Commission, which in recent years has been empowered to deal with all things public meetings, not just executive sessions. They also have a great deal of resources available on their website, including I believe past guidance and decisions related to the public meetings law. So, if you ever find yourself with a question and don't remember where to go, certainly reach out, and I'll be happy to direct you to them. Okay. So, having said that, what can you expect to hear from me in the next hour or so. And I just wanted to let you know, I realize that this is a scheduled meeting with a set end time. I am happy to hang out once my presentation is over in case anyone had any additional questions. Otherwise, please feel free to reach out online if you would like…or offline rather if you would like to follow up about anything else.

So, today we're going to talk about how my office can assist you in your work as commission members, as well as understanding and improving the public records request process. I don't expect that many of you would deal with public records requests directly, so we're going to keep this at the 30,000-foot level in

terms of explaining what the public records law is about and requires of public bodies. And then we'll drill down to particular issues that I understand might be of importance to you as commission members. So, what is this Office of the Public Records Advocate? Why are we here? Who are we, and what can we do? Well, the office came about in 2018 in response to what I believe was a 20-year conversation about the need for this type of office in Oregon.

And honestly it was really the end of the Kitzhaber administration, and some controversy around public records in that office that helped sort of provide the fuel to make this office a reality to be a place, a one-stop shop where anyone can get assistance dealing with public records issues. So, by statute, our tiny but might office of two people, myself and the deputy public records advocate, have to be attorneys by law. We are able to give legal advice. Although unlike, say, DOJ where I used to work, we do not form confidential attorney-client relationships, which is really useful because a lot of the work we do is mediating disputes. Now, let me tell you a little bit about my background so you know where I'm coming from. I've been an attorney for over 20 years at this point. And I actually spent the first 11 years as a public defender at the Legal Aid Society in New York.

So, when I say I really respect the work that you do and have some sense of the difficulties involved, please know that I truly mean that. I think in my heart I will always be a public defender to some degree. And this job sometimes incorporates the best elements of that, including meeting people where they are and really offering advice and guidance to help the system function better and to find ways to improve the system overall. Since then I've been in-house counsel to the Oregon Judicial Department, as well as a trial lawyer at the Department of Justice. So, I understand the layers that you're working with when you're trying to do your work and also work with your staff on public records issues. So, sort of the meat of the work that we do is facilitate a dispute resolution.

And the reason it's important that we're attorneys but don't form confidential relationships with those who contact us is because we are here to mediate disputed public records requests. And we get those requests for assistance, as we call them, either from public bodies such as yourselves who are saying, "Hey, we have a request," or, "They don't seem to be willing to work with us. We want to fulfill this public records request. Can you help us talk to that requestor or help us understand the fees we should be charging? Or work with us to figure out which exemptions do or do not apply to the information that's being requested?"

And we'll often get contacted by both sides of that dispute. And I'll say to the requestor, "Hey, I just spoke to OPDC, and I recommended X, Y, and Z. And I'm

going to tell you the very same thing. Let's work together to that everyone can either understand the law or have disclosed as many records as possible." The next big part of what we do, of course, are trainings such as these. We will do them online or go anywhere in the state and provide trainings on the requirements and best practices under the public records law. We always try to tailor those trainings to the audience that's receiving them. But of course a lot of the information is the same.

In fact, if anyone here has been in any of my prior trainings, not only will you hear a lot of the same information, unfortunately you might hear some of the same jokes as well because there's only so many jokes you can make about public records, right? So, please bear with me. We also provide training to interested members of the public. I truly believe that a knowledgeable requestor makes for a better process overall. And so, again, we offer those for free. I've trained as many as 200 people online and as few as 7 people in a room. We meet you where you are to provide the trainings that you need. You're going to hear me talk about the requirement to have a publicly posted public records policy. While a lot of public bodies don't or they're not up to date, I will say OPDC has a very robust public records policy.

I think it's great, and you are all doing well. But we'll talk a little bit about what goes into that. We help public bodies either update their policies or draft them from scratch. Because, again, many of them just don't have them. And I should say this work that we do is at the state and local level. So, if you're a public body in Oregon, we will assist you with public records issues, whether you are a state or local government. Finally, I am a voting member, employee, and executive director of the Public Records Advisory Council, which is a deep bench of bipartisan public records experts who vet and propose reforms to the public records law. Our members include nonvoting ex-officio members of the legislature and representatives of state and local government, as well as the media, the public, and the public sector workforce. So, if you'd ever like to learn about attending one of our meetings or even offering testimony, you are always welcome, and I'd be happy to connect you with the appropriate links to do so.

So, before we dive into the actual nitty gritty of the public records laws, is there any questions at this point about the work of our office or how we can be of assistance to you? All right. Well, hearing none, let's get going. You might hear me rifling through papers from time to time. I just always make sure I check my notes so I'm not missing anything. Okay. So, you're going to hear me say more than once that the Oregon Public Records Law is one of disclosure, not confidentiality. As those of us who are in service to a public body, i.e. a government, it is our duty to always lean towards disclosing as many records as possible, except for, of course, the 600+ times the law says we may not or shall not. What am I really talking about when I say the Public Records Law is one of

disclosure and not confidentiality? Well, let's start with an example. So, there's a website called muckrock.com. It's a national clearing house of information about government transparency at the state and local level.

It actually has a state by state guide on public records practices for each state, and it also allows people to submit public records requests through the website, utilizing an anonymized email address. So, let's say you receive a public records request from some email address that in no way identifies the requestor. If you're able to understand what they are seeking, they do not challenge you on records that you're withholding as confidential, and they pay the fees that you are asking for without seeking a fee waiver or reduction, they are permitted to take those records and go, and you never get to know who they are or what they intend to do with those records. So, when I say the Public Records Law is one of disclosure and not confidentiality, that's what I mean. At its core, these are the records of the government doing the people's business, and they are entitled to see them, of course except when they are not.

Well, what is a public body? Now, I understand that some of you as commission members are not public employees or state employees of any type. You might be members of the public. You're volunteers. Nevertheless, under the definition of a public body in Oregon that's subject to the Public Records Law, essentially if you are an employee or part of the leadership of any government within the confines of the State of Oregon then you, too, are subject to the Public Records Law. And in fact the definition of a public body under ORS 192, which is the Public Records Law, says that a public body includes every state officer, agency, department, division, bureau, board, and commission. So, that cites all of you squarely within the definition of a public body subject to the Public Records Law. And like any law, how is that truly like embodied? How is that brought to life? Well, public bodies act through their leaders and their employees. And therefore, the obligations of the Public Records Law are our obligations as those, again, who are in service to a public body.

So, what is a public record? You know, when this law was drafted in the early 1970s, actually in response to Watergate, it was pretty straightforward. All of our records essentially existed in paper format. And so when someone came seeking a record, it was pretty easy to identify whether or not it existed. Did you have this in your file cabinet, and does it meet the definition of a public record? Which is essentially it demonstrates you conducted the business of governing. That is what constitutes a public record. And it's prepared, owned, or used by your public body. So, there's a few things that go into that. First of all, given how much of our work has migrated onto digital platforms these days, a public record could really and truly be in any form. Electronic or paper. And that does include emails, photographs, social media posts, and even things like metadata and databases, which honestly I'm still trying to wrap my head around. I work

with really savvy requestors who want to sweep whole databases from public bodies so they can do their own analysis of the information.

And to a great extent, of course subject to any confidentiality provisions, that information is a public record subject to disclosure. Of course you get into these discussions with requestors and public bodies, and then you start dealing with stuff like real exorbitant fees and long timelines for producing this data because it's just so much. But nevertheless, at its core, this type of information can still be subject to disclosure. Interestingly enough, more than one public body could also be the custodian of a record, and therefore has to respond to a public records response.

I can only imagine in your work that you receive records from other public bodies that created those records and are the custodians of them. Well, under the Public Records Law, if you, too, are using these records for what is known as your own programmatic purposes, in other words conducting your own business of governing, then you, too, are a public body, and you're subject to disclosing those records, too. It's perfectly valid for a requestor to submit a public records request to both or either public body looking for those records. And because of things like differences in fees and conditional exemptions that say you may disclose in the public interest, not that you can't ever, a request might actually get a different response from one public body over another for the very same record.

So, at this point, hopefully I haven't confused you too much. I have a little…just a few hypotheticals here I thought we'd run through just to see your thoughts on what constitutes a public record or not. But before I do, are there any questions about what I've said so far? All right. Well, let's see how you're all doing then. Okay. In your opinion, which of the following are public records? And don't worry about whether or not they're potentially exempt. The first question is always is this record being sought a public record. Because of course it's not, that's the end of the request. So, what about the work related emails of a deputy sheriff? Does anyone think that is not a public record?

So, you guys don't even need me. You're right on top of this. Like I said, a public record could be in any form and most certainly includes work related emails. What about photographs of a workplace accident taken by an OSHA inspector? I'll just jump right in. Same premise. Public records can be in any form, and that can include photographs, of course. What about personal photographs stored on the hard drive of a water district employee's work computer? I'd like to hear some thoughts on this one. Yay, nay, maybe? What do you guys think? I see Brook says no. Robert says yes. Well, you know, in my opinion, I think it's arguable to say that they are not a public record unless they meet the definition of demonstrating the government conducting its business.

Certainly if an employee is being investigated for any sort of impropriety at work and these photographs are relevant then it very well may be a public record subject to disclosure. However, if the employee is just using their work computer for their own personal business and happen to put, say, their vacation photos on there until they get a chance to put them somewhere else, they're probably violating a workplace policy about using work devices for personal means, but I would argue that you would not have to disclose them as a public record. But this is a good time to say that facts and context always matter.

Every public records request is unique. Every public records request has multiple steps. At each point of the way you have to say to yourself, "Okay, what am I supposed to be doing here now? What are the considerations I have to undertake to decide what my next step is?" So, facts matter, and situations matter. And even a straightforward example could easily end up going either way based on the additional details that are available. Okay, text messages regarding a proposed new policy exchanged between fire department officials on their work cell phones? Yes. That is a public record, and text messages are an incredibly difficult area when it comes to public records requests because generally they live on the servers of our phone providers.

They are not within the custody and control of the public body itself. And as you all probably know, we have retention schedules that say how long we're supposed to keep records based on their content. Well, most cell phone providers delete text messages within a year. So, it's always advisable to not be conducting your government's business via text message. Or if for any reason you find yourself doing so, capture that information somewhere where it's within your control or your public body's control. Forward it to your email, take a screenshot. There's even software available now. I believe the City of Portland has started using it. That will automatically capture text messages and save them to the city servers so that the information remains available for as long as it should be. Transient messages like, "Hey, where are we going for lunch today? What time are you going to be in the office?"

Those don't count as public records. You don't have to worry about that. But if you're conducting your government's business even over text message, it's subject to disclosure. Now, what about an email discussion between two elected special district officials, both using their personal email accounts, discussing a potential city budget decision? Do we think that's a public record subject to disclosure? The answer is yes, it is. And this is another difficult area because when it comes to personal devices and personal accounts, if you receive a public records request and say to your staff and your leadership, "Please review your own devices and accounts and tell us if you have any responsive documents," it's up to that person who's reviewing their own items

to make a good faith search of their records and turn over anything that they believe to be responsive.

The public body that you lead or are an employee of cannot take your device or enter your account and look for the records. If your decision is appealed to the attorney general, they, too, cannot order any sort of inspection of your device or your account. But if this matter goes all the way to court, a judge can order an in camera inspection of your account or your device. At which point you'll have someone other than yourself rifling through your personal items, looking for responsive records. So, to the extent you ever find yourself using a personal device or account, just like with text messages, do everything you can to avoid discussing business over it. Or if you do, forward that information to somewhere where it can be captured by your work account or your work server, so that way you don't ever have to find yourself being called on the carpet and explaining or handing over your device and later having to explain how you missed some records that are subject to disclosure.

And finally, customer utility usage data. Well, yes. Again, even things like whole databases are subject to disclosure, and we are seeing more and more requests for this type of information, just FYI. Okay. So, a request for a public record can be in any form as long as it's in writing, but a requestor can be asked to submit the request as per your policy. And requests have to identify the records sought. So, what are we talking about here? Well, we do not have to be mind readers. If you receive a public records request and you truly do not understand what is being asked of you, you have the ability to reach out to the requestor and ask them to clarify.

And this is actually incredibly helpful to those who are processing public records requests because if you don't get appropriate clarification within 60 days, you are able to close that public records request and move on. You don't have to keep trying to get the requestor to explain it to you. But what do I mean when I say you can ask a person to submit their request as per your policy? Well, under the public records law, as I mentioned earlier, every public body is supposed to have a publicly posted public records policy. That's a lot of Ps, but it's all true. And what that policy is meant to include is both the manner in which your fees are calculated and what you're charging, as well as the custodians who will receive your record. So, let's say you don't have a policy or you don't have it publicly posted. And what does that really mean nowadays? Put it on your website.

If a requestor cannot access your policy and say, "Oh, they'll only accept it via this online form and this physical email address," well, then any other way that you receive a public records request, if a requestor writes it on a piece of paper, balls it up, and throws it through your front door, the second you catch that

piece of paper and look at it, if you understand what's on it, you are now subject to all the rules and requirements under the public records law, including deadlines.

But if you have a publicly posted policy that says the ways in which you receive records, the channels you accept them through, who your records custodians are…well, when that piece of paper comes flying through the door, you can say to the requestor, "Sorry, our publicly posted policy, which you can go see on our website, says you can only submit it through X, Y, and Z. So, please resubmit your request that way." Or you can take that piece of paper and move it into one of your established channels and start processing the request. But things like the deadlines that now exist in the law will not start running against you until you do so.

Now, I see that OPDC permits two ways of submitting a public records request – via your online form or physical address. I think it's great that you offer more than one way, because a lot of requestors come to us at differing levels of authority and knowledge about the law, and technology, and trust in government. I work with a lot of older members of the community, for instance, who prefer to talk on the phone than over email. I work with adults in custody who have to just mail me handwritten requests for assistance. And so to the extent you can meet requestors where they are with multiple channels of receiving a public records request then I think you're exercising appropriate constituent service. At the same time, we are all sort of limited in our resources and taxed for time, so I never recommend a public body instituting more channels than they're capable of affectively monitoring when setting up a public records request. All right.

Well, your policy is in place. You have affectively learned how to communicate with requestors to clarify what they are seeking. You now start working on a public records request. When are you supposed to get them done? The staff that you help administer, what kind of deadlines are they working under? What are their pressures to get this public records request done? Well, up until 2017, the only requirements under the public records law was that you complete a request as soon as practicable and without unreasonable delay. And as I'm sure you've all seen, public bodies vary so differently like across state government and between state government and local governments that that rule really had no sort of standard meaning because people would respond differently based on available staff, technology, other work being done.

So, after a raft of changes had occurred in 2017 including the creation of my office, deadlines were imposed in the law. Like uniform deadlines were imposed on the law for the first time ever. And what do they mean? Well, you still have to complete a public records request as soon as practicable and without

unreasonable delay. That's now your floor. But the ceiling is that you have to acknowledge receipt of that request within five business days and complete it within 15 business days. Remember, it's as soon as practicable, etc., up to this amount of time. So, what does that mean?

You get a request on Friday afternoon. You're capable of acknowledging that request. You should acknowledge it that afternoon. You don't get to wait five business days because that's not reasonable under those circumstances. But you receive a request, you acknowledge it right away, and then the staff available to complete the request or for any other reason that comes up you're able to do so, well, then you could potentially in good faith take up to 15 business days to complete the request simply because you are unable to do so sooner. That would be deemed reasonable. You also can offer an estimate of a reasonable time of completion if for any reason you cannot complete that request, even within 15 business days. You're not bound to that estimate. If for any reason things change, you are able to update the requestor with a new good faith estimate. But communication is really key here. A lot of the work that we do is we're often not the final decider of whether or not we did that correctly. There is a lot of different ways that we can all be called onto the carpet after the fact to explain what happened.

And when it comes to public records requests, individuals can contact our office for assistance. They can appeal to the attorney general, saying that they were unfairly denied their record even just by the delay in time it took. They can go to the media. They can go to their elected officials. So, if you want to be able to demonstrate that you are compliant with a public records request, documenting when the request is received, documenting the work that is occurring during the time it takes to complete the request, and communicating with the requestor is the most affective way to demonstrate that you are complying with the law in good faith. And maybe, maybe even engendering some trust with the requestor so that when you say, "I'm sorry. I know we said we expected it by the end of the week. We're actually going to need another week because of X, Y, and Z," the requestor will be willing to understand, and work with you, and wait for this information to become available.

But nevertheless, if you hear from a staff member, "Hey, commissioner, we got a public records request. Please review your emails or any devices for responsive records," just know that they are working under these deadlines, and sometimes they can't move to the next step until you've provided them with the answer they need. So, just keep that in mind if you ever hear from anyone looking for information.

Okay. So, you have your policy. You are choosing to charge fees. How do you decide what fees to charge? Well, there isn't a lot of guidance in the law on this

either other than that you may charge up to the actual cost of providing records and that those rates have to be reasonable. Now, what does reasonable mean? Well, you know what, that depends. And that could depend for the very same record. Let's say, for instance, you have a record that two public bodies possess or very similar records that two public bodies possess. It's a report about something, and it'll take a staff member approximately an hour to retrieve it, review it, and provide it to the requestor. Well, how much do you charge for that?

Well, first of all, there is case law that says you have to charge the lowest rate of compensation possible for each element of a public records request. So, for instance, you have a request for a report that's sitting in a database, and your executive director goes through the database, finds the record, attaches it to an email. If there was another staff member saying, "Admin one was capable of doing that very same work," your executive director should not be charging for that 10 minutes or 15 minutes that it took them to find that record and provide it. They should be charging at the admin one's rate because they're the lowest compensated person capable of providing that record.

But then even what admin one rate do you charge? Do you charge just the hourly rate of that person who could have provided the record? Or do you charge the hourly rate of that person plus their holistic or wrap around cost? Things like their health insurance and other benefits. Well, both have been found to be perfectly reasonable, and there is absolutely no other guidance in the law as to which one you should be charging to recoup or attempt to recoup your actual cost of providing that record. So, even within this very small area of the law that seems to have pretty clear cut guidance, there's room for flexibility and ambiguity. And the only advice I can really offer at this point is to say be internally consistent.

Don't charge one requestor just the hourly rate of the person who provided the record and another one the full cost of that person's compensation. Be consistent. Be clear. And document, document, document. And as you might know, you can charge for things like attorney time to review and redact records, but you cannot charge for the time it takes the attorney to educate themselves about which portions of the law apply, interestingly enough, despite all the ambiguities in the public records law. That's one thing they made sure to be very clear about. And now that you are a state agency within the executive branch, I will say that the Department of Administrative Services has a very robust public records policy with all kinds of information including multiple contacts within the agency.

Of course it's quite large, so sometimes you have to know which division to reach out to. They have their fee schedule posted, and they even have an FAQ

section where frequent questions about public records requests can be answered. They have a flow chart for determining when a request might be in the public interest. And they even have links to their proactive disclosure websites. It's a fun term in the public records world, and it really just means if you anticipate something being of interest, put it up on your website ahead of time. If you can provide someone a link that answers all or some of their questions instead of going through the whole process of looking for responsive records, charging them fees, etc., you can save everyone time and money. And, again, build trust between your agency and the requestor.

Let's take a moment here and see if we have any other questions. Hopefully you're still all with me. No war stories? No experiences of your own you want to share? I always find those really interesting. All right. Let's keep going on. Well, there are times… So, let me just stop for a second and say this. The public records law says that a public body may recoup its actual cost of providing records. I like to say the law really means you may recoup up to your actual costs for two reasons. One, I don't think any single public body at the state or local level has ever figured how to recoup their entire costs for providing records. And there's also some argument to be made that as a government service, should requestors really be paying full freight for this work that's being done?

But that leads me to my second point, which is a public body does not have to charge ever for public records, or they can always choose to discount, or they can find other ways to limit the costs of requests. But if you are charging, you may attempt to recoup up to your actual costs as long as you're being reasonable. But there are times that the Public Records Law says that you must consider waiving or reducing fees in the public interest. So, when does that come up? Well, first off, if you're not deciding for yourself that something is in the public interest and therefore worthy of being disclosed for no cost or low cost, a requestor has to make that ask of you. "Hey, I'm making this public records request. I think it's in the public interest. Therefore, please waive or reduce fees." Or you give them your fee estimate. "Hey, you made a public records request. This is how much we think it's going to cost. Please pay this before we proceed."

They could say back to you, "Well, actually, I think there's a public interest here. Please waive or reduce." It's appropriate for a requestor to do that really at any point in the request. So, you get this request. You have to consider it under the public records law. But the agency has reasonable discretion to deny it. So, what does that mean? Well, what it means for one thing is that this is another great time to communicate with a requestor. You're asking for this request to be…the fees to be waived or reduced. We need to know why. Remember I said earlier the law is one of disclosure, not confidentiality? So, if a requestor sort of

satisfies all these conditions, they get to take those records and go. You never get to find out what they're going to do with them. Well, this is a time where you could start asking questions.

Because even though the public records law itself only says that waiver or reduction should be available when making the records available primarily benefits the public generally, the way the case law has shaped out is that it essentially envisions legacy media coming and asking for fee waivers or reduction. Because several elements have been established that you have to answer for yourself to decide if there's a public interest. And those include things like, "Who are you, requestor? What is your purpose in asking for these records? What is the community affected by this information?" And then here's sort of where the legacy media comes into play. "What is your ability or platform to disseminate this information to those affected?" So, in other words, I often hear from a lot of requestors who say, "Well, I'm indigent. Therefore, providing these records to me at no or low cost is in the public interest."

I don't necessarily disagree with that, but the law itself is very specific. Public interest means this other thing that has now been sort of developed through these elements. And an individual request, say for their own knowledge about a government action or even because they want to sue, has never been held to be in the public interest. There is this greater focus on the community affected by this information and your ability to get these records out to them. So, someone from "The Oregonian" contacts you. Someone from public radio contacts you. It's pretty easy to say, "Okay. I understand the issue you're asking about. It is a concern to the public generally. And you have demonstrated a platform to release that…to get that information to those requestors. So, we're finding that there is a public interest here."

Well, what about someone who publishes articles on medium.com? That is a really popular format for people to consider themselves members of the media to put out articles on. And some public bodies say, "Oh, no, some website, that doesn't count. We'll never consider that a public interest." Other public bodies say, "Oh, sure. That makes perfect sense. We know Medium." And others kind of go down the middle and start saying things like, "Well, how many people read your last three articles? How many people subscribers do you have?" And really go deep into the weeds. And I'm not saying that approach is right or wrong. I think it just demonstrates the difficulty in trying to decide whether or not a particular request is in the public interest.

But what the law says is, is step one is figuring that out. Is there a public interest including this person's ability to get that information out to the public affected by it? But after that, you have to enter into this balancing test. Yes, there's a public interest, but how can we afford to waive or reduce fees? Well, then you

start looking at things like the number of staff available to fulfill this request. How many hours is it going to take? What is its impact on our resources? Because step two of the public interest balancing test is really just that. You're trying to weigh two different public interests. The one you've identified to the community and the one that is about the appropriate use of your own resources.

So, that is why public bodies always retain discretion to reasonably grant or deny a public records request but only after you do all of that weighing and considering. It's weird. Because this is actually a time that the law allows us to treat two different people, two different requestors differently. You could say to one requestor, "You have not met this requirement, and you do not get these records for little or no cost." And you could say to another requestor, "Well, as a matter of fact, you have met this requirement. We weighed its impact on us, and you are entitled to no or low cost for these records." And just finally, a lot of public bodies have a policy of waiving the first say 30 or 60 minutes of their work to forestall having to do this calculus.

In other words, "We're not going to charge you for the first 30 minutes of work. So, how about let's encourage you to come up with a concise, narrow request to fit within that time." And then no one has to worry about this public interest argument. Well, you figured out fees. You've dealt with the public interest fee waiver request you've gotten from the requestor. You have your records in hand. How do you decide what to disclose or not to disclose? Well, like I said, the Public Records Law is one of disclosure, not confidentiality except the 600 or so times that it says you cannot or you may not disclose records. Cannot include things like personal email addresses. So, even for your work as commissioners, if someone requested an email communication amongst several of you, and some of you are using your personal email addresses, if the content of that email is subject to disclosure, it would be disclosed, but your personal email address that you used to have that conversation always under all conditions has to be redacted. Then there's other information that is only conditionally exempt.

So, look, first of all, the majority of the exemptions that you'd be working with or that staff members would be working with can be found within the Public Records Law, ORS chapter 192, specifically subsections 345, 355. Now, within 345, every single exemption in there is a balancing test between confidentiality interest and the public interest in disclosure. Now, just a moment ago I was talking about public interest in waiving or disclosing fees, as one requestor demonstrated their ability to inform a community and another one hasn't.

Here, it says has one requestor demonstrated the ability to overcome a particular confidentiality concern and get records, and maybe another requestor hasn't? So, presumption is always in favor of disclosure, but you have

to do this balancing test. And what is a public interest in disclosure? It's very similar to a public interest in waiving or reducing fees. It facilitates a public understanding of how government business is conducted, and it's a value to the public at large, not a particular person. So, for instance, I think it was like back in the late '90s, there was a personnel investigation of a Portland police captain for some off duty hanky-panky that he was getting into.

Normally, personnel investigations that result in discipline, which happened here, are not subject to disclosure. The law says there is this desire to protect that employee from embarrassment, and therefore this information is confidential, unless the requestor can show a public interest in why it should be disclosed to them in this particular instance. Well, this went all the way up to court, and the court held that because this police captain held such a high position of trust within the community, even though these events occurred off duty, public knowledge about it was more important in this case than that captain's interest in confidentiality. And so for that reporter, for that request, the confidentiality concerns were overcome, and the records were disclosed in the public interest. But let's say someone else who is in any way injured by that captain's behavior wanted to sue and said, "I'm entitled to these records," they almost definitely would not get them because their interest was personal, pecuniary, like financial based, and therefore they would not be entitled to get that information.

And so for any exemption that falls under 345, you have to do this balancing test between whatever the confidentiality concern is within that exemption and the public interest in its disclosure. Now, ORS 192.355 is a little more interesting. And I'm going to spend a little more time here because it also relates to some of the work being done by the commission. There is no blanket balancing test here. Some of the exemptions including, like I said, for personal email, are clear and direct, nonconditional. You may never disclose. Others are the usual balancing test. Well, can the requestor show a public interest? And yet others say government, can you show that there is no public interest in disclosure.

So, if you ever think of using an exemption under this section of the law, you have to be clear to yourself, "Is this a nonconditional one? Is it where I'm fine unless the requestor asks for a disclosure in the public interest? Or is this one where I have to demonstrate that there is no public interest?" So, let's talk about one particular exemption in here. It's ORS 192.355 subsection 1. That is an exemption related to communications within a public body or between public bodies of an advisory nature. The commission does a lot of work and receives information from others to make decisions about administering OPDC. I understand this has been an area of conversation about how does this exemption apply. Well, first and foremost, it's important to realize it's as usual

on a case by case basis. And the Public Records Law is very clear that if you have information, some of which is confidential and some of which is not, you have a duty to redact or segregate that information and disclose anything that is not subject to confidentiality.

Remember, law of disclosure. And so, again, the root of this exemption that you need to keep in mind is that it's meant to encourage frankness and candor in opinions and recommendations exchanged within or between government bodies. And it's been developed to the extent that it has five elements that have to be met and applied narrowly to use for any record or piece of information within a record. And the concerns about frank communication has to clearly outweigh the public interest in disclosure. And actually, the attorney general cited a case that I think pretty easily sums up the difficulty that you're working with here when trying to use this exemption.

Because they said a public body asserting this exemption should be able to explain why the particular circumstances show that disclosure would deter its employees from offering recommendations and opinions that are part of their job duties. So, in other words, just because something is sensitive or just because something is in draft form or is otherwise unfinished in and of itself does not make it subject to withholding. You have to meet all five elements of this test. And even when you do, anything that remains that is purely factual still has to be disclosed. We could probably spend more time talking about this, but we don't have a lot of time left.

But I'm just curious, does anyone have any questions about this particular exemption or anything else we've discussed up to this point? Because I'd be happy to talk about it a little further before we move on. All right. And you're all just disclosure gurus, huh? This is great. All right. Well, are rounding the corner here towards the finish. I think resources are really important. And, again, even if you yourselves are not dealing with public records requests on a daily basis, our office is always here to answer your questions. But knowing where you, yourselves, can go to get some of these answers can always be helpful in your work, too. So, amongst the other things that occurred in the Public Records Law in 2017 was this requirement that the Oregon attorney general maintain a website of every actionable exemption under the Public Records Law.

It's a fascinating website. Because you can put in statutory sections or plain language, and it will not only pull up the relevant exemption, you can see on the right hand side here, it will show you any court cases or public records orders from the attorney general that exists related to that exemption. Now, look, I spent a lot of time going through this website. And if you ever do, too, you'll see what I've seen. The majority of these exemptions have never been adjudicated either because nobody questions them, or they're just not used because they

were added layer by layer over decades by people who had individual or particular concerns, but they never really amounted to much when it came to disclosure. I see we have a question. Go ahead, please.

Susan Mandiberg: I know I can find this by looking, but if you could just give us the address of this website that you have on there. Your slide is really small, and I can't read it.

Todd Albert: Oh, no. Okay. Well, it looks bigger on my side. When I'm done and I get out of the presentation, I will drop the link in the chat.

Susan Mandiberg: Great. Thank you.

Todd Albert: Absolutely. So, what is another really useful resource? Well, the attorney general's Public Records and Meetings Manuel. As you may know, this is maintained by the Office of the Attorney General. It was most recently updated in 2024. It is an online searchable PDF that is the current state of the Public Records Law in Oregon. Now, look, I will say that your own members may be making their own public records request to state and local government to facilitate the representation of their clients. This treatise is the state of the law as viewed by the Oregon attorney general. But attorney general public records appellate orders don't actually apply to local government. So, for local government, some of the issues that appear settled in here may not actually be so at the local level. This is still a great place to understand the general lay of the land. Of course any case from the court of appeals or higher that is cited is binding on everyone.

But for local decisions, our own office is attempting to build a district attorney's public records orders database. And the reason for that is that we have 36 counties in Oregon. We have 36 district attorneys who are making public records appellate rulings for all public bodies from the county level on down. The majority of these orders have never been published. We are doing our best to gather as many public records orders from recent years across all 36 counties and putting them in our database in conjunction with the state law library so that people can search on a county by county basis to understand what is going on within a particular location, or even understanding what are different counties doing across the board at the local level.

This is an ongoing work in progress. As a matter of fact, something else that happened in 2017 is that all DAs were supposed to be sending these orders and are supposed to be sending these orders to the attorney general, who himself does not have a mandate to do anything with them.

So, then they send them to us, and we put them in our database. So, if any of you are ever in conversation with a county district attorney, please feel free to say to them, “Hey, by the way, are you sending your orders to the attorney general? I heard not everyone is. Did you know it could end up in the Public Records Advocate’s database? You might be answering questions for some appellate people in your county and may be saving yourself from having to deal with some appeals because they can look back on your own juris prudence and then figure out whether or not they should filing an appeal.” So, we really think this is helpful for everyone at the local level working on public records issues, and we hope that we’ll continue getting more orders so we can build up our county by county database.

So, let me just move towards a conclusion here by talking about some carrots and sticks under the Public Records Law. Again, as public employees, I certainly know that a lot of the work that I do, we don’t have a safety net to do that work. Now, when I say the law is one of disclosure, not confidentiality, the legislature itself I think has recognized the importance of that notion and really wants people to lean into that. So, the carrot that we have in order to do that is ORS 192.335. Also added to the law in 2017 which says that a public body acting in good faith which discloses a record in response to a request that causes loss or damage is not liable unless they’ve violated a prohibitive…they’ve violated a specific prohibition on releasing that information.

So, like personal email addresses may never be released. You might have a court order. Short of violating, again, a nonconditional reason for releasing records, public bodies cannot be held liable for loss or damage. Obviously we all know you’ll still probably get sued. But this is, nevertheless, a clear defense that can be offered on your behalf. So, that’s the carrot. What’s the stick? Well, in 2019, the one thing that changed in the Public Records Law was that for the first time there can be fines for public bodies that either fail to respond to a public records request or unduly delay their response. And as you can see there, unduly delay is not defined. Again, another reason to communicate regularly with the requestor.

If you’re informing them of the delay in releasing records, if you’re working with them to clarify requests, fees, etc., it’s very unlikely you can be found to have unduly delayed a request. But should you ever be found to have done so, a public body can be fined 200 bucks. Not exactly going to break your bank, right? I mean in Washington State, I believe government bodies can be fined hundreds of dollars per day for public records violations. In Oregon, we said $200. So, maybe it’s a black eye for the press, but it’s not really going to affect your bottom line. But worse than that, public bodies could always be ordered to pay attorney’s fees for causing undue delay or not responding to a request. But now

in addition to the fine, you can also be ordered to turn over a request at no charge. You could be required to not charge fees.

So, let's say you receive some very large, voluminous request. You never responded to the requestor. You took too long to figure it out. You could have potentially recouped a lot of money in fees. Well, you failed to follow the process. You could actually be now required to turn the records over at no cost. Carrots and sticks. All right. If you come to this point in my presentation and feel like this is what a public records request looks like then you are thinking the right way. Like I said, every step of the way in a public records request for you or staff members undertaking it is a decision to be made.

And there isn't always even a right or wrong decision. It's merely what is in keeping with your good faith understanding of the law, your policy, your past practice, and your advice from your own staff members and counsel. But nevertheless, we are always here to assist on any issue big or small related to public records. Whether it's a one-off problematic request, you're anticipating issues down the road, you want to work on policy, you want to interface with our counsel, you want additional training that's on specific issues. We are always here to help and assist at any point, so I really hope you won't hesitate to reach out. And I did send an email to Jennifer with a link to a survey that I'd respectfully request you filled out when you had an opportunity to do so. Much like you, we are a fairly new state agency.

We have our own key performance measures that we are now required to meet, and one of those is in fact an agency survey, which is just a best practice anyway. So, any feedback you have to offer is incredibly helpful to us. We learn and grow by the experience of those who receive our services. So, I hope you'd be willing to share those experiences with us. I'm going to stop sharing so I can send you all the link to the database. If I can get out of this presentation. My computer is being very slow. I think you're seeing me now, not my presentation. Let me get out of that. Oops. Uh-oh. Did I just…? Oh, okay. Sorry. I'm confusing myself. I'm still here. You're still here. Excellent. Well, while I look for the link, please just let me know if you have any other questions I could answer for you.

Susan Mandiberg: Are there any other questions for Mr. Albert? Any cries of agony? No. Okay. With that, unless anyone has anything else to add to the meeting… I'll wait and see. I think we can entertain a motion to adjourn.

Peter Buckley: We don't have a quorum, but I'll make the motion. [Laughs]

Susan Mandiberg: I was going to announce that we [Inaudible 02:22:57] Nice to see everybody. Bye, bye.

Tom Lininger: Good job chairing, Vice Chair Mandiberg.

Susan Mandiberg: Oh, well… First time out. Hopefully it wasn't too awful.

Tom Lininger: You've got a knack for it.

Susan Mandiberg: [Laughs]