

**Members:**

Robert Harris, Chair  
 Susan Mandiberg, Vice Chair  
 Stephanie Engelsman  
 Alton Harvey, Jr.  
 Leslie Kay  
 Philippe Knab  
 Tom Lininger

**Nonvoting Members:**

Rep. Paul Evans  
 Haley Olson  
 Caitlin Plummer  
 Sen. Floyd Prozanski

**Interim Executive Director:**

Kenneth Sanchagrin

**Oregon Public Defense Commission Workgroup**

*Meeting will occur virtually  
 Thursday, February 5, 2026  
 5:00 to 6:30pm  
 Via Zoom\**

**Administrative Announcement**

*This is a public meeting, subject to the public meeting law and it will be recorded. Discussion will only be allowed amongst Commission members and staff for the duration of this meeting. Public comment will not be allowed during this meeting.*

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# AGENDA

Approx. Time	Item	Lead(s)
5:00-5:05	Welcome/Call to Order	Chair Harris
5:05-5:30	<b>Update:</b> <a href="#">OPDC Capacity Report</a>	Ken Sanchagrin
5:30-6:30	<b>Update/Discussion:</b> <ul style="list-style-type: none"> <li>• <a href="#">Habeas Performance Standards</a></li> <li>• <a href="#">Post-Conviction Relief Attorney Performance Standards</a></li> </ul>	Steve Arntt
6:30 (Approximately)	<b>***Adjourn***</b>	

*\*To join the Zoom meeting, click this link: <https://zoom.us/j/97879744276>. This meeting is accessible to persons with disabilities or with additional language service needs. Our Zoom virtual meeting platform is also equipped with Closed Captioning capabilities in various languages, which agency staff can assist you with setting up ahead of meetings.*

*Requests for interpreters for the hearing impaired, for other accommodations for persons with disabilities, or for additional interpreter services should be made to [info@opdc.state.or.us](mailto:info@opdc.state.or.us).*

*Please make requests as far in advance as possible, and at least 48 hours in advance of the meeting, to allow us to best meet your needs.*

*Listed times are an estimate, and the Chair may take agenda items out of order and/or adjust times for agenda items as needed.*

*Next meeting: **March 5, 2026, 5-6:30pm via Zoom.***

*Meeting dates, times, locations, and agenda items are subject to change by the Commission; future meeting dates are posted at: <https://www.oregon.gov/opdc/commission/Pages/meetings.aspx>*

**Note:** *Agenda items not addressed or completed during this meeting will be carried over to the next scheduled meeting, unless otherwise directed by the Chair.*



January 23, 2026

The Honorable Senator Kate Lieber, Co-Chair  
The Honorable Representative Tawna Sanchez, Co-Chair  
Joint Committee on Ways and Means  
900 Court Street NE  
H-178 State Capitol  
Salem, OR 97301

Dear Co-Chairs Lieber and Sanchez:

## Nature of the Request

This request is related to a report submitted by the Oregon Public Defense Commission (OPDC) as required by a budget note in House Bill 5031 (2025), which reads:

The Department of Administrative Services is requested to unschedule \$22.1 million General Fund in select programs that may be scheduled only after the submission of a report by the Oregon Public Defense Commission to the Joint Committee on Ways and Means for the 2026 legislative session, with a detailed comparison between budgeted and actual capacity for both contract providers and Trial Representation Division staff. The report shall include a specific plan of action to address those providers, or the Trial Representation Division, that are operating at less than 90% of budgeted capacity. The Commission is also to report on the preliminary results of the Enhanced Provider Capacity Pilot Program.

The agency is requesting acknowledgment of the report, as well as the rescheduling of the \$22.1 million General Fund.

## Agency Action

OPDC executed contracts for the 2025-27 biennium beginning on October 1, 2025. Contractors provide OPDC with caseload data for the previous month on the 15th of every month. Therefore, as of the release of this report, OPDC possessed caseload data for public defense contractors for October and November 2025. **Table 1** provides the MAC utilization for all providers by type. The full list of MAC utilization by contract type and county is provided in the report's appendix. Details of specific Adult Criminal and Juvenile provider contracts can be found via OPDC's data dashboards [here](#), and the Trial Division can be found [here](#).

**Table 2. Public Defense MAC by Provider Type**

Provider Type	Prorated MAC	Reported MAC	MAC Utilization
Adult Criminal	74.606	71.389	95.69%
Juvenile (non-PCRPP)	15.517	12.555	80.91%
OPDC Trial Division†	7.558	6.934	91.75%

	Expected Caseload	Reported Caseload	Utilization Percentage
PCRPP Providers‡	6,306.4	6,109.3	96.87%

† OPDC Trial Division MAC is measured from July 1, 2025 to December 31, 2025.

‡ PCRPP does not operate under a MAC model, but rather an open workload model of 80 open cases for a 1.0 FTE attorney. The percentage shown is the percent of workload used, with the expected number of open cases per month based on FTE being the denominator.

Based on MAC utilization, OPDC has sorted all providers into one of three tiers. Tier 1 includes providers that are above 90 percent, Tier 2 includes providers below 90 percent that are subject to agency monitoring, and Tier 3

includes providers that are below 90 percent and OPDC is actively implementing a plan of action to increase MAC utilization. **Table 2** provides the tiered breakdown for the four provider types.

**Table 2. Providers by MAC Utilization Tier**

<b>Tier</b>	<b>Adult Criminal</b>	<b>Juvenile</b>	<b>PCRPP†</b>	<b>OTD Office‡</b>	<b>Total</b>
1 >90%	60	27	18	2	107
2 <90% Monitor	29	15	2	0	46
3 <90% Intervention	13	7	3	1	24
<b>Total</b>	<b>102</b>	<b>49</b>	<b>23</b>	<b>3</b>	<b>177</b>

† PCRPP does not operate under a MAC model, but rather an open workload model of 80 open cases for a 1.0 FTE attorney. The percentage shown is the percent of workload used, with the expected number of open cases per month based on FTE being the denominator.

‡ OPDC Trial Division MAC is measured from July 1, 2025 to December 31, 2025.

After this initial review, OPDC identified 24 contractors requiring intervention. Plans were created to monitor and fill vacancies, address issues related to attorneys on leave, and, in some cases, shift capacity to another county that needed the available MAC. In addition, case pick up plans were created for other providers, seeking to increase case pickup rates or redistribute cases more equitably among providers in a jurisdiction, with the aim of bringing all providers with a jurisdiction to 90 percent MAC utilization. Some of these interventions have already been implemented, while others are on a 6-month timeline; if MAC utilization is not improved within that time frame, OPDC will amend contracts to better reflect the actual MAC being provided.

The report also provides an update to the Enhanced Caseload Program, a voluntary program that allows attorneys to take up to 115 percent of MAC. With 39 participants, OPDC is contracting for an additional 4.8 MAC across the entire contract period. In the first two months of reporting, these participants are at 106.5 percent utilization, which is above even the enhanced contracted amounts.

### Action Requested

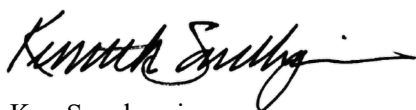
OPDC requests that the Committee acknowledge receipt of the Capacity Report, and requests the Department of Administrative Services to schedule the \$22.1 million General Fund previously unscheduled funds as follows:

Adult Trial Division:	\$16,500,000 General Fund
Juvenile Division:	\$2,300,000 General Fund
Trial Representation Division	\$1,000,000 General Fund
Parent Child Representation Program	\$2,300,000 General Fund

### Legislation Affected

No legislation is affected.

Sincerely,



Ken Sanchagrin  
Interim Executive Director

cc:

Amanda Beitel, Legislative Fiscal Officer  
John Borden, Principal Legislative Analyst, LFO  
Kate Nass, Chief Financial Officer  
Jonathan Bennett, Budget and Policy Analyst

# Oregon Public Defense Commission Capacity Report

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January 23, 2026

**Nature of the Report**

The Department of Administrative Services is requested to unschedule \$22.1 million General Fund in select programs that may be scheduled only after the submission of a report by the Public Defense Commission to the Joint Committee on Ways and Means for the 2026 legislative session, with a detailed comparison between budgeted and actual capacity for both contract providers and Trial Representation Division staff. The report shall include a specific plan of action to address those providers, or the Trial Representation Division, that are operating at less than 90% of budgeted capacity. The Commission is also to report on the preliminary results of the Enhanced Provider Capacity Pilot Program.

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## Definitions

**MAC:** Maximum Attorney Caseload – as defined in contract. MAC refers to attorneys providing direct representation to clients.

**FTE:** Full Time Equivalent – includes attorney time not directly tied to client representation, such as supervision, along with non-attorney contracted services like investigators and case managers.

**Pro rated MAC:** Contracted attorney MAC by month and contract cycle that accounts for adjustments to an attorney's MAC (increase or decrease) as reflected in the Contracts Database. Pro rated MAC is calculated based on the MAC 'start' dates, 'departure' dates, and 'effective' dates of amendments from the Contracts database. Prorated MAC is calculated on the number of days an attorney was on a specific MAC value as a portion of the contract cycle. It is a daily count, not a monthly count. For context for this report, a 1.0 MAC, or full time public defender, has a prorated MAC of .167 for October and November combined.

**MAC Reported:** The weight of cases reported by an attorney or contractor and case weight adjustments made based on language in the contract (such as withdraws, out of country, and subsequent attorney).

**Capacity:** MAC reported less pro rated MAC.

**Appointed Case:** A case reported for the first time by an attorney with an appointment date falling within the current contract cycle of October 1, 2025 - June 30, 2027.

**Open Case:** A case with an appointment date that does not match the report month and/or a case where a disposition event has not occurred.

**Closed case criminal contracts:** A case with a disposition date and a disposition code other than CONT.

**Closed case juvenile contracts:** A case with a disposition date and any of the following disposition codes listed: DSM, EMAN, JUNF, PRT, TERM, or WAIV.

**Adult Criminal Contracts:** Provider contracts that provide representation to adults in criminal cases, also include specialty courts, PCR, appeals, civil commitments, and others. Abbreviated to AC.

**Juvenile Contracts:** Provider contract that provides representation to children in delinquency cases, and adults and children in dependency or termination of parental rights cases, also includes juvenile appeals and other juvenile case types. Abbreviated to JC.

**Providers:** For this report, the term providers refers to contractors and the Oregon Trial Division's three regions. It does not mean individual public defenders or hourly attorneys.

**Contractors:** Contractors refer to Adult Criminal, Juvenile, and PCRCP providers who are currently contracted to provide public defense services in Oregon. It does not include the Oregon Trial Division or hourly attorneys.



## Background

In House Bill 5031 (2025), which serves as the Oregon Public Defense Commission's primary budget bill for the 2025-27 biennium, the Legislature elected to include the following budget note:

The Department of Administrative Services is requested to unschedule \$22.1 million General Fund in select programs that may be scheduled only after the submission of a report by the Public Defense Commission to the Joint Committee on Ways and Means for the 2026 legislative session, with a detailed comparison between budgeted and actual capacity for both contract providers and Trial Representation Division staff. The report shall include a specific plan of action to address those providers, or the Trial Representation Division, that are operating at less than 90% of budgeted capacity. The Commission is also to report on the preliminary results of the Enhanced Provider Capacity Pilot Program.

The report that follows is intended to meet the requirements of this budget note.

## Budgeted vs. Actual Capacity

<b>Table 1. Maximum Attorney Caseloads and Case Weights</b>		
<b>Case Type</b>	<b>Annual MAC</b>	<b>Case Weight</b>
<i>Adult Criminal</i>		
Murder	6	50
Jessica's Law	6	50
BM 11 Case	45	6.7
Major Felony	138	2.2
Minor Felony	165	1.8
Misdemeanor	300	1
Probation Vio	825	0.36
Civil Commit	230	1.3
<i>Juvenile</i>		
Murder	6	50
Delinquency	132	2.3
Dependency	69	4.3
Probation Vio	825	0.36

Since the 2021-23 biennium, the primary model OPDC has utilized for budget development and contracting has been the MAC Model, which is based on defined Maximum Attorney Caseload numbers, broken down by case type. As shown in **Table 1**, each case taken by a public defense attorney is given a weight based on seriousness, ranging from murder and Jessica's Law cases at the most serious end, down to probation violations. The MAC weighting system is applied to forecasts from the Department of Administrative Services Office of Economic Analysis to forecast the number of attorneys the statewide system in Oregon will need to properly function during a given biennium and it is used during OPDC's contracting period to determine attorney needs by case type at the county level to ensure that adequate local capacity is available to take cases. Once contracts are in place, annual MAC expectations are analyzed against contractor reported case assignment data to measure the degree to which

budget capacity is congruent with reported capacity within each jurisdiction. Importantly, as shown in Table 1, MAC is applied to both adult criminal and juvenile contracts, although the standards are different due to the different approaches taken in these two areas to prosecuting alleged criminal conduct or delinquent behavior. MAC, therefore, accounts for the majority of the tracking performed by the agency, although one program, the Parent Child Representation Program (PCRP), falls outside of the MAC regime.<sup>1</sup>

<sup>1</sup> PCRP does not operate under a MAC model, but rather an open workload model of 80 open cases for a 1.0 FTE attorney. In the pages that follow, assessments of PCRP budgeted versus actual capacity is based on the percentage of workload used by a contractor, which is calculated by dividing the actual number of open cases by the expected number of open cases per month for a provider on that provider's FTE.

OPDC entered into contracts for the 2025-27 biennium with providers beginning on October 1, 2025, for a term of eighteen months. Compared to past contracts, the 2025-27 agreement was intended to provide greater accountability for MAC utilization, ensuring that state-level investments in public defense were made in the most efficient manner, consistent with Legislative intent. In a pragmatic sense, however, it is also necessary to recognize that workload within the legal system is inherently inconsistent and unpredictable, as its volume of work is highly dependent on crime trends, local and state law enforcement resources, district attorney charging practices, and local defense attorney resource availability, to name a few. Due to these factors, a single instance of low MAC utilization in one month for a provider does not necessarily indicate that a provider is underperforming relative to its MAC expectations. Indeed, it is not uncommon to see months with high MAC utilization followed by months with lower MAC utilization (and vice versa), as providers work to balance caseloads to meet longer-term MAC utilization under OPDC’s contracts, while maintaining an ethical workload.

OPDC’s 2025-27 contracts include provisions related to MAC utilization that seek accountability while accounting for the unpredictable distribution of cases throughout the contract term. Specifically, two distinct occurrences during the contract term in which the contractor’s monthly caseload increases or decreases by 15 percent are viewed by OPDC as warranting a discussion between OPDC staff and the contractor to discuss the circumstances surrounding the increase or decrease. In essence, while one month may be an aberration, two consecutive months may indicate the beginning of a pattern that, depending on the circumstances in the local jurisdiction, may require some form of intervention. In all, discussions resulting from two months of high or low MAC utilization aim to bring the contractor back toward 90 percent MAC utilization.

Public defense providers report caseload data for the previous month on the 15<sup>th</sup> of every month. This means, for example, that October data reports were submitted to OPDC on November 15<sup>th</sup>, and November data reports were submitted to the agency on December 15<sup>th</sup>. Due to the nature of this reporting schedule, OPDC is including contractors’ caseload data for October and November 2025 to enable assessments of MAC utilization using the two months of available data under the new contract, which went into effect on October 1, 2025.

**Table 2** provides a summary of budgeted MAC versus actual capacity, which is denoted by the “Prorated MAC” and “Reported MAC” columns, respectively. The final column of Table 2 provides a summary measure of MAC utilization, which is merely the result of dividing reported MAC by prorated MAC. Overall, MAC utilization among providers for adult criminal cases exceeds 95 percent. Similarly, the overall MAC utilization for the Oregon Trial Division is nearly 92 percent. Juvenile providers in non-PCRCP counties reported lower MAC utilization of nearly 81 percent. Finally, as noted previously, PCRCP providers are not measured according to the MAC standard, so they are separated out in Table 2. Rather, they are assessed based on a comparison between reported open cases versus expected open cases. Statewide, as shown in Table 2, PCRCP providers are expected to maintain an average monthly open caseload of 6,306.4 cases.

<b>Table 2. Public Defense MAC by Provider Type</b>			
<b>Provider Type</b>	<b>Prorated MAC</b>	<b>Reported MAC</b>	<b>MAC Utilization</b>
Adult Criminal	74.606	71.389	95.69%
Juvenile (non-PCRCP)	15.517	12.555	80.91%
OPDC Trial Division†	7.558	6.934	91.75%
	<b>Expected Caseload</b>	<b>Reported Caseload</b>	<b>Utilization Percentage</b>
PCRCP Providers‡	6,306.4	6,109.3	96.87%

† OPDC Trial Division MAC is measured from July 1, 2025 to December 31, 2025.

‡ PCRCP does not operate under a MAC model, but rather an open workload model of 80 open cases for a 1.0 FTE attorney. The percentage shown is the percent of workload used, with the expected number of open cases per month based on FTE being the denominator.

The reported caseload under the 2025-27 contracts so far is 6,109.3 open cases. When the reported caseload is divided by the expected caseload, the resulting utilization rate for PCRCP is nearly 97 percent.

A full list of MAC utilization by contract type and county is provided in the report's appendix. Details of specific Adult Criminal and Juvenile provider contracts can be found [here](#), and the Trial Division can be found [here](#).

## Review Process

For the analysis of budgeted versus actual capacity, OPDC sorted public defense providers into one of three tiers based on MAC utilization, or the percentage of actual versus prorated capacity for PCRCP providers. The first tier includes those providers who meet or exceed the 90 percent capacity threshold as required in the budget note. As shown in **Table 3**, 107 providers, or 60.45 percent of the total, were found to be at or above 90 percent capacity.

**Table 3. Providers by MAC Utilization Tier**

Tier	Adult Criminal	Juvenile	PCRCP†	OTD Office‡	Total
1 >90%	60	27	18	2	107
2 <90% Monitor	29	15	2	0	46
3 <90% Intervention	13	7	3	1	24
<b>Total</b>	<b>102</b>	<b>49</b>	<b>23</b>	<b>3</b>	<b>177</b>

† PCRCP does not operate under a MAC model, but rather an open workload model of 80 open cases for a 1.0 FTE attorney. The percentage shown is the percent of workload used, with the expected number of open cases per month based on FTE being the denominator.

‡ OPDC Trial Division MAC is measured from July 1, 2025 to December 31, 2025.

This initial analysis identified 70 providers who did not meet the 90 percent capacity threshold. OPDC Contract Compliance Analysts then engaged in a deeper, more focused analysis of these entities, with the aim of determining whether agency intervention was required, as well as the type of intervention that would provide the most effective assistance to a local provider in meeting their MAC requirements. This work resulted in the establishment of two additional tiers, both of which contain entities that were operating below 90 percent capacity as of the end of November:

**Tier 2**, which includes providers who have reasonable, documented explanations for performing below the 90 percent threshold and therefore do not require intervention at this time. Providers in this category will continue to be monitored to ensure MAC utilization goals are met and could be subject to intervention from OPDC if MAC numbers do not improve in the immediate future. The explanations that sorted providers into Tier 2 are described in greater detail below. In total, 46 providers fell into Tier 2, or nearly 26 percent of all providers.

**Tier 3**, which includes providers operating below 90 percent MAC utilization but who do not meet the justifications found for providers in Tier 2. For these providers, the agency has crafted interventions that are described in greater detail below. In total, 24 providers fell into Tier 3, or 13.56 percent of all providers.

## Tier 2: Monitor

Of 177 providers total providers, 70 were operating below 90 percent MAC utilization. Following an analysis of these providers, 46 were assigned to Tier 2, which means that those providers will be monitored to ensure future MAC utilization goals are met and could be subject to intervention from

OPDC if MAC numbers do not improve in the immediate future. Inclusion in Tier 2 could be traceable to five factors, which will be explained in greater detail in the subsections that follow: (i) contractors with specialty or statewide contracts, (ii) contractors whose MAC was impacted by the 2025-27 biennial MAC reset, (iii) providers with less than half time contracts that are too small for drawing reliable data conclusions, (iv) intentional jurisdictional capacity planning, and (v) providers under 90 percent in non-crisis counties who would not benefit from intervention at this time.

## Specialty and Statewide Contracts

Thirteen Tier 2 contractors are statewide or specialty contractors who experience utilization impacts due to the operational structure of their practice areas. While MAC standards are designed to reflect mixed caseloads, OPDC recognizes the benefits of maintaining contracts with some providers who specialize in unique practice areas and complex or high-severity cases. For example, some contractors primarily or exclusively handle murder cases, for which a 1.0 MAC equates to approximately six cases per year. These cases arise unpredictably and require sustained availability, which means that utilization may appear low between filings or when there are gaps between case assignments. As long as these contractors remain prepared and capable of accepting and fully staffing murder cases when they occur, OPDC does not consider temporary low utilization at this stage of the contract to be a compliance concern.

The thirteen providers falling into this category are reported in **Table 4**. Four of the thirteen contractors provide representation for individuals in civil commitment matters. This case type has proven to be difficult to forecast and is also predicted to be impacted by the passage of House Bill 2005 (2025), which took effect at the beginning of 2026. Other contractors falling into this category include those providing statewide appeals coverage, which accounts for four contractors, and one contractor providing coverage for complex Jessica’s law cases. Other specialty contracts include statewide or multi-jurisdictional contracts and post-conviction relief (PCR) cases.

**Table 4. Specialty and Statewide Contracts Below 90% Utilization**

County/ Region	Provider	Contract Type	Reported MAC	Prorated MAC	MAC Utilization
Clack	Law Office of Amanda J. Marshall	(AC) Civil Commitment	0.157	0.192	81.44%
Clack	The Law Offices of Mary Tongel	(AC) Civil Commitment	0.170	0.192	88.23%
Statewide	Christopher M. Clayhold	(AC) Murder	0.000	0.167	0.00%
Statewide	Equal Justice Law	(AC) PCR Appeals	0.360	0.739	48.74%
Statewide	Law Office of Alsept & Ellis	(AC) PCR Murder	0.000	0.167	0.00%
Statewide	Liza Langford	(AC) Appeals	0.050	0.100	49.86%
Statewide	Multnomah Defenders, Inc.	(AC) Appeals, Civil Commitment	0.233	0.334	69.81%
Statewide	Richard L. Wolf, P.C.	(AC) Murder	0.000	0.167	0.00%
Statewide	Teena M. Killian	(AC) PCR Murder	0.022	0.192	11.56%
Statewide	Youth, Rights & Justice	(JC) Appeals	0.097	0.468	20.62%
Mult	Disability Rights Oregon	(AC) Civil Commitment	0.283	0.501	56.37%
Multi	Hollingsworth Law Office	(AC)	0.074	0.15	49.04%
Multi	Johnstone & Obert	(AC) Jessica’s Law	0.000	0.125	0.00%

## Contractor MAC Impacted by the 2025-27 Biennial MAC Reset

MAC utilization rates can and often do fluctuate month-to-month based on a variety of factors. These factors can include fluctuations in the supply of cases available to providers, “current” open cases which may impact a provider’s ability to take additional cases while maintaining an ethical caseload, and dynamics within a jurisdiction that may necessitate one contractor taking on additional cases above a normal rate to ensure adequate representation within the jurisdiction. Further, dynamics present at the end of a contract cycle can impact MAC rates at the conclusion of one contract, which impacts case pickup rates at the beginning of the next contract cycle. For example, in several jurisdictions at the conclusion of the 2023-25 contracts, one or more providers met their annual MAC expectations before the end of September 2025, leading other providers within the jurisdiction to pick up cases at a higher-than-normal rate to ensure the jurisdiction did not develop an unrepresented crisis. By taking higher caseloads in this manner, sometimes well above normal MAC expectations, these providers effectively limited their ability to take cases in October under the new contracts. Alternatively, contractors working to meet MAC expectations at the end of the 2023-25 contract may have needed to take more cases than they would during a normal month, which led to a higher number of open cases as the provider moved into the new contract period.

Based on this dynamic, OPDC examined whether calculating provider MAC from September to November would bring any of the 70 contractors listed in Table 3 above the 90 percent threshold. Following this exercise, nine contractors were identified as providers who would be above 90 percent MAC if the impacts of their September 2025 case assignments were taken into account. These nine providers, along with their calculated September to November utilization rates, are reported in **Table 5**. Importantly, while OPDC believes that contractors in this category do not require immediate intervention given that their lower MAC utilization rates appear to be driven by open caseloads assigned before the beginning of the current contract, they will be closely monitored going forward to ensure that December case pickup rates bring those providers up to 90 percent. If any of the providers in Table 5 continue to fall below 90 percent, OPDC will evaluate the cause and move them to Tier 3 if justified so that an action plan can be developed to bring them into compliance with MAC expectations.

**Table 5. Contractors whose MAC was Impacted by the 2025-27 Biennial MAC Reset**

County	Provider	Type	Prorated MAC	Reported MAC	†MAC Utilization	Sept-Nov Utilization
Baker	Elkhorn Public Defender	AC	0.169	0.138	81.84%	101%
Colum	Columbia County Indigent Defense	AC	0.585	0.518	88.52%	90%
Grant/ Harney	Steens Mountain Defenders	JC	0.057	0.039	68.61%	215%
Jack	Megan B. Annand	AC	0.084	0.070	83.25%	94%
Jose	Josephine County Defense Lawyers	JC	0.510	0.340	66.67%	106%
Klam	Philip Studenberg,	AC	0.160	0.014	8.69%	122%
Lane	Public Defender Services of Lane Co.	AC	3.719	2.471	66.43%	95%
Mult	Portland Defense Consortium	AC	2.408	1.890	78.49%	103%
Wash	Cornerstone Law Group	JC	0.284	0.240	71.81%	99%

† Two-month MAC Utilization for October and November 2025.

## Contracts Too Small for Reliable Trend Analysis

Some contracts are so small that two months of data do not allow the agency to draw meaningful conclusions about providers' MAC performance. As shown in **Table 6**, five providers who have utilization rates below 90 percent are contracted for less than 0.5 MAC annually. For example, a 0.2 MAC criminal contract translates to approximately 2.3 A/B felonies per month. For these providers, reporting 2 cases versus 3 in a single month could significantly affect utilization rates. Further, all five of these contracts are in rural counties, and none are in unrepresented crisis counties. Table 6 reports data on these five providers and provides a breakdown of their prorated versus reported MAC. In addition, Table 6 reports the hypothetical number of misdemeanors each contractor would need to take to reach 90 percent utilization, a figure intended to provide further context on the magnitude of the utilization gap for each provider. It is noteworthy that, combined, these contractors would only need 15.2 additional misdemeanors in December 2025 to reach 90% MAC as a group, despite the low MAC utilization numbers reported in the previous columns. This illustrates the challenge of using MAC as an assessment tool for small providers who work less than full-time for the agency. OPDC intends to continue monitoring these providers to determine whether they are closer to meeting MAC expectations in the coming months.

**Table 6. Small Contractors Below 90% Utilization**

County	Provider	Type	MAC Utilization	Prorated MAC	Reported MAC	Misdos for 90%
Baker	Whitnah Law	JC	26.55%	0.047	0.012	4.0
Grant/Harn	Whitnah Law	JC	39.42%	0.074	0.029	5.0
Union/Wall	Law Office of Jeffrey C. MacNeilly	JC	33.35%	0.043	0.014	3.3
Union/Wall	James A. Schaeffer	JC	76.75%	0.042	0.032	0.8
Union/Wall	Rick Dall Attorney at Law	JC	52.82%	0.042	0.022	2.1

## Intentional Jurisdictional Capacity Planning

Like many states in the Western U.S., Oregon's varied geographies and population distribution across them present unique challenges to the delivery of public safety services to its residents, including public defense services. Indeed, some of Oregon's counties are physically larger than entire states but have fewer than ten-thousand residents living within those vast landscapes. In these areas, for example, while demand for public defense services is relatively low due to the small local population, the size of the local jurisdiction increases the time a defense attorney spends on their cases, due to travel time and other factors. Further, because the local legal community is small, conflicts can easily arise, leading to cases that need to be handled by other providers. Due to these factors, and others, OPDC recognizes that rural and frontier counties often do not fit neatly into the forecast-based contracting approach OPDC uses in more populous counties. Rather, in many rural jurisdictions, OPDC engages in intentional capacity planning based on jurisdictional needs in these areas, which may result in "over-contracting" in these regions to ensure that constitutionally adequate public defense resources remain available. **Table 7** includes data on thirteen contractors operating in rural areas where OPDC has endeavored to meet local needs through contracting that differs slightly from what the DAS OEA forecast would require.



**Table 7. Rural Contractors Below 90% Utilization**

County	Provider	Type	Prorated MAC	Reported MAC	MAC Utilization	Misdos for 90%
Baker	Yervasi Law, P.C. - Adult Criminal	AC	0.084	0.025	30.10%	15.2
Columbia	Justice Alliance of Columbia County	AC	0.234	0.141	60.47%	20.9
Josephine	Southern Oregon Public Def	AC	0.345	0.267	77.17%	13.1
Lake	Spencer Law	AC	0.167	0.086	51.38%	19.3
Malheur	Elkhorn Public Defender	AC	0.449	0.374	83.24%	9.0
Malheur	Frontier Legal	AC	0.150	0.038	25.57%	29.1
Tillamook	Tillamook County Defense Consortium	AC	0.393	0.263	66.97%	27.2
Union/Wall	Elkhorn Public Defender	AC	0.102	0.051	50.23%	12.2
Union/Wall	James A. Schaeffer	AC	0.125	0.101	80.92%	3.5
Union/Wall	LJ Legal Solutions	AC	0.120	0.104	86.11%	1.2
Union/Wall	Rick Dall Attorney at Law	AC	0.120	0.062	51.35%	13.8

*PRCP Providers†*

Bent/Polk	Jarvis Bridge Halttunen and Weyer	PCRCP	128.8	89.3	69.29%	26.6
Clatsop/Columbia	Columbia County Indigent Defense Corporation	PCRCP	80.0	45.5	56.88%	26.5

† PCRCP does not operate under a MAC model, but rather an open workload model of 80 open cases for a 1.0 FTE attorney. The percentage shown is the percent of workload used, with the expected number of open cases per month based on FTE being the denominator.

By monitoring local case and provider trends, OPDC intends to continue refining its contracting in rural counties with small populations to improve the efficiency and effectiveness of public defense services in those jurisdictions. This work includes the development of additional measures of local need beyond MAC utilization that better account for the unique challenges of serving these jurisdictions.

## Full Representation

There are six additional providers that did not meet the 90 percent threshold and do not fall into one of the categories described in the sections above. These six providers, however, operate in jurisdictions with fewer than five unrepresented individuals, adult or juvenile, depending on the contract. In these jurisdictions, providers are meeting local needs and, in some cases, taking cross-jurisdictional cases when necessary. For these providers, continued low utilization rates could indicate that OPDC is overcontracted; however, OPDC would base reallocation decisions—particularly those that could lead to reductions in attorney positions—on more than two months of data. Potential solutions could also include rebalancing MAC between juvenile/PCRCP services and adult criminal services within the same provider, especially in counties with an adult unrepresented population but no similar concerns in the juvenile arena, or reallocating MAC to other areas. **Table 8** lists these contractors.

**Table 8. Contractors below 90% Utilization in Jurisdictions with <5 Unrepresented Persons**

County	Provider	Type	Prorated MAC	Reported MAC	MAC Utilization	Misdos for 90%
Lane	Lane County Juvenile Lawyers Association	JC	2.198	1.464	66.63%	67.9
Lane	Public Defender Services of Lane County	JC	0.627	0.341	54.40%	29.5
Marion	Juvenile Advocacy Collective	JC	2.385	1.487	62.36%	87.1
Wash	Hillsboro Law Group	JC	0.167	0.130	78.05%	2.7
Wash	Oregon Defense Attorney Consortium	JC	0.334	0.181	54.20%	15.8
Wash	Metropolitan Public Defender Services, Inc.	JC	0.627	0.356	56.82%	27.5

### Tier 3: Intervention

OPDC's Compliance Manager is responsible for ensuring that providers adhere to their contractual obligations. When providers fall out of compliance, OPDC's Contract Compliance Analysts work directly with providers to identify contributing factors, develop corrective strategies, and document agency interventions. Twenty-four providers, or around 13.5 percent of all providers, are classified as Tier 3 and OPDC is actively working with them to develop, or has already implemented, individualized plans of action to increase MAC utilization. These plans generally fall into three categories, which will be explained in greater detail in the subsections that follow: (i) addressing operational barriers, (ii) filling vacancies, and (iii) issuing an increased caseload assignment plan.

### Addressing Operational Barriers

As shown in **Table 9**, thirteen providers, just over half of those in Tier 3, are experiencing operational or structural barriers to meeting their MAC, which include internal or external limitations such as specialty case assignments, low or fluctuating case filings, or short-term staffing constraints. OPDC is working with these providers to address these barriers and adjust workflows where feasible.

OPDC has already intervened with eight of these providers through adjustments in MAC, either in October during the initial 2025-27 contracting phase or through amendments made in December (denoted in Table 9 as "previously adjusted"). In some of these jurisdictions, low MAC numbers were primarily attributable to reduced case filings, which resulted in excess MAC given the existing caseload. OPDC reduced MAC in these instances. In other cases, MAC was redistributed within an entity between its adult criminal and juvenile contracts. This was done when there was excess MAC for juvenile cases and insufficient MAC for adult criminal cases. It will take more time to determine the impact of these adjustments on MAC utilization and to determine whether further adjustments are needed. OPDC is cautious and deliberate when making capacity reductions, as the agency strives to avoid overcorrecting downward in response to falling case filings, given the difficulties presented when trying to scale contracts up (e.g., hiring new attorneys can take several months, during which time a crisis could arise in an under-resourced area). Many of these providers are also all within rural jurisdictions, and OPDC is cognizant of the unique jurisdictional needs of rural areas (see *Intentional Jurisdictional Capacity Planning* on pages 12-13).

The other five providers face different operational barriers, including short-term staffing constraints such as illness or protected leave, most of which have now been resolved. Fluctuating case filings, some caused by changes in staffing in the District Attorney's or Sheriff's office, have also led to lower case



pick-ups in the first two months of the contract for other providers. OPDC analysts have discussed these barriers with providers and believe they have been resolved or will be resolved in the coming months, and that MAC utilization will increase. OPDC will increase intervention if needed.

**Table 9. Providers with Operational Barriers Below 90% Utilization**

County/JD	Provider	Type	Prorated MAC	Reported MAC	MAC Utilization	Misdos for 90%
<i>Operational Barriers</i>						
Curry	Curry County Public Defense	AC	0.371	0.257	69.30%	23.1
Deschutes	Deschutes Defenders	JC	0.354	0.205	57.73%	15.0
Douglas	Arneson, Stewart & Styarfyr	AC	0.343	0.261	76.17%	14.3
Lane	Lane County Defense Consortium	AC	1.387	0.989	71.30%	77.8
<i>Providers whose MAC was Previously Adjusted</i>						
7th District	7th District Consortium	AC	0.475	0.346	72.82%	24.5
7th District	Columbia Gorge Defenders	AC	1.263	0.843	66.70%	88.1
7th District	Columbia Gorge Defenders	JC	0.102	0.074	72.37%	2.3
Benton	Benton County Legal Def Corp	AC	1.414	1.168	82.59%	31.4
Malheur	Five Rivers Law	AC	0.368	0.191	51.84%	42.1
Malheur	Five Rivers Law	JC	0.184	0.138	75.07%	3.6

PCRP Providers†

County/JD	Provider	Type	Expected Caseload	Reported Caseload	Utilization Percent	Misdos for 90%
Douglas	Arneson, Stewart & Styarfyr	PCRP	392	328.5	83.80%	24.3
<i>PCRP Providers† whose Contracts were Previously Adjusted</i>						
Multnomah	Metropolitan Public Defender Services	PCRP	921.6	826	89.63%	3.4
Multnomah	Multnomah Defenders, Inc	PCRP	553.6	482	87.07%	16.2

† PCRP does not operate under a MAC model, but rather an open workload model of 80 open cases for a 1.0 FTE attorney. The percentage shown is the percent of workload used, with the expected number of open cases per month based on FTE being the denominator.

## Filling Vacancies

Two Tier 3 providers are experiencing attorney vacancies or pending departures that are contributing to reduced utilization. OPDC recognizes that when an attorney has provided notice of resignation or separation, contractors reduce case assignments or cease assigning new cases altogether to the departing attorney to allow for a winding-down of that individual's caseload. This necessary transition period temporarily lowers a provider's MAC utilization. **Table 10** lists the providers experiencing vacancy challenges that are impacting their MAC utilization.

OPDC is working with the one capacity contract provider to ensure vacancies are filled. Under OPDC policy, contract vacancies are funded at 50 percent for up to 60 calendar days. At OPDC's discretion, it may fund vacancies for an additional 60 days. After that time, if the vacancy is not filled, it can be removed from the contract, reducing MAC requirements for that provider going forward.

**Table 10. Providers Below 90% Utilization with Vacancy Challenges**

County	Provider	Type	Prorated MAC	Reported MAC	MAC Utilization	Misdos for 90%
Jack	Southern Oregon Public Defender	JC	0.501	0.102	20.37%	46.1
Marion/ Statewide	Central Valley Regional Trial Division	AC	2.147	1.558	72.60%	112.3

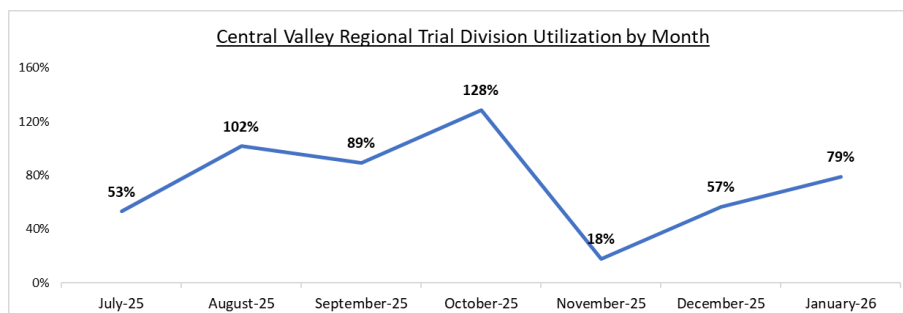
In addition to the capacity contract provider discussed above, OPDC’s Central Valley Regional Trial Division (CVRTD) Office is also experiencing vacancy challenges. The nature of these vacancies is similar in many ways to those experienced by providers, but it also highlights some of the unique challenges that OPDC faces in managing its attorneys within the Oregon Trial Division.

In November, three CVRTD attorneys entered wind-down status, reducing the number of cases assigned to the CVRTD and significantly impacting the office’s MAC. The first attorney in this group falls into the more traditional “vacancy” category, as this individual submitted their resignation and intends to leave the public defense field. During this attorney’s wind-down period, no new cases were assigned as the attorney focused on closing existing matters. Remaining open cases were then redistributed within the office in accordance with OPDC policy, which credits attorneys within the same contract or office with 50 percent MAC for cases previously assigned to that provider.

The other two attorneys in wind-down status do not fall into the typical “vacancy” category, although the impact on MAC is similar to that of a departing attorney. One of these two attorneys transitioned from a standard Deputy Defender position into a newly created Early Resolution Docket (ERD) position, which was authorized during the 2025 Legislative Session. Because early resolution dockets function differently from normal caseloads, OPDC treats this attorney’s workload the same way it would a specialty court contract, meaning cases assigned to that role do not count toward MAC, consistent with OPDC policy. As with any transition to a specialty assignment, the attorney’s MAC did not increase during this period.

The final attorney going through the wind-down process had been temporarily assigned to Coos County to help alleviate the unrepresented crisis there. That deployment, combined with the work of the local non-profit provider and the addition of a new consortium in October for the 2025-27 contract period, has effectively eliminated the unrepresented persons list in Coos County. As OPDC’s CVRTD attorney prepared to rotate back to Marion County, she had to wind down and close out her cases in Coos County, which temporarily reduced her ability to take new case intake during the transition.

To address these concerns, OPDC hired two new attorneys in mid-January to fill the position vacated by the departing attorney, as well as the Deputy Defender position previously occupied by the ERD attorney. One of the new attorneys was hired from outside of Oregon and entered employment at OPDC ready to take on a full caseload. The other attorney came from outside of public defense and will be able to take on a full caseload as well.

**Figure 1**

**Figure 1** presents monthly utilization for the CVRTD over the past seven months. As shown in the figure, utilization was particularly low during November and December of 2025, as the three transitions described above occurred.

Utilization has already rebounded in January and is expected to increase further with the addition of two new attorneys mid-month who enter the field without preexisting caseload responsibilities.

## Caseload Assignment Plans

As shown in **Table 11**, nine Tier 3 providers did not meet any of the above criteria. One way that OPDC is working with these providers to increase case assignments through increased pick-up dates by the individual provider. OPDC worked with the provider in Polk County in Table 11, for example, to add additional case pick-up days, which will increase their MAC while allowing the other Polk providers who are substantially over MAC to decrease their caseload. A second way that OPDC is working with providers is through coordinating and equalizing case assignments across providers within a particular jurisdiction. In Yamhill County, the jurisdiction's smaller size means individual case assignments can significantly impact MAC month to month. Recently, one Yamhill provider took a Jessica's Law case early in the new contract, resulting in their MAC significantly exceeding 100 percent. A pick-up plan is in place to assign future higher level cases to the other contractors on rotation, particularly those found in Table 11. Crook/Jefferson and Union/Wallowa both gained providers in the 2025-27 contracts which led to unequal case distribution amongst them. OPDC has addressed the unequal case distribution issue with providers and the court and expects this to be resolved as the jurisdiction becomes more accustomed to the new provider structure. The Clackamas contract is a new sole provider and has been provided a pickup plan to bring them into compliance over the next six months. The expected results for all of these jurisdiction's assignment plans are to even out MAC utilization across contractors within those jurisdictions, ensuring all providers operate at 90-100 percent utilization.

**Table 11. Providers Below 90% Utilization with Pick Up Plan**

County	Provider	Type	MAC Utilization	Prorated MAC	Reported MAC	Misdos for 90%
Clackamas	Hupy Law	JC	43.95%	0.167	0.073	10.2
Crook/Jeff	22nd Circuit Defenders	AC	46.19%	1.170	0.540	153.9
Crook/Jeff	22nd Circuit Defenders	JC	77.28%	0.359	0.278	6.0
Klamath	Dougherty Law	AC	53.06%	0.137	0.073	15.1
Marion	Public Defender of Marion County	AC	5.75%	2.49	0.143	629.4
Polk	Jarvis Bridge Halttunen and Weyer	AC	69.23%	0.819	0.567	51.0
Union/Wallowa	LJ Legal Solutions	JC	0.00%	0.042	0.00	5.0
Yamhill	Scott A. Hodgess	AC	66.00%	0.167	0.11	12.1
Yamhill	Yamhill Defense Consortium	AC	67.05%	1.671	1.121	114.9

A unique situation in Table 11 is the Public Defender of Marion County. At the conclusion of the 2025-27 contract negotiation period, the Public Defender of Marion County filed a lawsuit against OPDC challenging terms within the 2025-27 contract template related to MAC. Following the issuance of a temporary injunction related to OPDC's ability to require contractors to meet MAC expectations when doing so would impact an attorney's ethical capacity, OPDC entered into a 2025-27 contract with Public Defender of Marion County on December 16, 2025. At the request of the Public Defender of Marion County, the contract was backdated to October 1, 2025, meaning MAC calculations for this entity include that period. As of the release of this report, a trial is scheduled for this matter in mid-February.

In the interim, OPDC is working with the Marion County Circuit Court and Public Defender of Marion County to ensure continuity of representation for eligible clients while maintaining compliance with the court’s order, existing ethical obligations, and OPDC’s contract requirements. OPDC’s analysts and data unit are developing a case-pickup plan to help the provider increase MAC utilization. OPDC continues to monitor appointments, caseload capacity, and service delivery in Marion County and will make any necessary adjustments consistent with the outcome of the pending litigation and applicable legal guidance.

## Enhanced Provider Capacity Pilot Program

For the 2025-27 contract cycle starting on October 1, 2025, OPDC revised its contract terms to facilitate the appointment and compensation of sufficiently experienced attorneys with the necessary ethical capacity to take cases exceeding current MAC limits, up to 115 percent, on a voluntary basis. When entering into the 2025-27 contracts, providers were asked to specify how far above standard MAC expectations they were willing to go, in 5 percent increments (to ensure MAC overages were within attorneys’ ethical abilities). As of the end of November 2025, there were 39 participants in this program for a forecasted total of 4.8 additional MAC throughout the contract period, which equates to 0.802 additional MAC between October and November.

**Table 12** provides a breakdown of the participants in October and November by their contracted (prorated) MAC amounts, which includes the enhanced capacity they are contracted for above 100 percent.

**Table 12. MAC Utilization of the Exceed Caseload Program Participants**

<b>ECP %</b>	<b>Prorated MAC</b>	<b>MAC Reported</b>	<b>MAC Utilization</b>
5%	0.334	0.347	103.9%
10%	2.930	3.294	112.4%
15%	3.912	3.998	102.2%
<b>Total</b>	<b>7.176</b>	<b>7.639</b>	<b>106.5%</b>

Currently, as shown in Table 12, the program is exceeding MAC targets, as the participants in this program have taken cases in excess of their prorated MAC. For context, program participants in this pilot have represented the equivalent of 379 misdemeanors in October and November above their traditional MAC requirements.

## Appendix. Utilization by Provider Type and County/Region

### Adult Trial Contractors

Contract County	Utilization	Reported		
		MAC Prorated	MAC	Capacity Remaining
7 <sup>th</sup> District	<b>67.31%</b>	<b>1.170</b>	<b>1.738</b>	<b>0.568</b>
Baker	72.91%	0.218	0.299	0.081
Benton	82.59%	1.168	1.414	0.246
Clackamas	99.17%	5.388	5.434	0.046
Clatsop	117.58%	1.264	1.075	-0.189
Columbia	80.50%	0.659	0.819	0.16
Coos/Curry	105.62%	1.784	1.689	-0.095
Crook/Jefferson	62.95%	0.994	1.579	0.585
Curry	69.30%	0.257	0.371	0.114
Deschutes	109.14%	4.256	3.899	-0.357
Douglas	94.15%	1.406	1.494	0.088
Grant/Harney	104.40%	0.178	0.17	-0.008
Jackson	103.79%	4.069	3.921	-0.148
Josephine	116.33%	1.442	1.24	-0.202
Klamath	122.10%	2.451	2.007	-0.444
Lake	51.38%	0.086	0.167	0.081
Lane	67.75%	3.46	5.106	1.646
Lincoln	101.16%	1.259	1.245	-0.014
Linn	95.00%	2.294	2.415	0.121
Malheur	94.83%	1.099	1.159	0.06
Marion	60.69%	3.71	6.113	2.403
Multnomah	100.82%	12.147	12.048	-0.099
Polk	129.33%	1.715	1.326	-0.389
Tillamook	66.97%	0.263	0.393	0.13
Umatilla/Marrow	111.65%	1.962	1.758	-0.204
Union/Wallowa	112.36%	0.809	0.720	-0.089
Washington	100.88%	7.168	7.106	-0.062
Yamhill	76.48%	1.566	2.047	0.481
Statewide/Multijurisdictional	118.94%	7.404	6.225	-1.179
<b>Total</b>	<b>95.69%</b>	<b>71.389</b>	<b>74.606</b>	<b>3.217</b>

## Juvenile Contractors

Contract County	Utilization	Reported MAC	Prorated MAC	Capacity Remaining
7th District	87.21%	0.35	0.401	0.051
Baker	119.28%	0.13	0.109	-0.021
Clackamas	131.71%	1.345	1.021	-0.324
Crook, Jefferson	91.55%	0.497	0.543	0.046
Curry	251.63%	0.307	0.122	-0.185
Deschutes	89.46%	1.035	1.156	0.121
Grant, Harney	52.14%	0.068	0.13	0.062
Jackson	84.21%	1.641	1.949	0.308
Josephine	66.67%	0.34	0.51	0.17
Klamath	122.69%	0.673	0.548	-0.125
Lane	62.89%	1.776	2.824	1.048
Malheur	95.34%	0.398	0.418	0.02
Marion	62.36%	1.487	2.385	0.898
Tillamook	132.05%	0.154	0.117	-0.037
Umatilla/Morrow	105.16%	0.632	0.601	-0.031
Union, Wallowa	40.66%	0.069	0.169	0.1
Washington	70.22%	1.266	1.802	0.536
Statewide/Multijurisdictional	54.35%	0.387	0.712	0.325
<b>Total</b>	<b>80.91%</b>	<b>12.555</b>	<b>15.517</b>	<b>2.962</b>

## Parent Child Representation Program

<b>Contract County</b>	<b>Utilization</b>	<b>Reported PCRPP Case Count</b>	<b>Expected PCRPP Case Count</b>	<b>Open Case Capacity</b>
Benton	99.31%	71.5	72.0	0.5
Coos	115.66%	365.5	316.0	-49.5
Douglas	90.54%	670.0	740.0	70.0
Lincoln	105.00%	336.0	320.0	-16.0
Linn	98.56%	615.0	624.0	9.0
Multnomah	98.12%	2,577.8	2,627.2	49.4
Polk	92.70%	330.0	356.0	26.0
Yamhill	103.20%	330.3	320.0	-10.3
Multijurisdictional	87.33%	813.3	931.2	117.9
<b>Total</b>	<b>96.87%</b>	<b>6,109.3</b>	<b>6,306.4</b>	<b>197.1</b>

\*PCRPP does not operate under a MAC model, but rather an open workload model of 80 open cases for a 1.0 FTE attorney. The percentage shown is the percent of workload used, with the expected number of open cases per month based on FTE being the denominator.

## Oregon Trial Division

<b>Trial Division Region</b>	<b>Utilization</b>	<b>Reported MAC</b>	<b>Prorated MAC</b>	<b>Capacity Remaining</b>
Central Valley Region	75.56%	1.558	2.147	0.589
Northwest Region	103.51%	3.051	2.948	-0.103
Southern Region	94.50%	2.328	2.463	0.135
*Trial Division MAC is measured from July 1, 2025 to December 31, 2025.				





# Habeas Performance Standards With Commentary

January 2026

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## INTRODUCTION

Oregon Revised Statute 151.216(1)(j) mandates that the Oregon Public Defense Commission (OPDC) “[d]evelop, adopt and oversee the implementation, enforcement and modification of policies, procedures, minimum standards, and guidelines to ensure that public defense providers are providing effective assistance of counsel consistently to all eligible persons in this state as required by statute and the Oregon and United States Constitutions. The policies, procedures, standards, and guidelines described in this paragraph apply to employees of the commission and to any person or entity that contracts with the commission to provide public defense services in this state.”

The following standards were developed by OPDC staff with input from a *habeas* provider workgroup. Per OPDC policy, these standards will be reviewed and revised one, two, and five years from adoption. OPDC welcomes ongoing provider input regarding the content and efficacy of these standards.

Each standard sets a baseline for practice of appointed defense work and is followed by commentary that supplements the baseline standards. OPDC recognizes that in any given case, some standards and commentary might be inapplicable or even mutually exclusive.

Commentary is particularly challenging as there are many times when the commentary is impractical or even against a client’s best interest or desire. OPDC acknowledges that to practice law, exceptions to these baseline rules and their commentary must apply. The commentary provides additional considerations for counsel performing public defense. There are times when items listed in the commentary may be useful or helpful during representation. They are not meant to establish baseline minimum performance standards.

OPDC is grateful to Oregon Public Defense Commission *Habeas* Standards Workgroup for the extensive work OPDC drew upon in the development process.

## **Standard 1.1 Role of Lawyer in *Habeas* Cases**

**The lawyer for a Plaintiff in a *habeas* case should provide quality and zealous representation at all stages of the case, advocating at all times for the client's expressed interests. The lawyer should be familiar with applicable statutes, caselaw, and local court practices, and should stay aware of changes and developments in the law. The lawyer shall abide by the Oregon Rules of Professional Conduct and applicable rules of court. The lawyer should understand difference between Postconviction Relief (PCR), Extradition, Direct Appeal, *habeas* (authority for confinement), and *habeas* (conditions of confinement).**

### **Commentary:**

1. *Habeas* lawyers must be aware of other available remedies to assure that they are exhausted prior to seeking *habeas*.
2. In abiding by the Oregon Rules of Professional Conduct, a lawyer should ensure that each client receives competent, conflict-free representation in which the lawyer keeps the client informed about the representation and promptly responds to reasonable requests for information.
3. A lawyer is bound by the client's definition of his or her best interests and should not substitute the lawyer's judgment for that of the client regarding the objectives of the representation.
4. A lawyer should provide candid advice to the client regarding the probable success and consequences of pursuing a particular position in the case and give the client the information necessary to make informed decisions. A lawyer should consult with the client regarding the assertion or waiver of any right or position of the client.
5. A lawyer should exercise reasonable professional judgment regarding technical and tactical decisions and consult with the client on the strategy to achieve the client's objectives.
6. A lawyer should exercise reasonable professional judgment regarding the need for expert witnesses in the case, be familiar with and able to

work with experts as defined in Standard 3.2 and should immediately and continually assess the need for experts starting at appointment.

7. A lawyer assigned to actively assist a pro se plaintiff should be fully prepared about the matter. The lawyer should be prepared to advise the plaintiff and the court if a full representation role should be transferred to the lawyer at some point during the proceedings.

## **STANDARD 1.2 EDUCATION TRAINING AND EXPERIENCE OF HABEAS COUNSEL**

- A. A lawyer must be familiar with the statutes, the applicable substantive and procedural law, and its application in the jurisdiction where counsel provides representation. A lawyer has a continuing obligation to stay abreast of changes and developments in the law and with changing best practices for providing quality representation in *habeas* cases.**
- B. Prior to handling a *habeas* matter, a lawyer must have sufficient experience or training to provide quality representation. Prior to accepting appointment in a *habeas* case, a lawyer must be certified for that case type by OPDC.**

### Commentary:

1. A lawyer should remain proficient in the law, court rules and practice applicable to *habeas* cases and, regularly monitor the decisions of Oregon Appellate Courts.
2. Lawyers should maintain membership in state and national organizations that focus on educating and training lawyers in *habeas* law. Lawyers should subscribe to professional listservs, if available, consult online resources, and attend continuing legal education programs relating to the practice of *habeas* law. A lawyer practicing *habeas* law should complete an average of at least 10 hours of continuing legal education training in civil procedure, civil rights, prisoner's rights, or related area each year. Lawyers practicing authority to confine *habeas* cases may supplement this requirement with criminal law CLEs specific to sentencing or extradition.

3. Before undertaking representation in a *habeas* case, a less experienced lawyer should obtain training in the relevant areas of practice and should consult with others in the field, including nonlawyers. Less experienced lawyers should observe or serve as co-counsel with more experienced lawyers prior to accepting lead counsel responsibility for *habeas* cases. More experienced lawyers should mentor less experienced lawyers.
4. A lawyer providing representation in *habeas* cases should be familiar with key agencies and services typically involved in those cases or should know how to familiarize themselves as needed for their cases, such as the Oregon Department of Corrections, the Oregon Youth Authority, local juvenile departments, local community corrections programs, and private medical or treatment facilities and programs.
5. A lawyer should stay informed of the practices of the specific judge before whom a client they are representing is appearing.
6. Lawyers representing youth in *habeas* cases must be educated on and understand the additional trauma that youth in the prison system go through and must be prepared to provide resources to their clients to help them cope with that trauma.

### **STANDARD 1.3 OBLIGATIONS OF HABEAS COUNSEL REGARDING WORKLOAD**

**Before seeking appointment to act as counsel or accepting appointment, a lawyer has an obligation to ensure that they have sufficient time, resources, knowledge, and experience to offer quality representation to a Plaintiff in a *habeas* matter without hampering their representation of existing clients. Lawyers should be cognizant of ORS 34.362, that petitions claiming deprivation of a constitutional right require “immediate judicial attention”, when evaluating their ability to accept representation in a case. If, after accepting representation, the lawyer is unable to offer quality representation in the case, the lawyer must move to withdraw.**

Commentary:

1. A lawyer should have access to sufficient support services and resources to allow for quality representation, including investigation resources (see Standard 3.1).
2. A lawyer should evaluate their ability to appear in court with clients when deciding whether to accept an appointment in a case. Lawyers should not overly rely on other lawyers to cover their appearances. A lawyer must appear personally for all critical stages of the case.
3. When possible, lawyers should appear in person or in the same manner as their clients.

## **STANDARD 2.1 OBLIGATIONS OF *HABEAS* COUNSEL AT APPOINTMENT**

**Lawyers are frequently appointed to *habeas* cases after the initial filings. As such, a lawyer must be familiar with the laws regarding amending petitions, the timelines for proceeding with a *habeas* case, and the available immediate remedies that can be sought. Lawyers should immediately begin gathering information needed for the Plaintiff's Replication. See *Standard 5.1*.**

### Commentary:

1. Initial petitions must contain a need for immediate judicial scrutiny and a lack of any other adequate and timely remedy. Lawyers should seek to amend pleadings/file the plaintiff's replication (see Standard 5.1).
2. Lawyers should be prepared to assist prospective clients with application for counsel as needed in the furtherance of justice.
3. A lawyer should promptly conduct client conflict checks and notify the appointing body of the need for substitution of counsel if it arises.
4. A lawyer should be familiar with the local practices including case docketing and processing, expected case events, the dates for

upcoming court appearances, and the ability to expedite the proceedings under ORS 34.362.

5. As soon as practicable after appointment the lawyer should arrange to have client sign releases to get needed information early in the case such as medical information in conditions of confinement cases.
  - a. For authority for confinement cases the lawyer should seek the following information:
    - i. The underlying criminal judgment;
    - ii. The Oregon Department of Corrections' (ODOC) sentencing calculations;
    - iii. Transcripts from the sentencing hearing.
  - b. For extradition cases the lawyer should seek the following information:
    - i. The Demand from the demanding state;
    - ii. The Governor's Warrant;
    - iii. Transcripts from the extradition hearing.
6. A lawyer should be prepared to preserve the client's rights and demand due process. A lawyer should make clear that the plaintiff reserves the following rights in the present matter and any other matter:
  - a. Statutory right to request counsel with the court's discretion whether to make appointment;
  - b. Right to decision on the motion to appoint counsel;
  - c. Right to an expedited evidentiary hearing/trial.
7. Within one day of appointment the lawyer should file motions to disqualify judges as needed. There are varied practices regarding what constitutes a substantive pleadings and lawyers need to act immediately to disqualify any judge they believe cannot act fairly and impartially at trial or hearing in the case.

## **STANDARD 2.2 CLIENT CONTACT AND COMMUNICATION**

**A lawyer should always use clear communications, in developmentally appropriate language, and using an interpreter, as needed. A lawyer must conduct a client interview as soon as practicable after appointment but**



**no longer than seven days after appointment. Thereafter, a lawyer must establish a procedure to maintain regular contact with the client in order to explain the nature of the proceedings, meet the ongoing needs of the client, obtain necessary information from the client, consult with the client about decisions affecting the course of the litigation, conduct a conflict check, and respond to requests from the client for information or assistance concerning the case.**

Commentary:

1. A lawyer should provide a clear explanation of the role of both the client and the lawyer and demonstrate appropriate commitment to the client's expressed interests in the outcome of the proceedings. A lawyer should elicit the client's point of view and encourage the client's full participation in the litigation of the case.
2. Client communication should be in a private setting that allows for a confidential conversation. If a client requests in person contact, counsel should make reasonable efforts to accommodate that request. Counsel should meet in person as needed to prepare the client for testimony/trial.
3. At the initial meeting, the lawyer should review the initial petition filed by the client and be prepared to discuss the necessary elements of *habeas*, the procedure the client will be facing in subsequent court appearances, possible remedies if the client prevails, and should inquire if the client has any immediate needs regarding securing evidence or obtaining interim relief.
4. At the initial meeting the lawyer should discuss the need for releases of information (ROI) and assure the client signs and returns them.
5. A lawyer must advise the client of the consequences of prevailing on the *habeas* as well as the consequences of not prevailing.
6. A lawyer should use any contact with the client as an opportunity to gather timely information relevant to preparation of the case. Such information may include, but is not limited to:
  - a. The facts surrounding the client's petition or case;

- b. Any possible witnesses who should be located;
  - c. Any evidence that should be preserved, specifically including video recordings that might be overwritten;
  - d. Where appropriate, evidence of the client's competence.
7. During an initial interview with the client, a lawyer should.
- a. Obtain information concerning the following as applicable to the type of case:
    - i. The client's history within the institution including how long they have been incarcerated at a particular institution, family history of health conditions including mental health conditions, client's disciplinary history;
    - ii. The client's history of service in the military, if any;
    - iii. The client's current and historical physical and mental health concerns;
    - iv. Where to locate necessary records;
    - v. Prior incarcerations, current place of incarceration, and place of incarceration at the time of filing;
    - vi. The client's immediate medical needs, if any;
    - vii. The client's expected release date, length of time in custody, eligibility for early release;
    - viii. Contact information for clients, their family, or other resources where the client can be contacted in the event they are released from custody.
    - ix. The names of individuals, or other sources, that counsel can contact to verify the information provided by the client or who could provide other background information and the client's permission to contact these individuals;
    - x. For extradition cases, the lawyer should consider asking their client for information regarding:
      - A. Challenges to identity;
      - B. Challenges to fugitive status;
      - C. The client's presence or lack thereof in the demanding state at the time of the alleged incident.
  - b. Provide to the client information and advice including but not limited to:
    - i. An explanation of the lawyer-client privilege and instructions not

- to talk to anyone about the facts of the case without first consulting with the lawyer;
  - ii. A warning to keep confidential communication between themselves and the lawyer/lawyer's staff. Everything they say may become part of their case;
  - iii. The petition and any potential ramifications of its filing;
  - iv. The ability to amend the initial petition;
  - v. A general procedural overview of the progression of the case, where possible;
  - vi. That communication with people other than the lawyer's team is not privileged and may be monitored;
  - vii. That all calls and video visits not using the attorney phone are recorded and not confidential and emails are never confidential;
  - viii. That the client should make and keep written records of communication with the institution through filing kites regarding:
    - A. Sentence calculations in authority for confinement cases;
    - B. In conditions of confinement cases, any condition relevant to the case -such as medical care requested, received, or denied, air quality, access to services, etc.- encountered while incarcerated.
8. Frequency and Manner of Client Contact
- a. Following their initial contact with the client, lawyers should speak with their clients no less than once per month to obtain information and update the clients on the status of their case.
    - i. All calls should use the attorney line;
    - ii. If feasible, at least once during the pendency of the case the lawyer should meet the client in person;
    - iii. Lawyers should meet with their client in person as needed throughout the case;
    - iv. Letters are not a substitute for client contact.
  - b. Lawyers should continue having contact with their clients as required throughout the case and following the cases' resolution according to Standards 8.2, 9.1, and 9.2.

## **STANDARD 2.3 WORKING WITH CLIENTS WHO HAVE DIMINISHED CAPACITY**

**A lawyer must be able to recognize the symptoms of clients with diminished capacity and should follow the Oregon Rules of Professional Conduct, Rule 1.14, when representing those clients. Lawyers should act to preserve all their client's rights and should seek expert assistance as needed. In extreme cases lawyers should consider seeking the appointment of a Guardian Ad Litem or Conservator as needed to fully protect the client's rights. Lawyers representing clients with diminished capacity should continue to seek the lawful objectives of their client and not substitute their judgment for that of their client.**

### **Commentary:**

1. A lawyer should assess whether the client's level of functioning limits his or her ability to communicate effectively with counsel, as well as his or her ability to have a factual and rational understanding of the proceedings.
2. In deciding whether to request a competency determination, a lawyer must consider, among other things:
  - a. Their obligations, under Oregon Rule of Professional Conduct 1.14, to maintain a normal attorney-client relationship, to the extent possible, with a client with diminished capacity; and
  - b. The likely consequences of a finding of incompetence and whether there are other ways to resolve the case, such as dismissal upon obtaining services for the client or referral to other agencies.
3. If the lawyer decides to proceed with a competency hearing, he or she should secure the services of a qualified expert.
4. A lawyer should continue to evaluate a client's fitness throughout the case and should take appropriate action if a client's mental health deteriorates.

## **STANDARD 3.1 INVESTIGATION**

**A lawyer has the duty to conduct an independent review of the case, regardless of the client's admissions or statements to the lawyer. Where appropriate, the lawyer should engage in a full investigation, which**

**should be conducted as promptly as possible and should include all information, research, and discovery necessary to assess the strengths and weaknesses of the case, to prepare the case for hearing, and to best advise the client as to the possible outcomes of the case. A lawyer has a duty to be familiar with the process to request funding for an investigator from OPDC if they do not have access to an in-house investigator. The lawyer should not knowingly use illegal means to obtain evidence or instruct others to do so.**

Commentary:

1. Retain investigator as soon as possible after appointment in conditions of confinement cases. In authority to confine and extradition cases a lawyer should retain an investigator as soon as possible if the lawyer determines an investigator is needed.
2. A lawyer should obtain copies of the petition, order to show cause, defendant's response, and writ and should examine them to determine the specific issues that the client raised and the elements of each.
3. A lawyer should conduct an in-depth interview with the client as described in Standard 2.2.
4. A lawyer should carefully review all documents received as part of their investigation or discovery and should assess their value to the client. Lawyers should create a system for organizing or cataloging documents and note taking at the beginning of their case to facilitate document review throughout the case.
5. A lawyer should consider whether to interview potential witnesses, whether adverse, neutral, or favorable, and when new evidence is revealed during witness interviews, the lawyer should locate and assess its value to the client. Witness interviews should be conducted by an investigator or in the presence of a third person who will be available, if necessary, to testify as a plaintiff's witness at the trial. When speaking

with third parties, the lawyer has a duty to comply with the Oregon Rules of Professional Conduct, including Rule 3.4 (Fairness to Opposing Party and Counsel), 4.1 (Truthfulness in Statements to Others), 4.2 (Communication with Person Represented by Counsel), and 4.3 (Dealing with Unrepresented Persons).

6. A lawyer should obtain all relevant prior records of the client and witnesses, including criminal, juvenile, disciplinary, education, mental health, medical, and drug and alcohol use or treatment, where appropriate.
7. A lawyer should always consider whether to reduce investigation to writing and should instruct their investigators to only do so after consultation with the lawyer.
8. A lawyer may not intentionally destroy evidence in a case and must comply with all statutes governing discovery to the defense.

### **STANDARD 3.2 EXPERTS**

**A lawyer should immediately and continually evaluate the need for experts in the case and should obtain any necessary expert for either consultation or testimony or both. A lawyer must be aware of available types of experts that may be needed to properly litigate their case. A lawyer has a duty to be familiar with the process to request funding for experts from OPDC.**

#### **Commentary:**

1. Experts will be used more often in conditions of confinement cases and practitioners should utilize experts in most of their conditions of confinement cases. Lawyers in authority for confinement and extradition cases may not need to employ experts, but practitioners in those cases should be aware of the rules for experts.
2. Lawyers should not overly rely on their own knowledge of a given subject and should use experts to offer consultation on viability of claims as early

in the case as possible and to offer testimony as needed to prove their case.

3. Lawyers should consider using engagement letters for any expert used on their case which clearly outline the lawyer's expectations of the expert, privilege rules, and an understanding of the expert's duty of confidentiality.
4. A lawyer should be aware of the appeals process in the event that OPDC denies funding the lawyer believes is reasonably required for the case.
5. A lawyer should be aware of how to seek needed experts if the lawyer does not have one readily available. A lawyer should be familiar with the process of obtaining lists of experts in a given field from OPDC.
6. Lawyers should independently evaluate the quality of an expert prior to engagement and should consider any evidence that would be available to the defense to impeach that expert. Lawyers should review this evaluation regularly, even with often used experts.
7. A lawyer should understand the difference between an expert used to advise the Plaintiff's team and an expert used to testify and how to assure that an advisory expert does not unintentionally shift to a testimonial expert requiring disclosure to the defense.
8. A lawyer may choose whether to disclose the identity of experts pre-trial and should, prior to disclosure, consider whether maintaining the expert's anonymity is advantageous. Lawyers may use anonymous declarations where appropriate to maintain anonymity of experts. See *Stevens v. Czerniak*, 336 OR 392, 403-404 (2004).
9. A lawyer should adequately prepare all trial experts for testimony, including likely questions on cross-examination.

## **STANDARD 4.1 DISCOVERY**

**A lawyer has the duty to pursue formal and informal discovery in a prompt fashion upon appointment and to continue to pursue opportunities for discovery throughout the case. A lawyer must be familiar with all applicable statutes, rules, and case law governing discovery including those concerning the processes for filing motions to compel discovery or to preserve evidence, as well as those making sanctions available when the defense has engaged in discovery violations.**

Commentary:

1. Lawyers should assure that the Defendant has been served with the petition or order to show cause prior to filing discovery demands in accordance with Oregon Rules of Civil Procedure (ORCP) 43(B)(1).
2. A lawyer should make a prompt and comprehensive demand for discovery pursuant to applicable rules and constitutional provisions as soon as possible following appointment. The lawyer should continually seek all information to which the client is entitled. Requests should specify the timeframe and type of records sought.

In Conditions of Confinement cases discovery should include, but is not limited to, the following:

- a. All ODOC documents regarding the client's medical and mental health care while under the jurisdiction of the ODOC;
  - b. All ODOC documents regarding discipline and/or complaints while under the jurisdiction of ODOC;
  - c. All kytes or grievances from the client to the ODOC and responses to client's kytes.
  - d. Names and addresses of defense witnesses.
  - e. Prison Rape Elimination Act (PREA) records or records related to PREA requests including Special Investigation Unit (SIU) files.
  - f. Client's DOC400 file (the plaintiff's electronic prison record from DOC)
3. The lawyer should follow up on all discovery or requests for production regularly to assure that they have all the needed information.
  4. Lawyers should follow all scheduling orders issued by the court and should consider actively proposing favorable timelines for discovery.



5. A lawyer should be familiar with and observe the applicable statutes, rules and case law governing the obligation of the plaintiff to provide discovery. A lawyer should file motions for protective orders or otherwise resist discovery where a basis exists to shield information in the possession of the plaintiff from disclosure.
6. A lawyer should be familiar with the applicable remedies for defense failing to provide discovery and should pursue the applicable remedies in their cases. A lawyer should file motions to compel in order to secure defendant's compliance with the discovery rules and motions to exclude if the defense fails to provide discovery according to their obligation.
7. A lawyer should take appropriate actions seeking to preserve evidence where it is at risk of being destroyed or altered.
8. Lawyers should not rely on discovery to provide all information in the case and should not assume that defense lawyers are compliant with discovery obligations unless the lawyer has verified the compliance.

#### **STANDARD 4.2 THEORY OF THE CLAIMS FOR RELIEF**

**A lawyer should develop and continually reassess a theory of the client's claims for relief that advances the client's goals and encompasses the realities of the client's situation.**

##### Commentary:

1. A lawyer should use the theory of the claims for relief when evaluating strategic choices throughout the course of the representation.
2. A lawyer should be able to concisely explain the theory of the claims for relief to a lay person.
3. A lawyer should allow the theory of the claims for relief to focus the investigation and trial or hearing preparation, seeking out and developing facts and evidence that the theory makes material.

4. A lawyer should expect the claims to change as the case progresses and the plaintiff's team receives new information. Lawyers should remain flexible enough to modify or abandon claims or theories if they no longer serve the client.

## **STANDARD 5.1 PLAINTIFF'S REPLICATION**

**To draft the replication a lawyer should review the plaintiff's initial *pro se* filing. Once the lawyer has thoroughly interviewed the plaintiff, had sufficient discovery, and had sufficient time for experts to review the claims in the *pro se* filings, the lawyer should file a Replication that clearly gives notice of the client's claims for relief.**

### Commentary:

1. Claims for relief may change after the Replication is filed. If the claims change the lawyer should promptly seek to amend the Replication.
2. Lawyers should adhere to all court timelines for filing the Replication and should not miss filing deadlines.
3. Lawyers should be aware of the preferences of the court and the applicable laws for the citation of law in the Replication and should comply with those standards.

## **STANDARD 5.2 PRE-HEARING MOTIONS**

**A lawyer should research, prepare, file, and argue appropriate pretrial motions whenever there is reason to believe they would benefit their client. A lawyer must be knowledgeable of all motion deadlines that may apply to their case. Lawyers may not miss filing deadlines.**

### Commentary:

1. A lawyer should respond to Defendant's Motion to Dismiss within the statutory timeframe. In *habeas* cases, motions to dismiss are the equivalent to motions for summary judgment, though the standards are different in some ways. Lawyers should know the rules of summary judgment as well as the rules for responding to motions to dismiss. Lawyers should demonstrate facts in controversy necessary to win a motion to dismiss.

2. The decision to file a particular pretrial motion should be made by the lawyer after thorough investigation, discussion with their client, and considering the applicable law in light of the circumstances of the case.
3. Among the issues the lawyer should consider addressing in pretrial motions are:
  - a. Motions for Summary Judgment;
  - b. The removal of a judicial officer from the case through requests for recusal or the filing of an affidavit of prejudice if filed within 24 hours of the judicial officer receiving the case;
  - c. The discovery obligations of both the plaintiff and the defense, including:
    - i. Motions for protective orders;
    - ii. Motions to compel discovery;
    - iii. Motions to exclude for violation of discovery rules;
    - iv. Motions for access to records of other Adults in Custody which may be requested for 'Attorney Eye's Only' Protective Order to access unredacted records.
  - d. Requests for, and challenges to denial of, funding for access to reasonable and necessary resources and experts;
  - e. The plaintiff's right to an expedited hearing;
  - f. The right to a continuance in order to adequately prepare and present the plaintiff's case or to respond to defense motions;
  - g. Motion for extension of time for pleadings
  - h. Matters of trial evidence that may be appropriately litigated by means of a pretrial motion in limine, including:
    - i. The relevance of evidence that is expected to be presented by or objected to by the defense;
    - ii. The admissibility of particular witnesses, including experts, lawyers may also litigate this issue during trial; and
    - iii. The use of reputation or other character evidence;
4. Before deciding not to file a motion or to withdraw a motion already filed, a lawyer should consult with their client and carefully consider all facts in the case, applicable law, case strategy, and other relevant information.

### **STANDARD 5.3 OBLIGATION TO RENEW MOTIONS**

**During trial or subsequent proceedings, a lawyer should be prepared to raise any issue which is appropriately raised pretrial but could not have been so raised because the facts supporting the motion were unknown or not reasonably available. Counsel should also be prepared to renew a pretrial motion if new supporting information is disclosed in later proceedings.**

Commentary:

None

### **STANDARD 6.1 EXPLORATION OF SETTLEMENT**

**A lawyer has the duty to explore with the client the possibility, advisability, and consequences of reaching a negotiated disposition of the client's case. A lawyer has the duty to be familiar with the laws, local practices, and consequences concerning dispositions without trial. A lawyer cannot accept any negotiated settlement without the client's express authorization.**

Commentary:

1. A lawyer should explain to the client the strengths and weaknesses of the defense's case, the timeframes for addressing the client's claims through settlement and through trial, the benefits and consequences of considering a non-trial disposition, any investigation which has been or could be conducted, and discuss with the client any options that may be available to the client and the rights the client gives up by pursuing a non-trial disposition.
2. A lawyer should assist the client in weighing whether there are strategic advantages to be gained by settlement or continuing to trial including the impact of settlements on future claims for damages.
3. With the consent of the client, a lawyer should explore with the defense available options to resolve the case without trial. Throughout negotiation, a lawyer must zealously advocate for the expressed interests of the client, including advocating for some benefit for the client in exchange for settlement.

4. A lawyer must keep the client fully informed of continued negotiations and convey to the client any offers made by the defendant. The lawyer must attempt to ensure that the client has adequate time to consider the settlement. A lawyer should advise clients about their opinion of any settlement offers but may not substitute their judgment for that of their client.
5. A lawyer should continue to take steps necessary to preserve the client's rights and advance the client's case even while engaging in settlement negotiations.
6. Before conducting negotiations, a lawyer should be familiar with:
  - a. The types, advantages, disadvantages, enforceability and applicable procedures and requirements of available settlements;
  - b. Whether agreements between the client and the defendant would be binding on the court, the parties, or other interested people or organizations; and
  - c. The practices and policies of the particular defending authorities and judge that may affect the content and likely results of any negotiated settlement.
7. A lawyer should identify negotiation goals with the following in mind:
  - a. Concessions that the client might offer to the defense, including an agreement;
  - b. Benefits to the client from making an agreement with the defense.
8. A lawyer has the duty to inform the client of the full content of any tentative negotiated settlement or non-trial disposition, and to explain to the client the advantages, disadvantages, and potential consequences of the settlement or disposition.
9. A lawyer should not recommend that the client enter a settlement unless an appropriate investigation and evaluation of the case has taken place, including an analysis of controlling law and the evidence likely to be introduced if the case were to go forward.

## **STANDARD 6.2 ENTRY OF SETTLEMENT**

**The decision to enter into a settlement agreement rests solely with the client. A lawyer must not unduly influence the decision to enter a settlement and must ensure that when a client enters a settlement they do so voluntarily. Counsel must ensure the client has an intelligent understanding of the terms, conditions, and consequences of the settlement, including what rights the clients will forfeit.**

Commentary:

1. A lawyer has the duty to be familiar with local detention practices as well as statewide detention practices such as time served calculations, work release, alternatives to incarceration, etc.
2. A lawyer has the duty to explain to the client the process that the client will go through to enter a settlement and the role that the client will play in the process. The lawyer should explain to the client that the court may in some cases reject the settlement.

## **STANDARD 7.1 GENERAL TRIAL PREPARATION**

- A. A trial is a complex event requiring preparation, knowledge of applicable law and procedure, and skill. A plaintiff's lawyer must be prepared on the law and facts and competently plan the litigation of the client's case.**
- B. A lawyer should develop, in consultation with the client and members of the litigation team, an overall strategy for the conduct of the trial.**
- C. A lawyer must, in advance of trial, subpoena necessary witnesses, and develop outlines or plans for opening, closing, and anticipated direct and cross examinations.**
- D. A lawyer should file a trial memorandum outlining the plaintiff's case including the expected witness testimony and arguments in their favor. Trial memorandums need not disclose the testimony of experts unless doing so would be advantageous. If lawyers chose not to disclose their experts pre-trial, they should be prepared to cite *Stevens vs. Czerniak*, 336 OR 392, 403-404 (2004). Lawyers should file trial memorandums in a timely manner according to the court's scheduling order.**

### Commentary:

- 1. A lawyer should consider how much time the case will require for trial and make scheduling requests accordingly.
- 2. A lawyer should be aware of the court's available time for hearings and that if a longer than average hearing duration is requested it may delay the hearing.
- 3. A lawyer should assure that any witnesses provide declarations to the lawyer far enough in advance of trial.
- 4. A lawyer should ordinarily have the following materials available for use at trial:
  - a. Copies of all relevant documents filed in the case;
  - b. Relevant documents prepared by investigators;
  - c. Outline or draft of opening statement;
  - d. Direct examination plans for all prospective plaintiff's witnesses;
  - e. Cross-examination plans for all possible defense witnesses;
  - f. Copies of plaintiff's subpoenas;

- g. Prior statements of all witnesses (e.g., transcripts, reports, etc.);
  - h. Reports from experts;
  - i. The CVs of any experts expected to testify at trial;
  - j. Training and other available records for any professional witnesses who are expected to testify;
  - k. A list of all exhibits and the witnesses through whom they will be introduced;
  - l. Originals and copies of all documentary exhibits;
  - m. Proposed bench instructions with supporting authority;
  - n. Copies of all relevant statutes and cases;
  - o. Evidence codes and relevant statutes and/or compilations of evidence rules most likely to be relevant to the case;
  - p. Outline or draft of closing argument; and
  - q. Trial memoranda outlining any complex legal issues or factual problems the court may need to decide during the trial.
5. Lawyers should have these documents prepared for use in a digital format and should be prepared to use the share screen function of a virtual hearing as needed for presentation of evidence.
6. A lawyer should be fully informed as to the rules of evidence, the law relating to all stages of the trial process and be familiar with legal and evidentiary issues that can reasonably be anticipated to arise in the trial. The lawyer should analyze potential defense evidence for admissibility problems and develop strategies for challenging evidence. The lawyer should be prepared to address objections to plaintiff's evidence or testimony. The lawyer should consider requesting that non-expert witnesses be excluded from the trial.
7. A lawyer should decide if it is beneficial to secure an advance ruling on issues likely to arise at trial and, where appropriate, the lawyer should prepare motions and memoranda for such advance rulings in accordance with Standard 5.2.
8. If the ability of the lawyer to provide live witness testimony is challenged the lawyer should file motions to allow live testimony, cross examination, and rebuttal testimony according to the applicable statutes allowing such.



9. A lawyer should consider the advantages and disadvantages of entering pre-trial stipulations concerning evidence. Lawyers should only enter stipulations to evidence in circumstances where there are clear benefits to the client.
10. Throughout the trial process, a lawyer should endeavor to establish a proper record for appellate review. As part of this effort, a lawyer should request, whenever necessary, that all trial proceedings be recorded.
11. A lawyer should plan with the client the most convenient system for conferring privately throughout the trial. Where necessary, a lawyer should seek a court order to have the client available for conferences. A lawyer should, where necessary, secure the services of a competent interpreter/translator for the client during all trial proceedings.
12. As soon as practicable after appointment, a lawyer should consider whether the assistance of a co-counsel, associate counsel, or second chair would be beneficial to the client and, if so, attempt to obtain approval for the same as soon as possible.

## **STANDARD 7.2 OPENING STATEMENTS**

**An opening statement is a lawyer's first opportunity to present their case. The lawyer should be prepared to present a coherent statement of the plaintiff's theory based on evidence likely to be admitted at trial.**

### **Commentary:**

1. A lawyer's objective in making an opening statement should include the following:
  - a. Provide an overview of the plaintiff's case, emphasizing the plaintiff's theme and theory of the case;
  - b. Identify the weaknesses of the defense's case;
  - c. Discuss the plaintiff's burden of proof and how it is met;
  - d. Summarize the testimony of witnesses and the role of each witness in relationship to the entire case;
  - e. Describe the exhibits which will be introduced and the role of each exhibit in relationship to the entire case;

- f. State the ultimate inferences which the lawyer wishes the court to draw; and
  - g. Humanize the client.
- 2. A lawyer should listen attentively during the defense's opening statement to note potential promises made by the defense that could be used in summation.
- 3. A lawyer should give an opening statement unless not doing so would allow more time for the presentation of the case, the issues were well briefed in the trial memorandum, and the judge read the trial memorandum.

### **STANDARD 7.3 PRESENTING THE PLAINTIFF'S CASE**

**A lawyer should present evidence at trial which will advance the theory of the case that best serves the interest of the client, meets the requirements of proof for the claim, satisfies the plaintiff's burden of proof, and is convincing to the trier of fact.**

#### Commentary:

- 1. A lawyer should be aware of the elements required to prove their claims and of the burden of production.
- 2. A lawyer should develop, in consultation with the client and plaintiff's team, an overall strategy for the case.
- 3. In preparing for presentation of a plaintiff's case, a lawyer should:
  - a. Develop a plan for direct examination of each potential plaintiff's witness and assure each witness's attendance by subpoena;
  - b. Determine the implications that the order of witnesses may have on the case; and
  - c. Consider the best use and order of expert witnesses.
- 4. A lawyer should offer expert testimony through live presentation of the expert witness and should not rely on written declarations to the exclusion of live testimony.

5. A lawyer should carefully advise their client on whether to offer testimony in their own case. The decision to testify rests with the client. Clients may rely on a declaration in proving their case.
6. A lawyer should prepare all witnesses for direct and possible cross-examination. Where appropriate, a lawyer should also advise witnesses of suitable courtroom dress and demeanor.
7. In developing and presenting the plaintiff's case, a lawyer should consider the potential cross examination topics of the defense lawyer.
8. A lawyer should conduct redirect examination as appropriate.

#### **STANDARD 7.4 CONFRONTING THE RESPONDENT'S CASE**

**The lawyer should rely on the theme and theory of the case to direct the confrontation of the respondent's case. Whether it is refuting, discrediting, or diminishing the respondent's case, the theme and theory should determine the lawyer's course of trial.**

##### Commentary:

1. In preparing for cross-examination, a lawyer should be familiar with the applicable law and procedures concerning cross-examination and impeachment of witnesses. A lawyer should be prepared to question witnesses regarding prior statements which they may have made or adopted, documents subject to disclosure, and to develop further material for impeachment beyond what was found during pre-trial investigation.
2. As needed, but particularly in conditions of confinement cases, lawyers should review the licensing for medical staff or other witnesses with professional licenses. Lawyers should review previous publications of witnesses and request all disciplinary actions involving the witnesses

from their licensing boards. Some licensing information may only be available if specifically requested from the licensing board.

3. Lawyers should fully question Defense witnesses qualifications to act as experts and the truth of the declaration or affidavit prepared on their behalf by defendant's counsel.
4. Lawyers should thoroughly prepare for cross examination of all the defense's witnesses, in preparation for cross examination lawyers should consider:
  - a. The need for factual development;
  - b. The need to meet the plaintiff's burden;
  - c. The need to discredit the defense witnesses.
5. In preparing for cross-examination, a lawyer should:
  - a. Consider the need to integrate cross-examination, the theory of the plaintiff, and closing argument into questions for cross examination;
  - b. Anticipate those witnesses the defense might call in its case-in-chief or in rebuttal;
  - c. Consider whether cross-examination of each individual witness is likely to generate helpful information;
  - d. Consider an impeachment plan for any witnesses who may be impeachable including needed exhibits or transcripts;
  - e. Be alert to inconsistencies in a witness' testimony;
  - f. Be alert to variations in witness testimony;
  - g. Review all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses;
  - h. If available, review investigation reports of interviews, depositions, and other information developed about the witnesses;
  - i. Review relevant statutes, procedural manuals, and regulations for possible use in cross-examining professional witnesses;
  - j. Be alert to issues relating to witness credibility, including bias and motive for testifying;
  - k. Be prepared with all necessary impeachment documents, including having properly certified and authenticated documents in accordance with evidentiary rules;
  - l. Be mindful of ways that certain topics could "open the door" to information that might otherwise be excluded;
  - m. Avoid asking questions that do not advance a plaintiff's theory, that allow the witness to provide unhelpful explanations, or questions that the lawyer does not know the answer to.

- n. Whenever possible, ask closed ended leading questions.
  - o. Lawyers should seek out other sources of information on cross examination as needed to fully prepare.
6. A lawyer should be aware of the applicable law concerning admission of expert testimony and raise appropriate objections.
  7. Before beginning cross-examination, a lawyer should ascertain whether the discovery rules have been complied with. If not, the lawyer should request, at a minimum, adequate time to review these documents before commencing cross-examination.

## **STANDARD 7.5 CLOSING ARGUMENTS**

**A lawyer should be prepared to deliver a closing summation that presents the trier of fact with compelling reasons to render a judgment for the client. Lawyers should also use their closing arguments to assure that the court does not consider irrelevant or immaterial information harmful to the client in determining the case's outcome.**

### Commentary:

1. A lawyer should be familiar with the substantive limits on both plaintiff's and defense's summation.
2. Lawyers should be prepared to file supplemental briefing or a closing memorandum if it would benefit the client and the court permits.
3. Counsel should provide remedies sought under Standard 8.1 in their closing arguments.
4. A lawyer should prepare the outlines of the closing argument prior to the trial and refine the argument throughout trial by reviewing the proceedings to determine what aspects can be used in support of plaintiff's summation and, where appropriate, should consider:
  - a. Highlighting witness testimony that supports plaintiff's theory of the case.
  - b. Highlighting weaknesses in the defendant's case;
  - c. Demonstrating how favorable inferences may be drawn from the evidence; and

- d. Incorporating into the argument:
  - i. Helpful testimony from direct and cross-examinations;
  - ii. The standards of review for *habeas*; and
  - iii. Responses to anticipated defense arguments.
- 5. Whenever the defense lawyer exceeds the scope of permissible argument, the lawyer should object, request a mistrial, or seek cautionary instructions unless tactical considerations suggest otherwise.

### **STANDARD 8.1 OBLIGATION OF *HABEAS* COUNSEL CONCERNING DISPOSITION**

**A lawyer must work with the client and plaintiff's team to develop a theory of disposition or disposition plan that is consistent with the client's desired outcome. The lawyer must present this plan in court and zealously advocate on behalf of the client for such an outcome. Lawyers should review the accuracy of any judgments of the court and move the court to correct any errors.**

#### Commentary:

None

### **STANDARD 8.2 ONGOING COMPLIANCE MONITORING**

**A lawyer must stay in regular contact with the client following successful disposition of the case in order to monitor defendant's compliance with the judgment. Lawyers must be prepared to resume litigation in the event of breaches. A lawyer's monitoring should continue as long as there is cause.**

#### Commentary:

1. If defendant is non-compliant lawyers should prepare and file a motion for finding of non-compliance or contempt and should request remedies or sanctions including plaintiff's release.
2. Lawyers may request attorney fees when the defendant is non-compliant.

3. Lawyers should be familiar with post release remedies that their clients may have. This is an emerging field of law, See *White v. Reyes*, 335 Or App 124 (2024). See also *Fox v. Peters*, District Court of Oregon Case No 6:16-cv-01602-MC, 2016 WL 4265736. (D. Or. Aug. 11, 2016).

## **STANDARD 9.1 PRESERVATION OF ISSUES FOR APPELLATE REVIEW**

**A lawyer should be familiar with the requirements for preserving issues for appellate review.**

### Commentary:

1. A lawyer should know the requirements for preserving issues for review on appeal and other options to challenge lower court rulings.
2. A lawyer should review with the client those issues that have been preserved for appellate review and the prospects for a successful appeal.

## **STANDARD 9.2 UNDERTAKING AN APPEAL**

**A lawyer must be knowledgeable about the various types of appellate relief and their application to the client's case and should impart that information to the client. Throughout the trial proceedings, but especially upon disposition not favorable to the client, a lawyer should discuss with the client the various forms of appellate review and how they might benefit the client. Notices of appeals must be filed within 30 days of the date of the final judgment. Lawyers may not miss appellate deadlines. When requested by the client, a lawyer should ensure that a notice of appeal is filed, and that the client receives information about obtaining appellate counsel.**

### Commentary:

1. Lawyers are responsible for knowing the procedure for securing appellate counsel through OPDC. Lawyers may refer a case for appeal prior to the judgment being issued.

2. If the client chooses to pursue an appeal, a lawyer should take appropriate steps to preserve the client's rights, including requesting reconsideration, moving for a new trial, moving for a judgment notwithstanding the verdict, and referring the case to an appellate lawyer through OPDC. Lawyers are responsible for knowing the impact of each of these actions on the timeline for filing the appeal and should work with appellate counsel to assure that no deadlines are missed.
3. When the client pursues an appeal, a lawyer should cooperate in providing information to the appellate lawyer concerning the proceedings in the trial court. A trial lawyer must provide the appellate lawyer with all records from the trial case, the court's final judgment and any other relevant or requested information.
4. If the defendant appeals a judgment granting relief, lawyers should be prepared to cooperate with appellate counsel in litigating defense requests to stay the judgment pending appeal.





# Post-Conviction Relief Attorney Performance Standards with Commentary

January 2026

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## INTRODUCTION

Oregon Revised Statute 151.216(1)(j) mandates that the Oregon Public Defense Commission (OPDC) “[d]evelop, adopt and oversee the implementation, enforcement and modification of policies, procedures, minimum standards, and guidelines to ensure that public defense providers are providing effective assistance of counsel consistently to all eligible persons in this state as required by statute and the Oregon and United States Constitutions. The policies, procedures, standards, and guidelines described in this paragraph apply to employees of the commission and to any person or entity that contracts with the commission to provide public defense services in this state.”

The following standards were developed by OPDC staff with input from a post-conviction relief (PCR) provider workgroup. Per OPDC policy, these standards will be reviewed and revised one, two, and five years from adoption. OPDC welcomes ongoing provider input regarding the content and efficacy of these standards.

This iteration of the Standards was drawn heavily from the existing Oregon State Bar Post-conviction Relief Performance Standards. OPDC has adopted those standards to make them specific to public defense PCR casework and has added language that reflects evolving standards of practice. Each standard sets a baseline for practice of appointed post-conviction work and is followed by best practices that supplement the baseline standards. Best practices are aspirational. OPDC recognizes that in any given case, some standards might be inapplicable or even mutually exclusive; OPDC acknowledges that to practice law, exceptions to these baseline rules must apply in certain situations.

OPDC is grateful to the prior work of the Oregon State Bar and to the Oregon Public Defense Commission PCR Standards Workgroup for the extensive work OPDC drew upon in the development process.

## **Standard 1.1 – General Expectations of Post-Conviction Counsel**

**Counsel should not undertake representation in a post-conviction relief proceeding unless counsel fully understands the requirements of a collateral challenge to a criminal conviction, and how that differs from a record-based direct appeal of a criminal conviction.**

### Commentary:

1. Counsel should treat a post-conviction relief proceeding as both the first and last meaningful opportunity to present evidence not contained in the trial record on a variety of constitutional violations that may have taken place in the underlying criminal case, including but not limited to: claims involving the competence of the defendant; police and prosecutorial misconduct; judicial misconduct; faulty eyewitness evidence; unreliable informant testimony; coerced confessions; flawed forensic methods; juror misconduct; juror qualifications; ineffective and inadequate assistance of trial and appellate counsel; and whether a plea of guilty is entered knowingly, intelligently, and voluntarily.
2. Counsel should understand that while a client's innocence may or may not itself constitute a cognizable claim for state post-conviction relief, its relevance to the case is important. See *Perkins v. Fhuere*, 374 Or 575 (2025). Claims of innocence are typically intertwined with other recognized bases for post-conviction relief. For example, a meritorious “Brady claim” is typically based on suppression of evidence pointing to innocence. Similarly, a claim of inadequate or ineffective assistance of counsel may be predicated on trial counsel's failure to investigate sources of important evidence that support the client's assertion of innocence. Accordingly, post-conviction counsel should be prepared to carefully evaluate the need to investigate evidence of innocence that can support a claim for post-conviction relief.
3. Counsel should not have represented the petitioner during the underlying criminal case or direct appeal except in extraordinary circumstances, since the post-conviction proceeding may be the only opportunity to raise claims of ineffective or inadequate assistance of trial and appellate counsel. Trial or appellate counsel who seek to represent their clients in post-conviction relief proceedings should do so with caution and must abide by the conflict of interest provisions of Oregon Rule of Professional Conduct 1.7 and consult OSB Formal Ethics Op. No. 2005-160.

4. A lawyer should have adequate time and resources to provide competent representation to every client.
  - a. A lawyer should not accept caseloads that by reason of size and/or complexity interfere with the provision of competent representation.
  - b. A lawyer should have access to support services and other resources necessary to provide competent representation.
5. Counsel should understand the difference between seeking relief pursuant to a post-conviction relief petition and a petition for DNA testing pursuant to ORS 138.690.
6. Counsel should ensure at the outset of appointment that post-conviction is ripe and that the matter is not still on appeal. If a *pro se* petition was filed while the matter was still on direct appeal, counsel should take appropriate measures to ensure that a timely post-conviction petition is properly filed.
7. Counsel should understand, prior to undertaking representation of any client in post-conviction relief proceedings, that ordinarily any meritorious claim not contained in a first original or amended petition will likely be waived or otherwise unavailable as a ground for relief in a second petition for post-conviction relief, or in subsequent federal habeas corpus litigation. Any lack of diligence, mistake, or other omissions by counsel will ordinarily be borne by the client. Those claims and other pleadings to be signed by counsel must comply with Oregon Rules of Civil Procedure (ORCP) 17 C, requiring a factual basis and support in existing law or in a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

## **Standard 1.2 – Client Communication**

**A lawyer should meet with their client within 30 days of appointment. A notice of appointment and releases of information should be sent to the client within 14 days of appointment. Contact must be maintained throughout the representation, including before and after filing of the amended petition and to ensure the client can file a motion pursuant to *Church v. Gladden*, if desired.**

Commentary:

1. If a client requests in person contact, counsel should make reasonable efforts to accommodate that request. In person meetings should take place as needed to prepare the client for any testimony or trial preparation.
2. The lawyer should keep the client informed about the progress of investigation, the development of post-conviction claims, litigation timelines and deadlines, and consult with the client concerning amendments and challenges to the pleadings, discovery, pretrial hearings, and other preparations for trial. This should include providing a clear explanation of the claims included in the amended petition. If the lawyer decides, based on ORCP 17 C or other strategic reasons, not to include a claim that client has requested be included, the lawyer should provide a full explanation to the client.
3. The lawyer should advise the client concerning the consequences of prevailing on a petition for post-conviction relief, including the likelihood—in cases where petitioner has previously entered a plea of guilty pursuant to a plea agreement with the state—that the petitioner would face conviction on additional charges and/or a lengthier period of incarceration upon a new trial. Lawyers should make sure their client is aware of the remedies and claims available in post-conviction proceedings.
4. Counsel should mail client a copy of the trial memorandum and reply memorandum no later than the date they are filed.
5. Counsel should contact client to discuss the trial memorandum prior to trial and, if available, review with the client defendant's trial memorandum and any reply to the trial memorandum.
6. Counsel should ensure client is aware of the trial date and the client's right to attend the trial.

## **Standard 2 – Obligations of Defense Counsel regarding *Church v. Gladden* Motions**

**A lawyer must send client a copy of the filed amended petitions and include with it information on how to raise issues under *Church v. Gladden*, 244 Or. 308 (1966). The lawyer must be aware of Uniform Trial Court Rules and Supplementary Local Rules regarding the time limitations on filing *Church* motions to properly advise their client.**

### **Commentary:**

1. The lawyer should advise the client in writing how to raise a *Church* motion, the format in which the motion should be filed, relevant timelines and deadlines, and the remedies sought.
2. Counsel must not reveal confidences or take an adversarial position in response to *Church* motions. See *Lopez v. Nooth*, 287 Or App 731 (2017).

## **Standard 3 – Independent Investigation**

**A lawyer who undertakes to represent a petitioner in a post-conviction proceeding should independently review and investigate the trial proceedings. The review should begin with review of the complete file of trial and appellate counsel and the prosecution file. The lawyer should read the official trial record, obtain all discovery material from the trial lawyer, and meet with the client to explore all aspects of representation and the trial proceedings, including whether an appropriate investigation was conducted pursuant to the OPDC Criminal Performance Standard 3.1.**

### **Commentary:**

1. Lawyers should be familiar with the ORCP and should use subpoena power, depositions, requests for production of documents, and requests for admission.
2. Lawyers should be familiar with the Uniform Trial Court Rules for post-conviction, including but not limited to witness disclosure timelines.
3. Lawyers should be familiar with the victim's rights provisions of the Post-Conviction Statute.
  - a. Lawyers or their investigators cannot approach a victim without providing a clear explanation, preferably in writing, regarding victim's rights;

- b. Lawyers must obtain court approval to subpoena victims. See ORS 138.627.
- 3. Lawyers should obtain the services of qualified investigators and mitigators.
- 4. In most cases, lawyers should obtain:
  - a. The trial attorney file, regardless of the age of the file;
  - b. The district attorney file;
  - c. Any law enforcement files;
  - d. CARES reports and other child reporting agency files;
  - e. The appellate attorney file (if applicable);
  - f. The trial court file and transcript;
  - g. The appellate court file and transcripts (if applicable);
  - h. Client medical records, if applicable;
  - i. Any Oregon Department of Corrections file, if applicable;
  - j. Records from any relevant jail facility in which client was held, including medical files and visitation logs;
  - k. Any Oregon Public Defense Commission file; and
  - l. Files related to a co-defendant or government informant (including district attorney and United States Attorney files).
- 5. The lawyer should speak with trial counsel and appellate counsel and their investigators regarding issues in the trial that may not be apparent from the face of the record.
- 6. The lawyer should be familiar with protective orders regarding the use of any records obtained in post-conviction in future prosecutions as well as protective orders related to any necessary child abuse, mental health, or other statutorily required protective orders.
- 7. Counsel should seek expert witnesses where necessary for the investigation, preparation, and presentation of the case, and be familiar with the process to obtain expert funding from OPDC.



## **Standard 4 – Asserting Legal Claims**

**Counsel should be familiar with all legal claims potentially available in post-conviction relief proceedings and assert claims permitted by the facts and circumstances of a petitioner’s case to protect the client’s rights against later contentions that the claims have been waived, defaulted, not exhausted, or otherwise forfeited.**

### Commentary:

1. A properly pleaded amended petition must generally be filed within 120 days from the date of appointment unless the Court has authorized additional time.
  - a. The lawyer should be aware of any timelines for filing and amending petitions set forth in the Uniform Trial Court Rules, Supplemental Local Rules, and the ORCP.
  - b. The amended petition should raise all claims supported by the discovery obtained at the time of filing. If later discovery supports additional claims, counsel should seek to further amend the petition to include those claims.
  - c. The lawyer should review the original *pro se* petition to ensure that the client’s interests are preserved.
2. A lawyer should plead alternative theories to claims so that all avenues of relief are possible (e.g., ineffective assistance of counsel regarding a specific action can, at times, also be pleaded as failing to properly execute the trial strategy).
3. A lawyer should plead any evidence necessary to support the legal claim made. See *Horn v. Hill*, 180 Or App 139, 138-49 (2002) (“Where evidence omitted from a criminal trial is not produced in a post-conviction proceeding . . . its omission cannot be prejudicial”).
4. A lawyer should plead any relevant exceptions to any procedural bars that might be raised by the defendant, including successiveness, timeliness, or that claims could have been raised on appeal. See *North v. Cupp*, 254 Or 451 (1969) (setting forth exceptions to the trial preservation rule).
5. A lawyer should request to amend the formal petition when the need for new claims or amended claims arises—even if this is during trial—and should make every effort to amend rather than concede error in omitting

the claims in the formal petition. See *Ogle v. Nooth* 365 Or 771 (2019); ORCP 23 B.

6. Petitions should request whatever remedies are proper and just. See ORS 138.520.
7. A lawyer should not argue the law in the petition. See ORS 138.580.

### **Standard 5.1 – Litigating Claims**

**Before and during the trial on the petition for post-conviction relief, a lawyer should develop a factual basis through the presentation of evidence to establish the claims asserted in the petition. A lawyer must be sufficiently familiar with the procedural rules of post-conviction to properly file witness disclosures, exhibits, objections, and trial memoranda.**

#### **Commentary:**

1. Lawyers must disclose witnesses pursuant to ORS 138.615 and be aware of and comply with the specific disclosure requirements regarding expert witnesses. Witness disclosures must be made no later than 60 days before trial unless otherwise ordered by the court. UTCR 24.060.
2. Lawyers should be familiar with the case law regarding the use of experts in post-conviction. Experts testifying regarding ineffective assistance of counsel must have been experts at the time of the original trial, available at the time of the original trial, and must indicate they would have testified substantially similarly at the time of the original trial as they would in the post-conviction proceedings. See *Hale v. Belleque*, 255 Or App 653, 681, 298 P3d 596 (2013) (To satisfy a petitioner's burden of proof on a claim that trial counsel was constitutionally inadequate in failing to call a witness to testify, the petitioner must show that (1) the witness would have been available to testify, (2) would have appeared at the time of trial, and (3) would have provided testimony likely to have changed the result of the trial.)
3. If a claim involves the failure to call a witness (expert or lay), lawyers must present evidence, either through declarations or live testimony, of how that witness would have testified at the time of trial and that they were available to testify at the time of trial. See *New v. Armenakis*, 156 Or App

24, 29 (1998) (“Without an affidavit from Gable, there is no evidence about what Gable would have testified to, had he been called as a witness.”).

4. Lawyers should file exhibits in compliance with UTCR 24.040.
5. A lawyer must file a comprehensive trial memorandum. Trial memoranda should include but are not limited to:
  - a. Assertions regarding the facts and arguments regarding the law as to each claim set forth in the petition. Claims not supported in the trial memorandum will likely be dismissed as abandoned.
  - b. Any additional elements set forth in any scheduling order from the court.
6. A lawyer should file a response to the defendant’s trial memorandum. This memorandum should include but is not limited to:
  - a. A rebuttal of the defendant’s arguments;
  - b. A response to the defendant’s objections;
  - c. Objections to defendant’s exhibits, unless otherwise specified by the trial court.

## **Standard 5.2 – Client’s Presence at Trial**

**Counsel may not waive client’s right to attend trial unless waiver is authorized under ORS 138.620 and approved by the client.**

### Commentary:

Counsel should object to any attempt to limit client to solely telephonic appearance unless client directs otherwise. Counsel should be aware of ORS 138.622 and ensure availability of a method of confidential communication during hearing. See *also* ORCP 58 E.

## **Standard 5.3 – Obligations During Trial**

**Counsel must subpoena all necessary witnesses—including those necessary to cure hearsay objections—to trial and be prepared to present and argue all active claims. Counsel should offer all necessary exhibits into the record.**

### Commentary:

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1. Counsel should be prepared to argue new claims or alternative claims if testimony at trial supports them. Counsel should note such claims for the court and request to amend petition to reflect any changes.
2. Counsel should be prepared to argue against defendant's possible responses to any petitioner's trial memorandum.
3. At trial, Counsel should re-assert all relief requested.
4. A lawyer should be aware of the elements required to prove their claims and of the burden of production.
5. In preparing for cross-examination, a lawyer should be familiar with the applicable law and procedures concerning cross-examination and impeachment of witnesses. A lawyer should be prepared to question witnesses regarding prior statements which they may have made or adopted, documents subject to disclosure, and to develop further material for impeachment beyond what was found during pre-trial investigation.
6. Counsel should be prepared to file supplemental briefing or a closing memorandum if it would benefit the client and the court permits.
7. Counsel should be familiar with and utilize, where necessary, ORCP 39 I (Perpetuation of testimony after commencement of action), ORCP 38 B(3), and UTCR 5.130 for use in locations that have not adopted the Uniform Interstate Depositions and Discovery Act.

## **Standard 6 – Obligations of Counsel After Trial**

**Counsel must ensure that the court has addressed each claim for relief in its judgment. Immediately following the issuance of a judgment, counsel should send a copy of the judgment to the client. If there are adverse rulings, counsel should notify appellate counsel and ensure that a notice of appeal is filed if the client would like to appeal. Following a favorable judgment, counsel must file a certified copy of judgment with the trial court for the underlying conviction and serve a certified copy on the district attorney of the county of the original conviction and sentence. See ORS 138.640.**

Commentary:

1. After trial, if the court has not issued a judgment within 60 days the attorney should call the court's attention to the matter, in writing pursuant to UTCR 2.030.
2. If the court provides an opportunity for objections to a judgment prior to publication, counsel should object where appropriate.
3. Following the issuance of a judgment, counsel should send the client a closing letter explaining, among other things, file retention, appellate rights, and any rights to federal collateral review.
4. Lawyers are responsible for knowing the procedure for securing appellate counsel through OPDC.
5. Following a favorable judgment (in full or in part), counsel should file a supplemental judgment seeking the return of any filing fees and costs assessed and for prevailing party fees. ORS 138.550(1); ORS 20.190(1)(b)(B).