Members:

Jennifer Nash, Chair
Susan Mandiberg, Vice Chair
Peter Buckley
Stephanie Engelsman
Robert Harris
Alton Harvey, Jr.
Philippe Knab
Tom Lininger
Paul Lipscomb

Oregon Public Defense Commission

Nonvoting Members:

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

Interim Executive Director:

Kenneth Sanchagrin

Oregon Public Defense Commission
*Meeting will occur virtually via Zoom.**
Wednesday, October 15, 2025
Pre-Meeting Commission Work Session 9:00 AM – 10:00 AM PST
Commission Meeting 10:00 AM – approx. 2:00 PM PST

Administrative Announcement
This is a public meeting, subject to the public meeting law and it will be recorded. Deliberation of issues will only be conducted by Commission members unless permitted by the Chair. Individuals who engage in disruptive behavior that impedes official business will be asked to stop being disruptive or leave the meeting. Additional measures may be taken to have disruptive individuals removed if their continued presence poses a safety risk to the other persons in the room or makes it impossible to continue the meeting.

AGENDA

Approx. Time	Item/Leads

9:00-10:00	**OPDC Pre-Meeting Commission Work Session**
	Topics:
	• Update/Discussion on Delinquency Attorney Performance Standards
	  ○ Lead: Steve Arntt (30 Min)
	• Update/Discussion on New Key Performance Metrics (KPMs)
	  ○ Lead: Kim Freeman (30 Min)
	All members of the public are invited to join the Oregon Public Defense Commission for an ongoing Commission work session series, set to take place prior to convening official Commission meetings. These work sessions will provide Commissioners, new and experienced, with a foundational understanding of important issues and policy areas, including potential challenges, opportunities, and complexities. Commission work sessions may or may not lead to future decision-making, but they will always be valuable and educational for all Commissioners and public who attend. Work sessions will be available to join virtually via the public Zoom link listed below the agenda.
	***Note:** Agenda items not addressed or completed during this work session will be carried over to the next scheduled workgroup meeting, unless otherwise directed by the Chair.*

Approx. Time	Item	Lead(s)
10:00-10:05	Welcome – Call to Order	Chair Nash
10:05-10:15	New Commissioner Introductions	Chair Nash
10:15-10:30	Public Comment	
10:30-10:40	**Update:** Unrepresented Persons in Oregon Courts: Attorney Shortage	Ken Sanchagrin Adrian Manriquez
10:40-10:55	**Update:** Director's Update • Financial Case Management System (FCMS) • 2025-2027 Contracts	Ken Sanchagrin
10:55-11:05	**Update:** Budget	Ralph Amador
11:05-11:25	**Discussion:** Requirement for OPDC to Submit a 5% budget reduction to the Joint Ways and Means Committee for the 2025-27 Legislatively Adopted Budget	Ken Sanchagrin
11:25-11:40	****Break****	
11:40-12:20	**Briefing:** Cost Per Case Preliminary Estimates	Maddy Ferrando
12:20-12:45	**Update:** Legislative • End of Year Reports and Timeline	Lisa Taylor
12:45-1:15	**Discussion:** • Commission Calendar • November Commission Meeting • December Meeting Location • Election of New Chair	Chair Nash
1:15-2:00	****Executive Session**** ***The Commission will meet in Executive Session pursuant to ORS 192.660(2)(h) To consult with counsel concerning the legal rights and duties of a public body with regard to current litigation or litigation likely to be filed.*** *At the beginning of the agenda item, Chair Nash will introduce the Executive Session. After the introduction, the Commission will meet privately in Executive Session. At the conclusion of the Executive Session, Commissioners will re-join the public Zoom meeting to adjourn.* *Representatives of the news media and designated staff shall be allowed to attend the Executive Session. All other participants may not attend. Representatives of the news media are specifically directed not to report on or otherwise disclose any of the deliberations or anything said about these subjects during the Executive Session, except to state the general subject of the session as previously announced. No decision may be made in Executive Session.*	Chair Nash

2:00pm (Approximately)	****Adjourn****	

**To join the Zoom meeting, click this link: https://zoom.us/j/92713271859. 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. 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.*

The Commission welcomes public comment. Verbal and written comments must be directly related to agenda items. Please click here to review the guidelines for providing public comment on our website.

Next meeting: ***November 19, 2025, 9am – 1pm via Zoom.*** *Meeting dates, times, locations, and agenda items are subject to change by the Commission; future meetings dates are posted at*: *https://www.oregon.gov/opdc/commission/Pages/meetings.aspx.*

Delinquency Attorney Performance Standards

(DRAFT)

September 2025

Table of Contents

INTRODUCTION

Oregon Revised Statute 151.216(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 delinquency defense 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 Standards for Representation in Criminal and Juvenile Delinquency Cases. OPDC has adopted those standards to make them specific to delinquency casework and has added language that reflects evolving standards of practice. 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 the prior work of the Oregon State Bar and to the Oregon Public Defense Commission Delinquency Standards Workgroup for the extensive work OPDC drew upon in the development process.

Standard 1.1 – Role of Defense Counsel

The lawyer for a youth in a delinquency case should provide quality and zealous representation at all stages of the case, always advocating for the youth'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.

Commentary:

1. In abiding by the Oregon Rules of Professional Conduct, a lawyer should ensure that each youth receives competent, conflict-free representation in which the lawyer keeps the youth informed about the representation and promptly responds to reasonable requests for information.

2. The defense of a delinquency case requires knowledge and skills specific to juvenile defense in addition to what is required for the defense of an adult criminal case. The lawyer should be knowledgeable about adolescent development and be well-versed in the relevant statutes, case law and local court rules concerning juvenile delinquency cases. The lawyer should be familiar with the applicable standards at every stage of the proceedings and vigorously advocate to protect the youth's due process rights, challenge the prosecution's case, and ensure that any court-ordered services are provided in the least restrictive setting.

3. In juvenile delinquency cases, a lawyer is bound by the youth's definition of their interests and should not substitute the lawyer's judgment for that of the youth regarding the objectives of the representation. A lawyer should explain to the youth and, where appropriate, to the youth's parents or guardians that the lawyer may not substitute a parent or guardian's interests or view of the youth's best interests for those expressed by the youth. Bearing in mind that children may be more susceptible to influence than an adult, a lawyer should ensure that the youth's decisions reflect their actual position. To this end, the lawyer has a duty not to overbear the will of the youth.

4. A lawyer should provide candid advice to the youth regarding the probable success and consequences of pursuing a particular position in the case and give the youth the information necessary to make informed decisions, including making available and reviewing discovery material with the youth. A lawyer should consult with the

youth regarding the assertion or waiver of any right or position of the youth. The lawyer should explain to the youth, in a developmentally appropriate way, which decisions belong to the youth alone and which may be made by the lawyer.

5. A lawyer should consult with the youth on the strategy and means by which the youth's objectives are to be pursued and exercise the lawyer's professional judgment concerning technical and tactical decisions involved in the representation. The lawyer should keep the youth fully informed, including reviewing discovery with the youth and provide the youth with information and advice at all junctures of the case to assist the youth with making informed decisions.

6. A lawyer assigned to actively assist a *pro se* accused youth should be apprised about the matter and prepared to accept representation in the matter to the extent that the circumstances of the case allow if ethically permissible. OPDC understands that there is inherent difficulty in taking over a case from a *pro se* litigant and maintaining the current case timelines.

Standard 1.2 – Education, Training and Experience of Defense Counsel

A. A lawyer must be familiar with the applicable substantive and procedural law, and its application in the particular 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 delinquency cases. A lawyer should also be informed of the practices of the specific judge before whom a case is pending.

B. Prior to handling a delinquency matter, a lawyer must have sufficient experience and training to provide quality representation. Prior to accepting appointment in a delinquency case, a lawyer must be certified for that case type by OPDC.

Commentary:

1. To remain proficient in the law, court rules, and practice applicable to delinquency cases, a lawyer should regularly monitor the work of Oregon courts, pertinent federal appellate courts, and the Oregon State Legislature. A lawyer should stay current on changes in case law and statutes applicable to juveniles and apply changes to current practice. Lawyers in delinquency cases must stay current in appellate opinions regarding evidence, juvenile

delinquency law, and applicable changes to criminal procedure and substantive criminal law. A lawyer should stay up to date on the direct and collateral consequences of a juvenile adjudication.

2. A lawyer should maintain membership in state and national organizations that focus on education and training in the practice of criminal and delinquency cases and subscribe to listservs, consult available online resources, and attend continuing legal education programs devoted to the practice of criminal and delinquency cases. A lawyer practicing juvenile delinquency law should complete at least 10 hours of continuing legal education training in criminal and delinquency law each year, at least three hours of which should be specific to delinquency defense.

3. Lawyers should be familiar with other non-penal consequences of a delinquency adjudication, such as those affecting driving privileges, public benefits, sex offender registration, residency restrictions, student financial aid, opportunities for military service or other public service, professional licensing, firearms possession, DNA sampling, HIV testing, among others. A lawyer practicing juvenile delinquency law should become familiar with the basics of immigration law pertinent to the possible immigration consequences of an adjudication in a delinquency case for noncitizen youths.

5. Before undertaking representation in a juvenile delinquency case, a less experienced lawyer should obtain training in the relevant areas of practice and should consult with others in the field, including non-lawyers. A less experienced lawyer should observe and, when possible, serve as co-counsel to more experienced lawyers prior to accepting sole responsibility for a delinquency case. More experienced lawyers should mentor less experienced lawyers.

6. Lawyers in delinquency cases should develop a working knowledge of child and adolescent development, including information concerning emotional, social, and neurological development that could impact effective communication by the lawyer with youths and the defense of charges against the youth. Lawyers in delinquency cases should be familiar with adolescent brain development, the impact of trauma on emotional and neurological development, and should be trained in communicating with youth in a developmentally appropriate manner.

7. Lawyers should recognize when to consult with and retain experts to assist in the youth's defense.

8. A lawyer providing representation in juvenile delinquency cases should be familiar with key agencies and services typically involved in those cases, such as the Oregon Youth Authority, the Department of Human Services, the Juvenile Psychiatric Security Review Board, county Juvenile Department, private treatment facilities, along with other services and programs available as alternatives to detention and dispositional alternatives to custody.

9. Lawyers representing youth in the criminal system must be familiar with the federal sight and sound restrictions for housing youth in custody with adults.-

10. A lawyer for indigent youth should be familiar with services available to youths who are unhoused, unable to provide for their own food, or need other social services.

Standard 1.3 – Obligations of Defense Counsel Regarding Workload

Before accepting appointment as counsel, a lawyer has an obligation to ensure that they have sufficient time, resources, knowledge, and experience to offer quality representation to a youth in a delinquency matter. If it later appears that 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.

2. A lawyer should evaluate their ability to appear in court with youths when deciding whether to accept an appointment in a case. Lawyers should not overly rely on other lawyers to cover their appearances. A lawyer should 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 Defense Counsel at Initial Appearance

A lawyer must be familiar with the law regarding initial appearance, arraignment, and detention. At the initial court appearance in a delinquency case, a lawyer should inform the youth of the offenses alleged in the petition, and assert and preserve pertinent statutory and constitutional rights of the youth on the record. Lawyers should seek release for detained youths at the first appearance.

Commentary:

1. A lawyer should promptly conduct youth conflict checks.

2. A lawyer should always endeavor to meet with and interview youths in advance of their first appearance.

3. A lawyer should be familiar with the local practice regarding case docketing and processing so that the lawyer may inform the youth regarding expected case events and the dates for upcoming court appearances.

4. A lawyer should be familiar with the law regarding initial appearance and juvenile detention.

5. A lawyer should be prepared to enter an appropriate assertion that preserves the youth's rights and demands due process, whether that is a denial of the allegations in a delinquency petition or request for some other further proceeding. A lawyer should make clear that the youth reserves the following rights in the present and any other matter:

    a. Right to remain silent under the State and Federal Constitutions;
    b. Right to counsel under State and Federal Constitutions;
    c. Right to file challenges to the petition;
    d. Right to file challenges to the evidence;
    e. Right to file notices of affirmative defenses; and
    f. Right to a speedy trial.

6. A lawyer should be prepared to object the court's failure to comply with the law regarding the initial appearance process, such as the statute requiring an ability to confer confidentially with the youth during a video arraignment.

7. A lawyer should obtain all relevant documents and orders that pertain the youth's initial appearance. A lawyer should ensure that the youth has all relevant orders, as desired by the youth.

8. A lawyer may waive formal reading of the allegations and advice of rights by the court, providing the lawyer advises the youth what rights are waived, the nature of the allegations and the potential consequences of relinquishing their rights.

9. If the adjudicatory judge is assigned at the initial appearance, the lawyer must be familiar with the law and local practice for filing motions to disqualify a judge, discuss this with the youth, and be prepared to timely file appropriate documents challenging an assigned judge.

10. Lawyers should seek release of incarcerated youths at the initial appearance in accordance with standard 2.3.

Standard 2.2 – Youth Contact and Communication

A lawyer should personally conduct a youth interview as soon as practicable after representation begins and thereafter establish a procedure to maintain regular contact with the youth. These meetings should be used to explain the allegations and the nature of the proceedings, meet the ongoing needs of the youth, obtain necessary information from the youth, consult with the youth about decisions affecting the course of the defense, and to respond to requests from the youth for information or assistance concerning the case. For youths who are in custody, the initial interview should take place no more than 2 business days after assignment to the attorney. For out of custody youths, initial outreach to schedule an initial interview should occur no more than 3 business days after assignment to the attorney.

Commentary:

1. A lawyer should provide a clear explanation, in developmentally appropriate language and using an interpreter as needed, of the role of both the youth and the lawyer and demonstrate appropriate commitment to the youth's expressed interests in the outcome of the proceedings. A lawyer should elicit the youth's point of view and encourage the youth's full participation in the defense of the case.

2. The initial interview should be in person, in a private setting that allows for a confidential conversation. To maintain privileges and assure that the youth knows the communication is confidential, a lawyer should not allow parents or other people to participate in the initial meeting with the youth.

3. At the initial meeting, the lawyer should review the allegations facing the youth and be prepared to discuss the necessary elements of the charges and the procedure the youth will be facing in subsequent court appearances, and should inquire if the youth has any immediate needs.

4. Prior to all meetings, the lawyer should:

    a. Be familiar with the elements of the charged offense(s) and the potential disposition alternatives;
    b. Obtain copies of any relevant documents that are available. This includes any charging documents and recommendations and reports made by agencies including but not limited to reports regarding pre-adjudication detention and any law enforcement reports that might be available;
    c. Be familiar with the legal procedure the youth will encounter and be prepared to discuss the process with the youth; and

d. If the youth is in custody, be familiar with the different types of pre-adjudication release conditions the court may set and whether private or public agencies are available to act as a custodian for the youth's release. The lawyer should also be prepared to discuss the process of ongoing detention review.

5. During an initial interview with the youth, a lawyer should:
   a. Obtain information concerning:
      i. The youth's ties to the community including any placement options for a youth being held in detention;
      ii. The youth's physical and mental health history including any past or current treatment providers, including getting youth and parents (if necessary) to sign releases for records;
      iii. The youth's educational history, including asking about any special education history. Youth and parents (if necessary) should be asked to sign releases for all educational records;
      iv. The youth's immediate medical needs and whether those needs are currently being met;
      v. The youth's mental health needs, including information regarding current medications; the lawyer should ensure that detention facilities have the youth's current prescriptions and that the youth has access to medications while in detention;
      vi. The youth's past involvement with the juvenile system, including but not limited to prior foster care or residential placements, any prior failures to appear for court appearances, any prior runaways, whether the youth is currently on supervision by the juvenile department or Oregon Youth Authority, and the youth's past or present performance under supervision;
      vii. The names of individuals or other sources that counsel can contact to verify information or who would have information about the youth and the youth's permission to contact those individuals;
      viii. Information concerning the youth's arrest, including information regarding any searches or seizures by law enforcement, statements made to law enforcement and the circumstances surrounding such statements, and identification procedures. It is ideal to obtain this information as close in time to the events as possible, as the youth's memory may fade with time;
      ix. Information concerning potential witnesses, video evidence, and any other evidence that requires immediate action to preserve;
      x. Information concerning youth's history that would impact their social, emotional, and neurological development and whether youth's trauma history and brain development impacted the youth's actions and thought-processes;
   b. Provide the youth information including but not limited to:
      i. An explanation of the procedures that will be followed in setting the conditions of pre-adjudication release;

ii. An explanation of the lawyer-youth privilege, including exceptions to the privilege, and instructions not to talk with anyone about the facts of the case without the lawyer present;
iii. The allegations and potential disposition alternatives, as well as potential collateral consequences of any adjudication and disposition;
iv. A general procedural overview of the progression of the case, where possible;
v. Advice that communication with people other than the defense team is not privileged – including parents/guardians – and a warning that if the youth is in custody that communications may be monitored;
vi. Discussion of who, if anyone, the youth would like the lawyer to communicate with about the youth and their case and clear limits concerning the type of information that may be shared and with whom.

6. A lawyer should use any contact with the youth as an opportunity to gather timely information relevant to preparation of the defense. Such information may include, but it not limited to:
   a. The topics enumerated in Subsection (a)(6), above;
   b. Any threats or promises made by law enforcement not previously disclosed;
   c. Evidence or assessments of the youth's competence to stand trial and mental state at the time of the offense.

Standard 2.3 – Release of Youth

A. A lawyer has a duty to seek release of the youth from detention under the conditions most favorable and acceptable to the youth.

B. Release should be sought at the earliest opportunity and if not successful a lawyer should continue to seek release at appropriate subsequent hearings.

Commentary:

1. If the youth is in detention, the lawyer should review the documents supporting probable cause and, if appropriate, challenge any finding of probable cause. Where detention continues, the lawyer should move for release if appropriate.

2. If the court will not consider release at initial appearance, the lawyer should request a detention release hearing and decision within the statutory time requirements. The lawyers should be familiar with the law and procedures for detention hearings and the risk factors that the court is likely or required to consider.

3. In preparation for the detention hearing the lawyer should discuss statutory release criteria with the youth and prepared to address the court regarding these

factors including residence, school attendance, employment, compliance with release conditions such as no contact with alleged victims, and any release compliance monitoring. The lawyer should work with the youth, the youth's parents or caretakers, and the juvenile department to develop an appropriate release plan. The lawyer should seek out services and supports, as appropriate, to augment an appropriate release plan.

4. Where the youth is incarcerated and unable to obtain pretrial release, counsel should alert the court and detention facility to any special medical or psychiatric and security needs of the youth and request that the court order the appropriate officials to take steps to meet such special needs as required.

Standard 3.1 – Investigation

A lawyer has the duty to conduct an independent review of the case, regardless of the youth's admissions or statements to the lawyer of facts constituting an admission or the youth's stated desire to make an admission. Where appropriate, the lawyer should engage in a full investigation, which should be conducted promptly and should include all information necessary to assess the strengths and weaknesses of the case, to prepare the case for trial or hearing, and to advise the youth as to the possibility and consequences of adverse adjudication. 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, and whenever possible should avoid taking on investigations themselves that could cause them to be a witness in the case. The lawyer should not knowingly use illegal means to obtain evidence or instruct others to do so.

Commentary:

1. A lawyer should obtain copies of all petitions pending against the youth and should examine them to determine the specific allegations that have been brought against the youth.

2. A lawyer should conduct multiple meetings or interviews with the youth to elicit the necessary information as described in Standard 2.2. The meetings should be tailored to meet the developmental needs of the youth, including the need to accommodate for learning differences or attention difficulties. All meetings need to proceed at the pace determined by the youth, especially youth with attention deficiencies. The interview should be used to identify:

    a. Additional sources of information concerning the incidents or events giving rise to the allegations and to any defenses;

b. Evidence concerning improper conduct or practices by law enforcement, juvenile authorities, mental health departments or the prosecution, which may affect the youth's rights or the admissibility of evidence;
c. Information relevant to the court's jurisdiction;
d. Information relevant to pretrial or prehearing release and possible pretrial or prehearing disposition;
e. The youth's mental health needs and the need for expert evaluations, including evaluations to assess youth's ability to aid and assist in their defense;
f. Information relevant to youth's social, educational, and mental health history, including history of involvement with social services and any other information relevant to mitigation; and
g. Information relevant to disposition and potential consequences of adverse adjudication.

3. A lawyer should consider whether to interview potential witnesses, whether adverse, neutral, or favorable, and when new evidence is revealed during the course of witness interviews, the lawyer should locate and assess its value to the youth. 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 defense witness at the trial or hearing. 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). The lawyer also has a duty, where appropriate, to comply with statutory rights or victims, such as those embodied in ORS 419C.273 and 419C.276ORS 135.970(2) and (3).

4. A lawyer should attempt to interview all law enforcement officers involved in the investigation of the case and taking the youth into custody and should obtain all pertinent information in the possession of the prosecution, juvenile authorities, or law enforcement, including, law enforcement personnel records and documentation of prior officer misconduct. In cases involving child witnesses or victims, the lawyer should seek records of counseling sessions with those children. The lawyer should pursue formal and informal discovery with authorities as described in Standard 4.1.

5. Where appropriate, a lawyer should inspect the scene of the alleged offense under circumstances (including weather, lighting conditions, and time of day) as similar as possible to those existing at the time of the alleged incident.

6. A lawyer should obtain school, mental health, medical, drug and alcohol, immigration, prior criminal offense records, juvenile records, and child welfare records of the youth and witnesses.

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 prosecution.

Standard 3.2 – Experts

A lawyer should immediately and continually evaluate the need for experts in the case and should attempt to obtain any necessary expert for consultation or testimony or both. A lawyer must be aware of available 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. Lawyers should consider using engagement letters for any expert used on their case that clearly outline the lawyer's expectations of the expert, privilege rules, and an understanding of the expert's duty of confidentiality.

2. A lawyer should be aware of the appeals process if OPDC denies funding the lawyer believes is reasonably required for the case.

3. A lawyer should be familiar with the available experts in fields that routinely arise in delinquency cases and should have an available professional network to assist in evaluating and obtaining needed experts.

4. Lawyers should independently evaluate the quality of an expert prior to engagement and should consider any evidence that would be available to the prosecution to impeach that expert. Lawyers should review this evaluation regularly, even with frequently used experts.

5. A lawyer should understand the difference between an expert used to advise the defense team and an expert used to testify and how to assure that an advisory expert does not unintentionally shift to a testimonial expert and require disclosure to the prosecution.

6. 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 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 prosecution has engaged in discovery violations.

Commentary:

1. A lawyer should be familiar with and observe the applicable statutes, rules and case law governing the obligation of the defense to provide discovery. A lawyer should file motions for protective orders or otherwise resist discovery where a lawful basis exists to shield information in the possession of the defense from disclosure.

2. A lawyer should make a prompt and comprehensive demand for discovery pursuant to applicable rules and constitutional provisions and should continually seek all information to which the youth is entitled, especially any exculpatory, impeaching and mitigating evidence. Discovery should include, but is not limited to, the following:

    a. Potentially exculpatory, impeaching and mitigating information;
    b. Law enforcement reports and notes, 911 recordings and transcripts, inter-officer transmissions, dispatch reports, and reports or notes of searches or seizures and the circumstances in which they were accomplished;
    c. Written communications, including emails, between prosecution, law enforcement and witnesses;
    d. Names and addresses of prosecution witnesses, their prior statements, their prior criminal records, and their relevant digital, electronic, and social media postings;
    e. Oral or written statements by the youth and the circumstances under which those statements were made;
    f. The youth's prior juvenile records and evidence of any other misconduct that the prosecution may intend to use against the youth;
    g. Copies or, or the opportunity to inspect books, papers, documents, photographs, computer data, tangible objects, buildings or places, and other material relevant to the case;
    h. Results or reports of physical or mental examinations, and of scientific tests or experiments, and the data and documents on which they are based;
    i. Statements and reports of experts and the data and documents on which they are based; and
    j. Statements of co-youth.

3. A lawyer should consider filing motions seeking to preserve evidence where it is at risk of being destroyed or altered.

4. A lawyer should consider issuing subpoenas where necessary to obtain favorable evidence and should file motions as necessary to obtain otherwise protected or confidential information necessary for the youth's defense (such as video and documentary evidence from child abuse centers, alleged victims' counseling records, child welfare records related to the allegations, and any other protected records relevant to the youth's defense).

5. A lawyer should review all discovery with the youth and be prepared to answer all youth's questions and explain the relevance of the discovery to the case.

6. Lawyers should not rely on discovery to provide all information in the case and should not assume that prosecutors are compliant with discovery obligations unless the lawyer has verified the compliance.

Standard 4.2 – Theory of the Case

A lawyer should develop and continually reassess a theory of the youth's case that advances the youth's goals and encompasses the realities of the youth's situation.

Commentary:

1. A lawyer should use the theory of the case when evaluating strategic choices throughout the course of representation.

2. A lawyer should be able to concisely explain the theory of the case to a lay person.

3. A lawyer should allow the theory of the case 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 remain flexible enough to modify or abandon the theory if it does not serve the youth.

Standard 5.1 – Pretrial Motions and Notices

A lawyer should research, prepare, file, and argue appropriate pretrial motions and notices. A lawyer must be knowledgeable of all motion and notice deadlines that may apply to their case. Lawyers may not miss filing deadlines.

Commentary:

1. The decision to file a particular pretrial motion or notice should be made by the lawyer after thorough investigation, discussion with their client, and after considering the applicable law under the circumstances of the case.

2. Among the issues the lawyer should consider addressing in pretrial motions are:

    a. The pre-adjudication custody of the youth;
    b. The competency or fitness to proceed of the youth (see Standard 5.3);
    c. The constitutionality of relevant statutes;
    d. Potential defects in the charging process or instrument;
    e. The sufficiency of the charging document;
    f. The severance of charges or co-youth for trial;
    g. Change of venue;
    h. The removal of a judicial officer from the case through requests for recusal or the filing of an affidavit of prejudice;
    i. The discovery obligations of both the prosecution and the defense, including:
        i. Motions for protective orders;
        ii. *Brady v. Maryland* motions; and
        iii. Motions to compel discovery.
    j. Violations of federal or state constitutional or statutory provisions, including:
        i. Illegal searches or seizures;
        ii. Involuntary statements or confessions;
        iii. Statements obtained in violation of the right to counsel or
        iv. privilege against self-incrimination;
        v. Unreliable identification evidence;
        vi. Unreliable scientific or pseudoscientific evidence;
        vii. Speedy trial rights; and
        viii. Double jeopardy protections.
    k. Requests for—and challenges to denials of—funding for access to reasonable and necessary resources and experts;
    l. The right to a continuance to adequately prepare and present a defense or to respond to prosecution motions;
    m. Matters of trial evidence that may be appropriately litigated by means of a pretrial motion *in limine*, including:
        i. The competency or admissibility of particular witnesses, including experts and children;
        ii. The use of prior convictions for impeachment purposes;
        iii. The use of prior or subsequent bad acts;
        iv. The use of reputation or other character evidence; and
        v. The use of evidence subject to “rape shield” and similar protections.
    n. Notices of affirmative defenses and other required notices to present particular evidence;
    o. The dismissal of charges on the basis of civil compromise, best interests of a youth, in the furtherance of justice, or the general equitable powers of the court.

3. Before deciding not to file a motion or to withdraw a motion already filed, a lawyer should carefully consider all facts in the case, applicable law, case strategy and other relevant information, including:
   a. The burden of proof, the potential advantages, and disadvantages of having witnesses testify under oath at pretrial hearings and to what extent a pretrial hearing reveals defense strategy to a youth's detriment;
   b. Whether a pretrial motion may be necessary to protect the youth's rights against later claims of waiver, procedural default, or failure to preserve an issue for later appeal;
   c. The effect the filing of a motion may have upon the youth's speedy trial rights; and
   d. Whether other objectives, in addition to the ultimate relief requested by a motion, may be served by the filing and litigation of a particular motion.

Standard 5.2 – Filing and Arguing Pretrial Motions

A lawyer should file all pretrial motions in a timely fashion, should have knowledge of local court rules, and should comport with those rules to the extent possible. A lawyer should prepare for a motion hearing just as they would prepare for trial, including preparing for the presentation of evidence, exhibits, and witnesses.

Commentary:

1. Motions should succinctly inform the court of the authority relied upon.

2. When a hearing on a motion requires taking evidence, or when the taking of evidence is advantageous to the youth's position, a lawyer's preparation should include:

   a. Investigation, discovery, and research relevant to the claims advanced;
   b. Subpoenaing all helpful evidence and witnesses including those also subpoenaed by the prosecution;
   c. Preparing witnesses to testify;
   d. Fully understanding the applicable burdens of proof, evidentiary principles and court procedures, including the costs and benefits of having the youth of other witnesses testify and be subject to cross examination; and
   e. A consideration of the record being made for the purposes of an adjudication proceeding in addition to the underlying motion.

3. After a hearing during which evidence is taken an attorney should request the FTR recording of the hearing and have transcriptions made.

4. A lawyer should consider the strategy of submitting proposed findings of fact and conclusions of law to the court at the conclusion of the hearing.

5. After an adverse ruling, a lawyer should consider seeking interlocutory relief, if available, taking necessary steps to perfect an appeal, and renewing the motion or objection during trial to preserve the matter for appeal.

Standard 5.3 – Pretrial Determination of Youth's Fitness to Proceed

A lawyer must be able to recognize when a youth may not be competent to stand trial due to mental health disorders, developmental immaturity, and developmental or intellectual disabilities, and take appropriate action. The lawyer's responsibility to evaluate and recognize their client's competence is ongoing throughout the case. Lawyers must take appropriate action to address youth's competency as soon as possible.

Commentary:

1. A lawyer should assess whether the youth's level of functioning limits their ability to communicate effectively with counsel, as well as their ability to have a factual and rational understanding of the proceedings.

2. When a lawyer has reason to doubt the youth's competency to stand trial, the lawyer should request funding for a retained psychological examination of the youth as well as gather collateral information related to the youth's mental health. The lawyer should consider filing a pretrial motion requesting a competency evaluation only if a private evaluation cannot be obtained. The lawyer should discuss the issue of competency with the youth and explain the purpose of a competency evaluation, along with the potential outcomes of a competency evaluation.

3. Lawyers should seek prior psychological examinations of the youth as well as other records relating to their client's prior commitments, mental health evaluations, or diagnoses. Lawyers may use those records at the lawyer's discretion in any proceeding relating to the youth's ability to aid and assist in their own defense.

4. The right to be able to aid and assist in their own defense is a core right of the youth. If a lawyer has reason to doubt their client's fitness to proceed the lawyer has an obligation to take appropriate action to determine the youth's fitness. If a lawyer has concerns regarding a youth's capacity the lawyer must consider and, if possible, discuss with their client:

a. His or her obligations under Oregon Rule of Professional Conduct 1.14, to maintain a normal attorney-youth relationship, to the extent possible, with a youth 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 youth or referral to other agencies.

5. If the lawyer decides to proceed with a competency hearing, they should secure the services of a qualified expert in accordance with Standard 3.2.

6. Lawyers should keep up to date with developments concerning the Oregon State Hospital, federal litigation involving the State's handling of youths found unfit to proceed, and any legislative changes to the statutory framework of fitness.

7. If a court finds a youth incompetent to proceed, a lawyer should seek to resolve the delinquency case by having the petition converted to a dependency petition or through a motion to dismiss in the best interests of the youth. A lawyer should maintain contact with the youth during the restorative services process, including being present for any evaluations, as appropriate to achieve youth's stated interest.

8. If a court finds a youth incompetent to proceed, a lawyer should advocate for the least restrictive level of supervision and the least intrusive treatment available that will restore the youth to fitness.

9. If a court finds a youth is competent to proceed, a lawyer should continue to raise the matter during the course of the proceedings if the lawyer has a concern about the youth's continuing competency to proceed and in order to preserve the matter for appeal.

Standard 5.4 – Continuing Obligations to File or Renew Pretrial Motions or Notices

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.

Standard 6.1 – Exploring Disposition without Trial

A lawyer has the duty to explore with the youth the possibility, advisability, and consequences of reaching a negotiated disposition of charges or a disposition without trial. 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 or agree to enter into any non-trial disposition without the youth's express authorization.

Commentary:

1. A lawyer should explore and consider restorative justice options, civil compromise, diversion, Formal Accountability Agreements, having the case filed as a dependency case, alternative dispositions including conditional postponements, motions to dismiss in the interests of justice, negotiated admissions or disposition agreements, and other non-trial dispositions.

2. A lawyer should explain to the youth the strengths and weaknesses of the prosecution's case and the defense case, the benefits and consequences of considering a non-trial disposition, any investigation which has been or could be conducted, and discuss with the youth any options that may be available to the youth and the rights the youth gives up by pursuing a non-trial disposition.

3. A lawyer should assist the youth in weighing whether there are strategic advantages to be gained by making an admission or continuing to trial.

4. With the consent of the youth, a lawyer should explore with the prosecutor and the juvenile court counselor, when appropriate, available options to resolve the case without trial. The lawyer should obtain information about the position the prosecutor and juvenile court counselor will take as to non-admission dispositions and recommendations that will be made about disposition. Throughout negotiation, a lawyer must zealously advocate for the expressed interests of the youth, including advocating for some benefit for the youth in exchange for an admission.

5. A lawyer cannot accept any negotiated settlement or agree to enter into any non-trial disposition without the youth's express authorization. The lawyer must attempt to ensure that the youth has adequate time to consider the plea and alternative options. A lawyer should advise youths about their opinion of any plea offers but may not substitute their judgement for that of their client.

6. A lawyer must keep the youth fully informed of continued negotiations and convey to the youth any offers made by the prosecution or recommendations by the juvenile court counselor for a negotiated settlement. The lawyer must assure that the youth has adequate time to consider the proposed admission and

alternative options. The terms of any proposed settlement must be explained to the youth in a clear, developmentally appropriate manner and the lawyer should exercise care that the youth understands the terms of the settlement as well as the consequences of the proposed settlement. The lawyer should also ensure that the youth has the opportunity to consult with trusted adults regarding the proposed admission and alternative options and should, with permission, explain to the trusted adult the terms of the settlement.

7. A lawyer should continue to take steps necessary to preserve the youth's rights and advance the youth's defenses even while engaging in settlement negotiations.

8. Before conducting negotiations, a lawyer should be familiar with:

    a. The types, advantages and disadvantages, and applicable procedures and requirements of available admissions to juvenile court jurisdiction, including an admission of being within the jurisdiction of the court, no contest, a conditional admission of jurisdiction that reserves the right to appeal certain issues, and an admission in which the youth is not required to acknowledge guilt (*Alford* plea);
    b. Whether agreements between the youth and the prosecution would be binding on the court or on the juvenile, parole and probation, and immigration authorities; and
    c. The practices and policies of the particular prosecuting authorities, juvenile authorities, and judge that may affect the content and likely results of any negotiated settlement.

9. A lawyer should be aware of, advise the youth of, and, where appropriate, seek to mitigate the following, where relevant:

    a. Rights that the youth would waive when making an admission disposing of the case without a trial;
    b. The minimum and maximum term of incarceration that may be ordered, including whether the minimum disposition would be indeterminate, and probation or post-confinement supervision.
    c. The minimum and maximum fines and assessments, court costs that may be ordered as well as options for waiving, deferring, or paying fines by installments, and any restitution that is being requested by the victim(s);
    d. Arguments to eliminate or reduce fines, assessments and court costs, challenges to liability for and the amount of restitution, the possibilities of civil action by the victims, asset forfeiture, and the availability of work programs to pay restitution and perform community service;
    e. Consequences related to previous offenses;
    f. The availability and possible conditions of conditional postponement, probation, and parole;
    g. The availability and possible conditions of alternative dispositions and formal accountability agreements;

h. For non-citizen youth, the possibility of temporary and permanent immigration relief through the available legislative or administrative immigration programs and Special Immigrant Juvenile Status;
i. For non-citizen youths, the possibility of adverse immigration consequences;
j. For non-citizen youths, the possibility of criminal consequences of illegal re-entry following adjudications and deportation;
k. The possibility of other consequences of adjudication, such as:
    i. Requirements for sex offender registration, relief, and set-aside;
    ii. DNA sampling, AIDS, and STD testing;
    iii. Effect on driver's or professional licenses and on firearm possession;
    iv. Loss of public benefits;
    v. Loss of housing, education, financial aid, career, employment, vocational, or military service opportunities; and
    vi. Risk of enhanced sentences for future adult convictions, including familiarity with the Oregon Sentencing Guidelines;
m. The possible place and manner of confinement, placement or commitment;
n. The availability of pre- and post-adjudication diversion programs and treatment programs;
o. The confidentiality of juvenile records and the availability of expungement.

10. A lawyer should identify negotiation goals with the following in mind:

    a. Concessions that the youth might offer to the prosecution, including an agreement:
        i. Not to contest jurisdiction;
        ii. Not to dispute the merits of some or all of the charges;
        iii. Not to assert or litigate certain rights or issues;
        iv. To fulfill conditions of restitution, rehabilitation, treatment, or community service;
        v. To provide assistance to law enforcement or juvenile authorities in investigating and prosecuting other alleged wrongful activity.
    b. Benefits to the youth, including an agreement:
        i. That the prosecution will recommend a reduced sentence upon adjudication compared with the likely sentence after adjudication at trial;
        ii. That the prosecutor will accept a plea to a lesser charge or dismiss remaining charges upon a plea;
        iii. That the prosecution will agree to continue juvenile court jurisdiction;
        iv. That the prosecution will not oppose release pending disposition or appeal;
        v. That the youth may reserve the right to contest certain issues;
        vi. To dismiss or reduce charges immediately or upon completion of certain conditions;
        vii. That the youth will not be subject to further investigation or prosecution for uncharged conduct;

viii. That the youth will receive, subject to the court's agreement, a specified set or range of sanctions; or
ix. That the prosecution will take, or refrain from taking, a specified position with respect to sanctions.

11. A lawyer has the duty to inform the youth of the full content of any tentative negotiated settlement or non-trial disposition, and to explain to the youth the advantages, disadvantages, and potential consequences of the settlement or disposition. A lawyer should discuss with the youth whether the youth wishes to counter the proposed settlement and promptly convey any counter-offer to the prosecution.

12. A lawyer should not recommend that the youth enter a dispositional admission unless appropriate investigation and evaluation of the case has taken place, including and analysis of controlling law and the evidence likely to be introduced if that case were to go forward.

Standard 6.2 – Entry of Admission to Jurisdiction

A decision to enter an admission to the allegation(s) rests solely with the youth. The lawyer must not unduly influence the decision to enter an admission and must ensure that the youth's acceptance of the negotiated admission is voluntary and knowing and reflects an intelligent understanding of the admission and the rights the youth will forfeit.

Commentary:

1. A lawyer has the duty to explain to the youth the advantages, disadvantages, and consequences of resolving the case by admitting to the allegations.

2. A lawyer has the duty to explain to the youth the nature of the hearing at which the youth will enter the admission and the role that the youth will play in the hearing, including participating in the colloquy to determine voluntary waiver of rights and answering other questions from the court and making a statement concerning the offense. The lawyer should be familiar with the Model Colloquy for juvenile waiver of the right to trial. The lawyer should explain to the youth that the court may in some cases reject the admission.

3. If during the admission hearing, the youth does not understand questions being asked by the court, the lawyer must request a recess to assist the youth.

Standard 7.1 – General Trial Preparation

A. A juvenile adjudicatory hearing (herein referred to as a trial) is a complex event requiring preparation, knowledge of applicable law and procedure, and skill. A defense lawyer must be prepared on the law and facts, and competently plan a challenge to the state's case and, where appropriate, presentation of a defense case.

B. A lawyer should develop, in consultation with the youth and members of the defense team, an overall defense 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, anticipated cross examinations, and direct examinations.

Commentary:

1. 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. An outline or draft of opening statement;
    d. Cross-examination plans for all possible prosecution witnesses;
    e. Direct examination plans for all prospective defense witnesses;
    f. Copies of defense subpoenas;
    g. Prior statements of all prosecution witnesses (e.g., transcripts, police reports);
    h. Prior statements of all defense witnesses;
    i. Reports from experts;
    j. The CVs of any experts expected to testify at trial;
    k. Training and other available records for any law enforcement offers who are expected to testify;
    l. A list of all exhibits and the witnesses through whom they will be introduced;
    m. Originals and copies of all documentary exhibits;
    n. Copies of all relevant statutes and cases;
    o. Evidence codes and relevant statutes and/or compilations of evidence rules and criminal or juvenile law 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.

2. 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 prosecution evidence for admissibility problems and develop strategies

for challenging evidence. The lawyer should be prepared to address objections to defense testimony. The lawyer should be prepared to raise affirmative defenses as applicable. The lawyer should consider requesting that witnesses be excluded from the trial.

3. A lawyer should evaluate whether expert testimony is necessary and beneficial to the youth. If so, the lawyer should seek an appropriate expert witness and prepare the witness to testify, including possible areas of cross examination.

4. 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.

5. Throughout the trial process, a lawyer should advise the youth as to suitable courtroom dress and demeanor.

6. A lawyer should plan with the youth the most convenient system for conferring privately throughout the trial; where necessary, a lawyer should seek a court order to have the youth available for conferences. A lawyer should, where necessary, secure the services of a competent interpreter or translator for the youth during all trial proceedings.

7. Throughout preparation and trial, a lawyer should consider the potential effects that actions may have upon disposition if there is a finding that the youth is within the jurisdiction of the court. A lawyer should discuss the risks of those actions with their client.

8. 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 youth or required by OPDC and, if so, attempt to obtain approval for the same as soon as possible.

Standard 7.2 – Opening Statement

An opening statement is a lawyer's first opportunity to present the defense case. The lawyer should be prepared to present a coherent statement of the defense theory based on evidence likely to be admitted at trial and should raise and, if necessary, preserve for appeal any objections to the prosecutor's opening statement.

Commentary:

1. Prior to delivering an opening statement, a lawyer should ask that the witnesses be excluded from the courtroom, unless a strategic reason exists for not doing so.

2. A lawyer's objective in making an opening statement may include the following:

    a. Provide an overview of the defense case emphasizing the defense theme and theory of the case;
    b. Identify the weaknesses of the prosecution's case;
    c. Emphasize the prosecution's burden of proof;
    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 judge to draw; and
    g. Humanize the youth.

3. A lawyer should listen attentively during the state's opening statement in order to raise objections and note potential promises of proof made by the state that could be used in summation.

4. A lawyer should consider incorporating the promises of proof the prosecutor makes during opening statement in the defense summation.

5. Whenever the prosecutor oversteps the bounds of a proper opening statement, a lawyer should consider objecting or requesting a mistrial unless tactical considerations weigh against any such objections or requests. Such tactical considerations may include, but are not limited to:

    a. The significance of the prosecutor's error;
    b. The possibility that an objection might enhance the significance of the information in the judge's mind;
    c. Whether there are any rulings made by the judge against objecting during the other attorney's opening statement.

6. A lawyer should give an opening statement in all cases unless there is a strong tactical reason not to. Lawyers may consider deferring opening statements until the beginning of the defense case.

Standard 7.3 – Confronting the Prosecution's Case

The essence of the defense is confronting the prosecution's case. The lawyer should develop a theme and theory of the case that directs the manner of conducting this confrontation. Whether it is refuting, discrediting, or diminishing the state's case, the theme and theory should determine the lawyer's course of action.

Commentary:

1. A lawyer should attempt to anticipate weaknesses in the prosecution's proof and consider researching and preparing corresponding motion for judgment of acquittal.

2. A lawyer should consider the advantages and disadvantages of entering into stipulations concerning the prosecution's case.

3. 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.

4. In preparing for cross-examination, a lawyer should:

    a. Consider the need to integrate cross-examination, the theory of the defense, and closing argument into questions for cross examination;
    b. Anticipate those witnesses the prosecutor 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's testimony;
    f. Be alert to possible 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 and other information developed about the witnesses;
    i. Review relevant statutes and police procedural manuals and regulations for possible use in cross-examining police 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 state's information that might otherwise be excluded;
    m. Avoid asking questions that do not advance a defense theory, that allow the witness to provide unhelpful explanations, or questions that the attorney does not know the answer to.
    n. Whenever possible, ask closed ended leading questions.

5. A lawyer should be aware of the applicable law concerning competency of witnesses and admission of expert testimony to raise appropriate objections.

6. Before beginning cross-examination, a lawyer should ascertain whether the prosecutor has provided copies of all prior statements of the witnesses as required by applicable law. If the lawyer does not receive prior statements of prosecution witnesses until they have completed direct examination, the lawyer should request, at a minimum, adequate time to review these documents before commencing cross-examination.

7. At the close of the prosecution's case, a lawyer should move for a judgment of acquittal on each count alleged, when appropriate. The lawyer should request, when necessary, that the court immediately rule on the motion.

Standard 7.4 – Presenting the Defense Case

A lawyer should be prepared to present evidence at trial where it will advance a defense theory of the case that best serves the interest of the youth.

Commentary:

1. A lawyer should develop, in consultation with the youth and defense team, an overall defense strategy. In deciding on defense strategy, a lawyer should consider whether the youth's interests are best served by not putting on a defense case and instead rely on the prosecution's failure to meet its constitutional burden of proving each element beyond a reasonable doubt.

2. A lawyer should discuss with the youth all of the considerations relevant to the youth's decision whether or not to testify.

3. A lawyer should be aware of the elements of any affirmative defense and know whether the youth bears a burden of persuasion or a burden of production.

4. In preparing for presentation of a defense case, a lawyer should:

    a. Develop a plan for direct examination of each potential defense witness and assure each witness's attendance by subpoena if necessary;
    b. Determine the implications that the order of witnesses may have on the defense case;
    c. Consider the possible use of character witnesses;
    d. Consider the need for expert witnesses; and
    e. Consider whether to present a defense based on mental disease, defect, diminished capacity, or partial responsibility, and provide notice of intent to

present such evidence and consult with the youth about the implications of an insanity defense.

5. In developing and presenting the defense case, a lawyer should consider the implications it may have for a rebuttal by the prosecutor.

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. A lawyer should conduct redirect examination as appropriate.

8. At the close of the defense case, the lawyer should renew the motion for judgment of acquittal on each charged count.

9. A lawyer should be prepared to object to an improper state's rebuttal case and offer surrebuttal witnesses if allowed.

Standard 7.5 – Closing Argument

A lawyer should be prepared to deliver a closing summation that presents the trier of fact with compelling reasons to render a verdict for the youth.

Commentary:

1. A lawyer should be familiar with the substantive limits on both prosecution and defense summation.

2. A lawyer should be familiar with local rules and the individual judge's practice concerning time limits and objections during closing argument as well as provisions for rebuttal argument by the prosecution.

3. A lawyer should prepare the outlines of the closing argument prior to the trial and refine the argument at the end of trial by reviewing the proceedings to determine what aspects can be used in support of defense summation and, where appropriate, should consider:
   a. Highlighting weaknesses in the prosecution's case;
   b. Describing favorable inferences to be drawn from the evidence;
   c. What the possible effects of the defense arguments are on the prosecutor's rebuttal argument; and
   d. Incorporating into the argument:
      i. Helpful testimony from direct and cross-examinations;
      ii. Verbatim instructions drawn from the applicable adult criminal jury charge; and
      iii. Responses to anticipated prosecution arguments.

4. Whenever the prosecutor exceeds the scope of permissible argument, the lawyer should object or request a mistrial unless tactical considerations suggest otherwise.

5. A lawyer should ask the court, even if sufficient evidence is found to support jurisdiction, not to exercise jurisdiction and move to dismiss the petition (or defer finding jurisdiction until after the dispositional hearing) on the ground that jurisdiction is not in the best interests of the youth or society.

Standard 8 – Obligations of Counsel Concerning Disposition

A lawyer must work with the youth to develop a theory of disposition and an individualized disposition plan that is consistent with the youth's desired outcome. The lawyer must present this plan in court and zealously advocate on behalf of the youth for such an outcome.

Commentary:

1. In every delinquency case, a lawyer should:
   a. Be knowledgeable about the applicable law governing the length and conditions of any applicable disposition, the pertinent dispositional procedures, and inform the youth at the commencement of the case of the potential disposition for the alleged offenses;
   b. Be aware of the youth's relevant history and circumstances, including physical and mental health needs, and educational needs, and be sensitive to the youth's sexual orientation or gender identity to the extent this history or circumstance impacts dispositional plan;
   c. Understand and advise the youth concerning the availability of deferred dispositions, conditional discharges, early termination of probation, informal dispositions, alternative disposition including conditional postponement and diversion agreements, and formal accountability agreements;
   d. Understand and explain to the youth the consequences and conditions that are likely to be imposed as probation requirements or requirements of other dispositions and the potential collateral consequences of any disposition in a case, including the effect of an adjudication on a sentence for any subsequent crime or act that would be a crime if committed by an adult;
   e. Be knowledgeable about treatment or other programs, out-of-home placement possibilities, including group homes, foster case, residential treatment programs, or mental health treatment facilities that may be required as part of disposition or that are available as an alternative to incarceration or out of home placement for youth that could reduce the length of a youth's time in custody or in out-of-home placement;
   f. Be knowledgeable about the requirements of placements that receive Title IV-E of the Social Security Act funding through contacts with the Juvenile

Departments or the Department of Human Services and be able to request "no reasonable efforts" findings from the juvenile court when it would benefit the youth;

g. Develop a plan in conjunction with the youth, supported where appropriate by a written memorandum addressing pertinent legal and factual considerations, that seeks the least restrictive and burdensome disposition which can reasonably be obtained based upon the facts and circumstances for the case and that is acceptable to the youth;
h. Where appropriate, obtain assessments or evaluations that support the youth's plan;
i. Investigate and prepare to present to a prosecutor when engaged in plea negotiations or to the court at disposition available mitigating evidence and other favorable information that might benefit the youth at disposition;
j. Ensure that the court does not consider inaccurate information or immaterial information harmful to the youth in determining the disposition to be imposed;
k. Be aware of and prepare to address explicit or implicit bias that impacts disposition; and
l. Review the accuracy of any temporary or final disposition order of judgments of the court and move the court to correct any errors that disadvantage the youth.

2. In understanding the disposition applicable to a youth's case, a lawyer should:
   a. Be familiar with the law and any applicable administrative rules governing the length of disposition and be familiar with the juvenile code and case law language that supports a less restrictive disposition that best meets the expressed needs of the youth;
   b. Be knowledgeable about potential court-imposed financial obligations, both direct and in-direct, including restitution and payments for treatment services, and, where appropriate, challenge the imposition of such obligations when not supported by the facts or law;
   c. Be familiar with the operation of indeterminate disposition and the law governing credit for pretrial detention, time limits on post-disposition juvenile detention and out-of-home placement, as well the length of time and usual conditions of juvenile parole;
   d. As warranted by the circumstances of a case, consult with experts concerning the collateral consequence of a juvenile adjudication on a youth's immigration status or other collateral consequences of concern to the youth e.g., civil disabilities, sex-offender registration, disqualification for types of employment, consequences related to the child welfare system, DNA and HIV testing, military opportunities, availability of public assistance, school loans and housing and enhanced sentences or dispositions for future convictions or adjudications;
   e. Be familiar with statutes and relevant cases from state and federal appellate courts governing legal issues pertinent to disposition; and
   f. Advance other available legal arguments that support the least restrictive and burdensome sentence.

3. In understanding the applicable dispositional hearing procedures, a lawyer should:
   a. Determine the effect that admission negotiations may have on the disposition discretion of the court;
   b. Understand the availability of other evidentiary hearings to challenge inaccurate or misleading information that might harm the youth, to present evidence favorable to the youth and ascertain the applicable rules of evidence and burdens of proof at such a hearing;
   c. Undertake other available avenues to present legal and factual information to the court that might benefit the youth and challenge information harmful to the youth.

4. In advocating for the least restrictive or burdensome disposition for a youth, a lawyer should:
   a. Inform the youth of the applicable dispositional requirements, options, and alternatives, including liability for restitution and other potential financial obligations and the methods of collection and consequences of non-payment;
   b. Maintain regular contact with the youth before the dispositional hearing and keep the youth informed of the steps being taken in preparation of disposition and work with the youth to develop a theory for the disposition phase of the case;
   c. Obtain from the youth and others information such as the youth's background and personal history, prior juvenile record, employment history and skills, education and current school issues, medical history and condition, mental health issues and mental health treatment history, current and historical substance abuse history and treatment, and what, if any, relationship there is between the youth's acts that would be crimes if committed by an adult and the youth's medical, mental health, or substance abuse issues and the sources through which the information can be corroborated;
   d. Determine with the youth whether to obtain a psychiatric, psychological, educational, neurological, or other evaluation for dispositional purposes;
   e. If the youth is being evaluated or assessed, whether by the state or at the lawyer's request, provide the evaluator in advance with background information about the youth and request that the evaluator address the youth's emotional, educational, and other needs as well as alternative dispositions that will best meet those needs and society's needs for protection;
   f. Prepare the youth for any evaluations or interviews conducted for disposition purposes;
   g. Be familiar with and, where appropriate, challenge the validity and reliability of any risk assessment tools;
   h. Investigate any disputed information related to disposition, including restitution claims;
   i. Inform the youth of the youth's right to address the court at disposition and, if the youth chooses to do so, prepare the youth to personally address the court,

including advice of the possible consequences that admission of responsibility may have on an appeal, retrial, or trial on other matters;

j. Ensure the youth has adequate time prior to disposition hearing to examine any dispositional report, or other documents and evidence that will be submitted to the court at disposition;
k. Prepare a written disposition plan that the lawyer and the youth agree will achieve the youth's goals;
l. Be prepared to present documents, affidavits, letters, and other information including witnesses that support a disposition favorable to the youth;
m. As supported by the facts and circumstances of the case and youth, challenge any conditions of probation or parole that are not reasonably related to the adjudicated acts, the protection of the public or reformation of the youth;
n. Be prepared to present evidence on the reasonableness of Oregon Youth Authority, Juvenile Department or Department of Human Services efforts that could have been made concerning the disposition and, when supported by the evidence, request a "no reasonable efforts" finding by the court;
o. After the court has found jurisdiction, move the court, when supported by the facts, to not exercise jurisdiction and dismiss the petition, amend the petition, or find jurisdiction on fewer than all charges, on the ground that jurisdiction is not in the best interests of the youth or society;
p. Be familiar with the obligations of the court and district attorney regarding statutory or constitutional victims' rights and, where appropriate, ensure that the record reflects compliance with those obligations;
q. Take any other steps that are necessary to advocated fully for the disposition requested by the youth and to protect the interests of the youth; and
r. Advise the youth about the obligations and duration of disposition conditions imposed by the court, and the consequences of failure to comply with orders of the court. Where appropriate, counsel should confer with the youth's parents regarding the disposition process to obtain their support for the youth's proposed disposition.

Standard 9.1 – Consequences of Plea on Appeal

In addition to direct and collateral consequences, a lawyer should be familiar with, and advise the youth of, the consequences of an admission to juvenile court jurisdiction on the youth's ability to successfully challenge the conviction, juvenile adjudication, sentence, or disposition in an appellate proceeding.

Commentary:

1. A lawyer should be familiar with the effects of a guilty plea, admission to juvenile court jurisdiction, or a no contest plea on the various forms of appeal.

2. During discussions with the youth regarding a possible admission, plea of guilty, or no contest, a lawyer must inform the youth of the consequences of such a plea on any potential appeals.

3. A lawyer should be familiar with the procedural requirements of the various types of pleas, including the conditional admission, that affect the possibility of appeal.

Standard 9.2 – Preservation of Issues for Appellate Review

A lawyer should be familiar with the requirements for preserving issues for appellate review. A lawyer should discuss the various forms of appellate review with the youth and apprise the youth of which issues have been preserved for review.

Commentary:

1. A lawyer must know the requirements for preserving issues for review on direct appeal and in federal habeas corpus proceedings.

2. A lawyer should review with the youth those issues that have been preserved for appellate review and the prospects for a successful appeal.

Standard 9.3 – Post Sentencing and Disposition Procedures

A lawyer should be familiar with procedures that are available to the youth after disposition. A lawyer should explain those procedures to the youth, discern the youth's interests and choices, and be prepared to zealously advocate for the youth.

Commentary:

1. Upon entry of judgment, a lawyer should immediately review the judgment to ensure that it reflects the oral pronouncement of the sentence or disposition and is otherwise free of legal or factual error. A lawyer should ensure that the judgment includes the disposition probation plan, including any actions to be taken by parents, guardians, or custodians.

2. The lawyer must be knowledgeable concerning the application and procedural requirements of a motion for new trial or motion to correct the judgment.

3. The lawyer should be versed in relevant case law, statutes, court rules, and administrative procedures regarding the enforcement of disposition orders, as well as the methods of filing motions for post-disposition and post-adjudicatory relief, for excusal or relief from sex offender registration requirements, and to review, reopen, modify, or set aside adjudicative and dispositional orders. For youth whose circumstances have changed; youth whose health, safety, or welfare

is at risk; or youth not receiving services as directed by the court, a lawyer should file motions for early discharge or dismissal of probation or commitment, early release from detention, or modification of the court order. Where commitment is indeterminate and youth correctional authorities have discretion over whether and when to release a youth from secure custody, when the period of incarceration becomes excessive the lawyer should advocate to terminate or limit the term of commitment, if desired by the youth.

Standard 9.4 – Maintain Regular Contact with Youth

A. A lawyer for a youth in delinquency proceedings should stay in contact with the youth following disposition and continue representation while the youth remains under court or agency jurisdiction.

B. A lawyer should inform a youth of procedures available for requesting a discretionary review of, or reduction in, the sentence or disposition imposed by the trial court, including any time limitations that apply to such a request.

Commentary:

1. The lawyer should assure a youth that the lawyer will continue to advocate on the youth's behalf regarding post-disposition hearings, including probation reviews and probation or parole violation hearings, challenges to conditions of confinement, and other legal issues, especially when the youth is incarcerated. The lawyer should also provide advocacy to get the youth's record expunged or to obtain relief from sex offender registration.

2. Lawyers for youth convicted as adults but who were under 18 years of age at the time of the offense should be familiar with and inform the youth of the "second look" provisions of ORS 420A.203 and ORS 420A.206.

3. To stay in regular contact with an adjudicated youth, a lawyer should have contact with the youth at least quarterly and before any court hearings.

Standard 9.5 – Representing a Youth Pursuant to ORS 419C.615

A lawyer appointed to represent a youth in a claim for juvenile post adjudication relief pursuant to ORS 419C.615 should be familiar with and able to meet the performance standards set forth in the Oregon State Bar Performance Standards for Post-Conviction Relief Practitioners.

A lawyer appointed to represent a youth in a claim for juvenile post adjudication relief pursuant to ORS 419C.615 should be sufficiently familiar with youth development and the standards for representation of youth in delinquency matters to identify possible shortcomings in the representation or process.

Counsel should conduct a thorough and independent investigation of the validity of the underlying adjudication, disposition, and, when applicable, appellate proceedings. Counsel's investigation should examine the entire delinquency case for evidence of a substantial denial of state or federal constitutional rights in the trial level or appellate proceedings.

Counsel should ordinarily not have represented the petitioner during the underlying delinquency case or direct appeal since the post-adjudication proceeding may be the only opportunity to raise claims of ineffective or inadequate assistance of trial and appellate counsel.

Commentary:

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

    a. Counsel should be familiar with the type of claims that may be raised in post-adjudication relief proceedings, and understand that most direct-appeal-like, record based claims, are not cognizable.
    b. Counsel should understand that a "collateral" basis for post-adjudication relief, by statutory and common sense understanding, will ordinarily not be entirely established by the previously compiled record of the case, and must be supported by factual and legal grounds that arise outside the record.
    c. Counsel should not accept appointment in a post-adjudication relief proceeding unless he or she is prepared, knowledgeable, and skilled to undertake a comprehensive extra-record investigation.

2. Juvenile post-adjudication relief is a critical chance to present new evidence that was not part of the original adjudication. Counsel representing youths in these cases should consider:

    a. whether the youth was mentally fit during the case;
    b. misconduct by police or prosecutors;
    c. judicial error or misconduct;
    d. mistaken or flawed eyewitness accounts;
    e. false or unreliable testimony from informants;
    f. forced or pressured confessions;
    g. errors in forensic testing and analysis;
    h. poor representation by the youth's trial or appeals lawyer; and
    i. whether an admission was made voluntarily and with full understanding.

3. Counsel's investigation should include a thorough review of all available transcripts of the proceedings in the delinquency case. Counsel should seek to obtain, review, and transcribe any necessary portions of the proceedings that were not already transcribed.

4. Counsel should obtain and review other relevant records and documents, including the complete file of trial counsel and appellate counsel in the delinquency case, and, where appropriate, files and records of investigators and experts who worked with trial counsel, prosecutorial and police files and records, and records of the trial and appellate courts. Where appropriate, counsel should interview trial and appellate counsel. Trial and appellate counsel should cooperate with post adjudication counsel's investigation to the extent ethically permitted.

Standard 10.1 – Representing Youth in Waiver Proceedings: Specialized Training and Experience Necessary

Specialized training and experience are prerequisites to providing effective assistance of counsel to youths facing waiver motions and possible adult prosecution.

Counsel must be familiar with relevant statutes and case law regarding the interplay between adult and juvenile prosecution, including waiver factors enumerated ORS 419C.349(2)(b). Counsel must be aware of the timing and process of waiver hearings and required findings for waiver of the juvenile court's jurisdiction.

Commentary:

1. Counsel should be knowledgeable and aware of the extent to which adult and juvenile facilities provide young youth's legally mandated safety protections, medical and mental health care, rehabilitative treatment, and mandatory education services to which they are entitled;

2. Counsel should be aware of timelines for youth to be committed to juvenile or adult facilities;

3. Counsel should be knowledgeable of sentencing alternatives in both adult court and for waived youth convicted in adult court;

4. Counsel should pursue specialized training, including in the areas of child and adolescent development, to ensure the requisite level of knowledge and skill to represent a youth in a transfer hearing or in adult court, and be familiar with developmental issues that may affect competence to stand trial; and

5. When the youth will be tried in adult court, counsel has the responsibility of educating the adult court stakeholders, including new defense counsel, if applicable, of the special developmental considerations of youth. Counsel must use child development research and case law supporting the lessened culpability of adolescent offenders in arguing intent, capacity, and the appropriateness of rehabilitative sentencing options.

Standard 10.2 – Informing the Youth of the Possibility of Adult Prosecution and the Potential Consequences

Counsel must fully advise the youth of the procedures that may lead to adult prosecution and the various ways that the state could proceed.

Commentary:

1. Counsel should strive to use developmentally appropriate language when advising the youth about the youth's case;

2. Counsel must be well versed in the procedures that could lead to adult prosecution as well as the consequences of an adult prosecution;

3. Counsel must explain the consequences of prosecution in adult court, including the extent of possible sentencing decisions, as well as collateral consequences. Counsel should advise which venue would be most likely to achieve the youth's expressed interest;

4. As part of counsel's obligation to inform the youth about the Waiver proceedings, counsel should discuss with the youth, at a minimum:
   a. Factors the court uses to determine whether to try youth as adult;
   b. Use of physical, psychological, or other evidence considered by the court at a waiver hearing;
   c. The disadvantages along with the advantages of proceeding in adult court;
   d. The potential to negotiate a plea that would allow the youth to remain in juvenile court or receive a more lenient sentence in adult court; and
   e. The potential, where it exists, of a change of counsel should the court waive juvenile jurisdiction over the case.

Standard 10.3 – Conducting Investigation for Youths Facing Waiver and Possible Adult Prosecution

Counsel must conduct timely and thorough investigation of the circumstances of the allegations and the youth's background in any case where the youth is facing a waiver petition under ORS 419C.349.

Commentary:

1. Counsel must understand the factors that weigh for and against waiver to adult court and must investigation the case accordingly;

2. Counsel should compile and coordinate all evidence and information bearing on the waiver decision;

3. Counsel should retain a licensed investigator to conduct a thorough investigation into the factual circumstances of the underlying charges as well as a mitigation specialist to investigate and develop the factual record pertaining to youth's history and development;

4. Counsel should obtain records and evidence bearing on the waiver decision, which may include:
   a. Past juvenile delinquency records;
   b. Child welfare records;
   c. School records;
   d. Detention records;
   e. Mental health and medical records;
   f. Other relevant records related to youth's history and development, including relevant family history and circumstances; and
   g. Interviews of people with personal knowledge of the youth.

5. Counsel should arrange for independent evaluations, including but not limited to psychological evaluations related to the specific waiver criteria and retain experts as necessary and appropriate to challenge the evidence in the state's case, educate the court regarding juvenile development and brain science, and support youth's case at a waiver hearing.

   a. Counsel should provide defense evaluators with relevant records or materials to assist the expert's work on the case;
   b. Counsel should advise youth on the advantages and disadvantages of discussing the underlying allegations with any defense evaluator(s), including the potential use of such statements at the waiver proceeding and any subsequent proceedings;
   c. Counsel should advise youth on whether to invoke his or her constitutional right to remain silent during an evaluation regarding the underlying allegations and any other areas of potential juvenile or criminal liability;
   d. If counsel and youth decide that invocation of the right to remain silent is in youth's best interest as to any topic, counsel must be present during the evaluation to invoke such rights; and
   e. Counsel should prepare youth for his or her meeting with the evaluator.

6. If the state intends to proceed with an independent psychological evaluation of youth for the purpose of the waiver hearing, counsel must, at a minimum:

a. Advise the youth as to the advantages and disadvantages of participating in the evaluation, including advising youth whether to discuss the underlying allegations with the evaluator or whether to invoke youth's constitutional right to remain silent as to the charges or other potential topics carrying potential juvenile or criminal liability;
b. Prepare youth for the meeting with the state's evaluator;
c. Counsel must be present in person during any evaluation or meeting between the youth and the state's evaluator, even if counsel does not intend to invoke youth's rights;
d. Counsel should invoke youth's constitutional right to remain silent, as appropriate, during the evaluation;
e. Counsel should advocate for appropriate breaks for youth, as needed, during the evaluation; and
f. Counsel should decide, with input from the youth, whether to provide records or mitigation materials bearing on the youth's history and development to the state's expert to aid in the evaluation.

7. Counsel should be familiar with the legal issues relating to waiver including case law and research regarding adolescent development. Counsel should develop cogent arguments that support the youth's expressed interests.

8. Counsel must advocate for the youth's expressed interests regarding jurisdiction with prosecutors and other stakeholders in advance of a waiver proceeding.

Standard 10.4 – Advocate Against Waiver to Adult Court

Counsel must, when in the youth's expressed interests, endeavor to prevent adult prosecution of the youth.

Commentary:

At a waiver hearing, counsel should:

1. Present testimony and evidence that supports the juvenile court retaining jurisdiction over the case, including but not limited to: presentation of expert testimony, presentation of mitigation evidence, lay witness evidence or testimony, challenges to the underlying factual basis for the petition, and any other evidence that relates to the court's required findings under ORS 419C.349.

2. Counsel should file appropriate pre-hearing motions, including but not limited to, a hearing memorandum outlining the relevant legal issues and facts to be considered by the court at the hearing, motions to suppress evidence, and evidentiary or constitutional motions specific to waiver hearings.

3. Counsel must be prepared to challenge the state's evidence, including cross examination of any expert witnesses called by the state.

4. Counsel should present a cogent and well-organized closing argument to the court founded in the law and the facts of the case and zealously advocating against waiver of juvenile court's jurisdiction.

Standard 10.5 – Obligations Following a Determination to Prosecute the Youth in Adult Court

Commentary:

1. Counsel should be aware of federal and state limitations on youth placement in adult facilities and, as appropriate and consistent with the youth's wishes, advocate for appropriate placement.

2. If the case is waived to adult court and the youth is assigned a different lawyer, counsel should work closely with the new attorney to ensure a smooth transition of the case.

STATEWIDE

In-custody numbers increased by 34.4% and out-of-custody numbers increased by 1.0% during September.

	7/3/23	8/31/25	9/30/25	Change
In-Custody	4	154	207	53
Out-of-Custody Pretrial	26	2,802	2,830	28

Much of the increase is likely due to the end of the 23-25 contract cycle as providers meet MAC limits. With new contracts beginning October 1, these numbers are likely to reduce as new MAC becomes available.

- For consistency, OPDC always reports on the unrepresented numbers as of the last day of the month. This month, that date coincided with the last day of OPDC's 23-25 contract cycle.
- This resulted in higher unrepresented numbers, as many contractors had reached their contracted MAC limit for the entire contract cycle.
- Since the 25-27 contract began on October 1, in custody numbers have already decreased by 46, and out-of-custody pretrial numbers have decreased by 100.
- This end-of-contract impact was extremely acute at the end of 2021-2023, where contractors were cutting off months prior to the end of the contract.

While this month's trends are likely an anomaly, we are still seeing clear trends throughout the states. Since the beginning of the year, in-custody individuals have increased 15.6%, and out-of-custody pretrial individuals have decreased 9.6%. Notable trends since January 1, 2025 include:

- Coos County unrepresented pretrial out-of-custody numbers have remained under 120, and unrepresented in-custody have remained under 12;
- Jackson County in-custody numbers have declined by nearly 66%;
- Marion County unrepresented pretrial out-of-custody numbers have decreased by 450, the largest decrease of any county;
- Multnomah County unrepresented pretrial out-of-custody numbers have plateaued in the past two months but are up 200 from the beginning of the year.

OPDC assignment coordinators identified counsel for 1,108 cases in September, 201 of which were Betschart cases.

	8/31/25	9/30/25	Change
Total (Cumulative)	3,341	3,542	201
Contractors	540	589	49
Hourly	2,251	2,381	130
OPDC Trial Division	566	588	22

Unrepresented Report

September 2025

Unrepresented Trends

As seen in **Figure 1**, the majority of unrepresented cases have been misdemeanors, with fewer than 40% being felonies. **Figure 2** shows the trend line for both in-custody and out-of-custody pretrial individuals.

Figure 1: Pretrial Unrepresented Cases & Individuals

Source: OJD Unrepresented Data

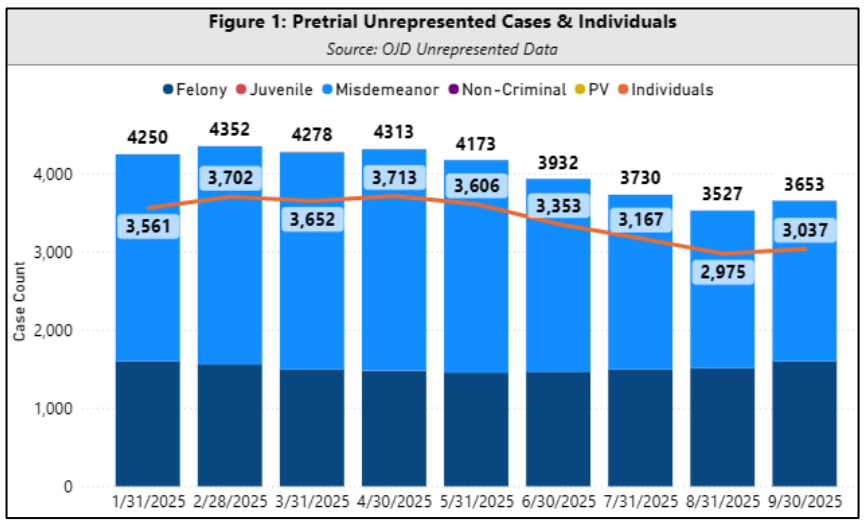
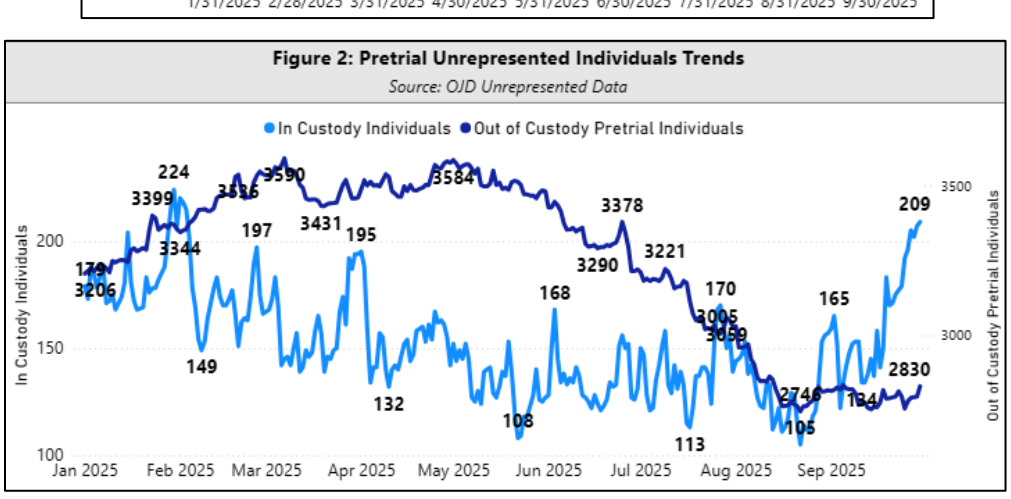


Figure 2: Pretrial Unrepresented Individuals Trends

Source: OJD Unrepresented Data



Caseload Capacity

Collectively, criminal contractors and the OPDC trial division were appointed to over 7,300 cases in September 2025. Contractors were at a 91% MAC utilization, and using the same calculations, the Oregon Trial Division is at 104% MAC utilization.

Figure 3 summarizes cases and MAC utilization for contractors and the Oregon Trial Division. The same calculations are used to determine MAC utilization for all provider types.

Figure 3: Case Data and MAC Utilization

Provider Type	Total Cases	Monthly Cases	MAC Utilization
Contractors (Criminal)[1]	178,417	7,080	91.0%
Consotia	78,088	3,122	93.0%
Non-Profits	72,395	2,967	87.4%
Individuals/Firms	27,934	991	96.4%
Oregon Trial Divsion[2]	2,996	186	104.3%
Northwest	842	32	95.4%
Central Valley	961	112	105.6%
Southern	1,204	53	114.4%

[1] OPDC Contract Data, July 2023-August 2025

[2] Oregon Trial Division, Excludes Chiefs, December 2023-September 2025

OPDC Case Assignments

Of the 1,108 cases OPDC Assignment Coordinators assigned in August, 563 cases were in crisis counties.

Figure 4 shows the total number of cases assigned by OPDC Assignment Coordinators in the crisis counties since May 2024. **Figure 5** shows the number of clients with a case subject to Betschart, the Assignment Coordinators helped find an attorney for in one of the crisis counties since May 2024.

Figure 4: Cases Assigned by OPDC Assignment Coordinators

Source: OPDC Assignment Coordinator Data

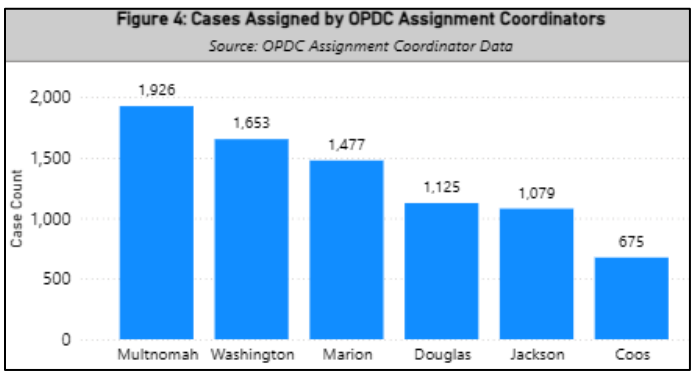
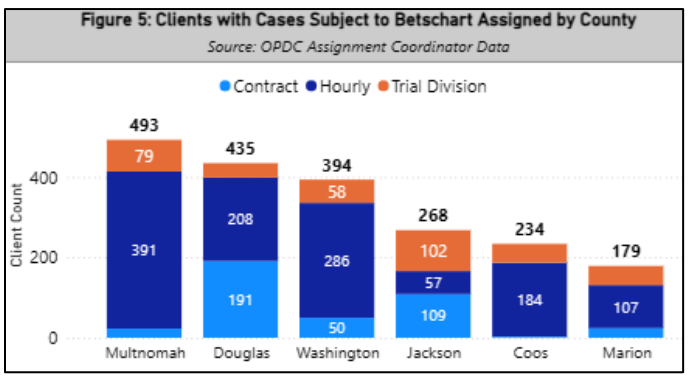


Figure 5: Clients with Cases Subject to Betschart Assigned by County

Source: OPDC Assignment Coordinator Data



OREGON TRIAL DIVISION

The Oregon Trial Division (OTD) comprises state-employed attorneys and support staff who provide trial-level defense services throughout the state. They primarily serve three regions: the Northwest, Central Valley, and Southern regions. The OTD currently has 17 attorneys and 3 Chief Deputy Attorneys who manage the regional offices. Data about the Trial Division can be found under Caseload Summary on the Trial Division Dashboard.

MAC Utilization

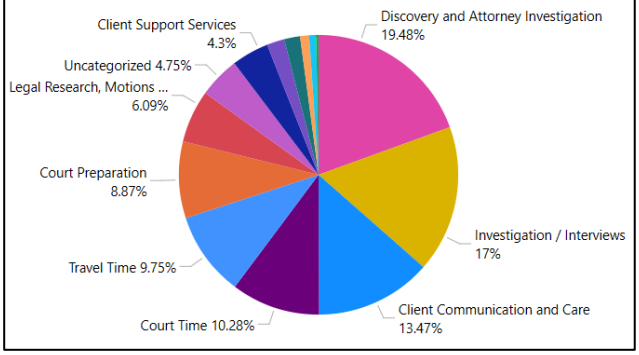
Maximum Attorney Caseload (MAC) Utilization is the measure of attorney capacity for the OTD. Each OTD region is treated individually, and MAC is calculated in the same manner as contractor MAC. **Figure 1** shows the MAC utilization rates of each OTD office. OTD has taken 2,996 cases since first opening in December 2023. They have closed 1,609 of those cases and have 1,387 open cases.

Figure 1	Total Cases	MAC Utilization
Oregon Trial Division	2,991	104.3%
Northwest	842	95.4%
Central Valley	961	105.6%
Southern	1,204	114.4%

Timekeeping

OTD attorneys track the time they spend on each case. Across 13 different categories, we can see how OTD attorneys, investigators, and case managers allocate their time. As **Figure 2** shows, discovery and investigation are the most time-consuming parts of a case, followed by client communication. As state employees, OTD attorneys have an open workload, meaning that when an attorney closes a case, they immediately have available capacity for new cases. The chiefs manage attorney time based on MAC utilization, while also considering national workload standards and a 1,578-hour work assumption.

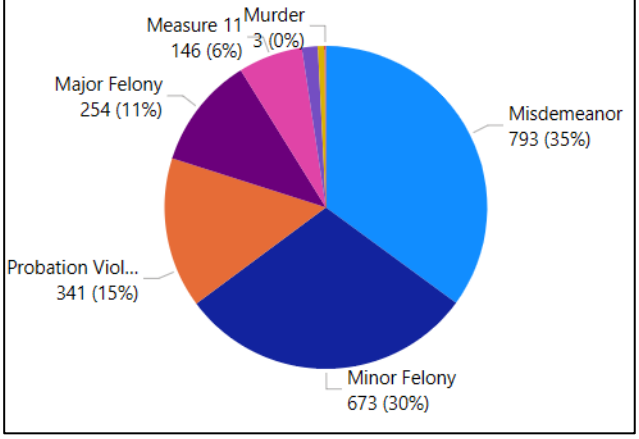
Figure 2: Time Tracking by Category



Unrepresented Impact

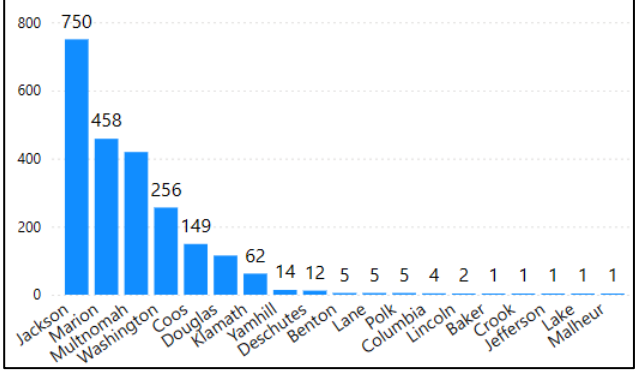
OTD has removed 2,261 cases from the unrepresented list, including 590 Betschart cases. **Figure 3** shows the types of cases removed, and **Figure 4** shows the distribution per county. Many clients have multiple charges, with attorneys often handling serious felonies alongside misdemeanors. Stand-alone misdemeanors and minor felonies include domestic violence and Betschart charges, as well as cases from early resolution dockets.

Figure 3: Oregon Trial Division Cases from Unrepresented List



OTD has partnered with DAs and courts in Multnomah, Marion, Coos, and Jackson counties to create early resolution dockets for defendants with low-level charges, mainly property offenses. These dockets allow defendants to review plea offers with attorneys, leading to effective case resolutions. For example, Multnomah resolved 20 unrepresented cases in one day, Coos County averages 9 per month, Marion will target 20 per week in October, and Jackson clears 25 cases per month at arraignment.

Figure 4: Oregon Trial Division Cases from Unrepresented List



Unrepresented Report

September 2025

COOS

Unrepresented Report

September 2025

Both in-custody and out-of-custody numbers **increased slightly** in September.

	7/3/23	8/31/25	9/30/25	Change
In-Custody	4	5	7	2
Out-of-Custody Pretrial	26	60	61	1

Coos County's only contracted provider, a non-profit, took 107 cases in August; their MAC utilization is 100.3%.

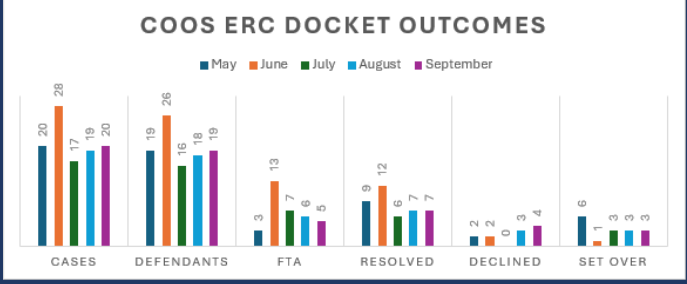
	July	August	Change
Total Cases taken July 2023-August 2025	2,284	2,391	107
MAC Utilization	100.6%	100.3%	-0.3%

The Oregon Trial Division took 27 cases in September.

	8/31/25	9/30/25	Change
Total (Cumulative)	127	154	27
Northwest Region	3	2	-1
Central Region	127	148	21
Southern Region	3	4	1

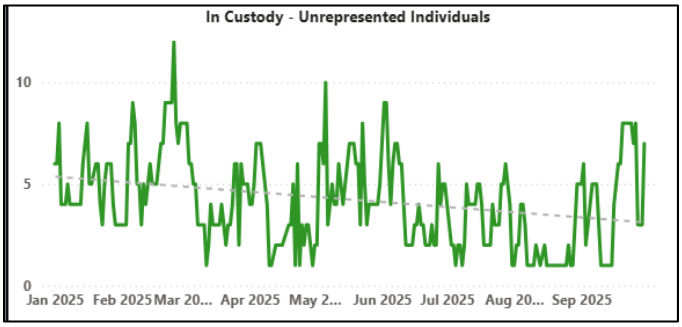
OPDC assignment coordinators identified counsel for 42 cases in September, 12 of which were Betschart cases. As the number of in-custody, unrepresented individuals declines, so does the number of Betschart cases.

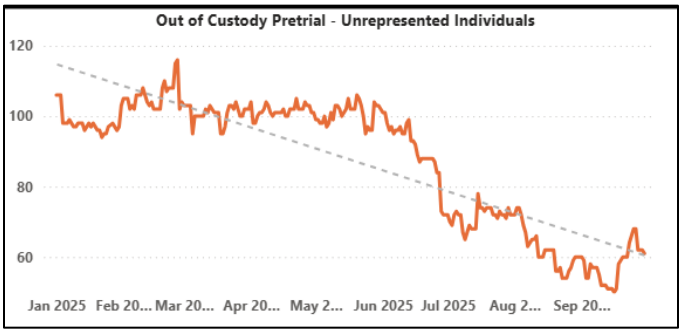
	8/31/25	9/30/25	Change
Total (Cumulative)	283	295	12
Contractors	3	3	0
Hourly	230	237	7
OPDC Trial Division	51	56	5



Unrepresented Trends

Since the beginning of the year, Coos has seen in-custody numbers remain low, averaging around 5, and has completely cleared its in-custody list on a few occasions. Out-of-custody numbers have declined significantly during that time frame.





Early Resolution Case Docket

Earlier this year, the Oregon Trial Division collaborated with the court and the DA's office to establish an early resolution case (ERC) docket. This docket offers defendants with low-level charges, often property offenses, the chance to review a plea offer with a defense attorney, with the option to accept the plea and resolve their charges. Starting in May 2025, this monthly docket has played a key role in reducing Coos County's unrepresented pretrial backlog, with its positive impact evident in the downward trend beginning that month. These dockets have proven so effective that October marks the last planned ERC docket in Coos, as nearly all ERC-eligible cases will have been resolved. The newly formed consortium in Coos may take over this docket to expand Trial Division capacity elsewhere. The graph to the left, provided by OJD's 15th Judicial District's Operational Analyst, illustrates the impact and outcomes of the ERC docket in Coos over the past five months.

DOUGLAS

Unrepresented Report

September 2025

In-custody numbers **increased** by 7**,** and out-of-custody numbers **increased** by 4.6% in September.

	7/3/23	8/31/25	9/30/25	Change
In-Custody	4	4	11	7
Out-of-Custody Pretrial	26	239	250	11

Douglas County contract providers took 163 cases in August; their MAC utilization is 82.4%.

	July	August	Change
Total Cases taken July 2023-August 2025	3,856	4,019	163
MAC Utilization	81.9%	82.4%	0.5%
Consortia	81.1%	79.1%	-2.0%
Non-Profits	82.7%	84.9%	2.2%
Other	81.1%	79.7%	-1.4%

The Oregon Trial Division took 12 cases in September.

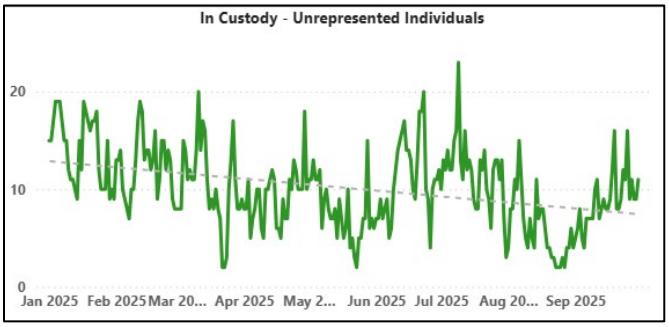
	8/31/25	9/30/25	Change
Total (Cumulative)	108	120	12
Central Region	76	88	12
Southern Region	32	32	0

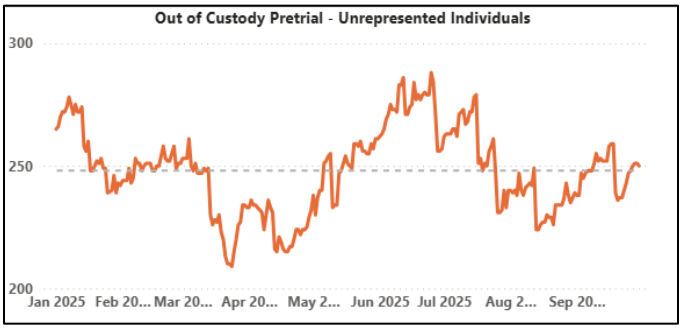
OPDC assignment coordinators identified counsel for 67 cases in September, 43 of which were Betschart cases. As the number of in-custody unrepresented individuals declines, so does the number of Betschart cases.

	8/31/25	9/30/25	Change
Total (Cumulative)	567	610	43
Contractors	255	271	16
Hourly	268	292	24
OPDC Trial Division	47	50	3

Unrepresented Trends

Since the beginning of the year, Douglas County has seen a decline in in-custody numbers, averaging around 10. Out-of-custody numbers have fluctuated month by month, but remained relatively stable overall during that time frame, averaging around 250.





Looking Forward

Douglas County providers experienced considerable volatility throughout 2024. However, since the beginning of the year, conditions have stabilized. OPDC believes that the new contracts will give Douglas County additional resources and that investments in the Supervised Practice Portfolio Examination, an alternative to the Bar, and in recently barred attorneys will generate returns within the next six months.

JACKSON

Unrepresented Report

September 2025

In-custody numbers **decreased** by 3, and out-of-custody numbers **increased** by 22, or 4.8% in September.

	7/3/23	8/31/25	9/30/25	Change
In-Custody	4	16	13	-3
Out-of-Custody Pretrial	6	456	478	22

Jackson County contract providers took 391 cases in August; their MAC utilization is 95.8%.

	July	August	Change
Total Cases taken July 2023-August 2025	7,525	7,916	391
MAC Utilization	95.7%	95.8%	0.1%
Consortia	96.0%	95.7%	-0.3%
Non-Profits	95.4%	95.9%	0.4%
Other	93.3%	95.5%	2.2%

The Oregon Trial Division took 65 cases in September.

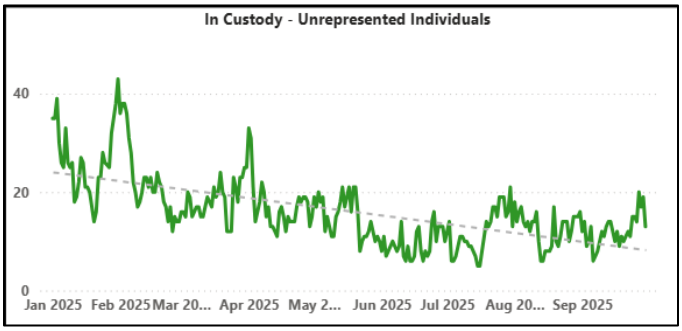
	8/31/25	9/30/25	Change
Total (Cumulative)	1,025	1,090	65
Central Region	0	15	15
Southern Region	1025	1,075	50

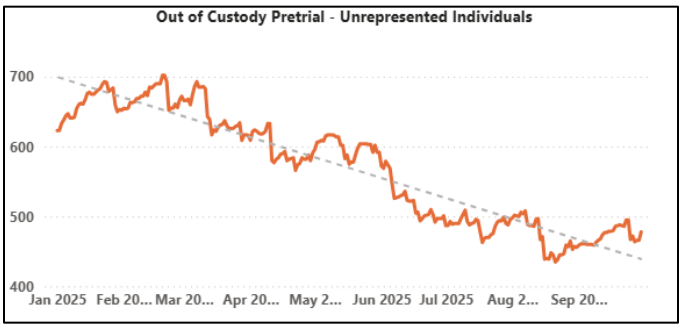
OPDC assignment coordinators identified counsel for 20 cases in September, 7 of which were Betschart cases. As in-custody unrepresented numbers decline, so do the number of Betschart cases.

	8/31/25	9/30/25	Change
Total (Cumulative)	320	327	7
Contractors	119	125	6
Hourly	74	75	1
OPDC Trial Division	129	129	0

Unrepresented Trends

Since the beginning of the year, Jackson County has seen a decline in both in-custody and out-of-custody numbers. This downward trend has continued since out-of-custody numbers peaked at nearly 800 individuals in June 2024.





Oregon Trial Division and Early Disposition Program

Jackson County is unique in its use of the Oregon Trial Division. The Southern Regional Division staffs the arraignment docket once a week, rotating with other contract providers in the county. On these days, OTD handles all in-custody cases on the docket, preventing them from becoming unrepresented. Jackson believed it was crucial to include OTD in this way to integrate them into the community and the broader public safety system.

In addition, the Southern Division's chief staffs a twice-monthly Early Disposition Program. They work with the DA to identify low-level and diversion-eligible cases, offering an opportunity to resolve the case on the same day with a reasonable offer. This program averages 25 cases resolved per month. Since starting in late May, they have resolved 122 cases in Jackson County. These cases never appeared on the unrepresented list due to the success of this docket.

MARION

Unrepresented Report

September 2025

In-custody numbers **increased by 5**, and out-of-custody numbers **decreased** by 39, or 20.5% in September.

	7/3/23	8/31/25	9/30/25	Change
In-Custody	4	7	12	5
Out-of-Custody Pretrial	26	190	151	-39

Marion County contract providers took 660 cases in August; their MAC utilization is 71.9%.

	July	August	Change
Total Cases taken July 2023-August 2025	10,834	11,494	660
MAC Utilization	71.3%	71.9%	0.6%
Consortia	76.8%	76.6%	-0.2%
Non-Profits	64.9%	66.6%	1.7%

The Oregon Trial Division took 49 cases in September.

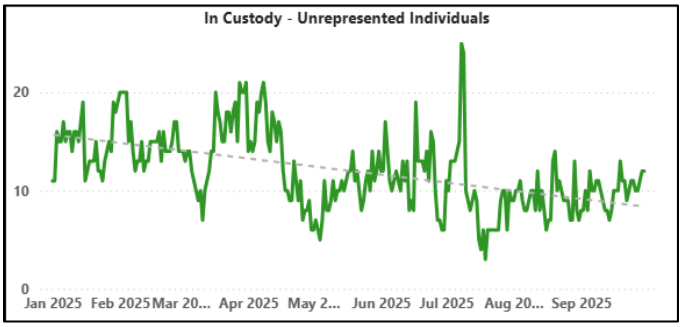
	8/31/25	9/30/25	Change
Total (Cumulative)	576	625	49
Northwest Region	1	6	616
Central Region	576	617	41
Southern Region	2	2	0

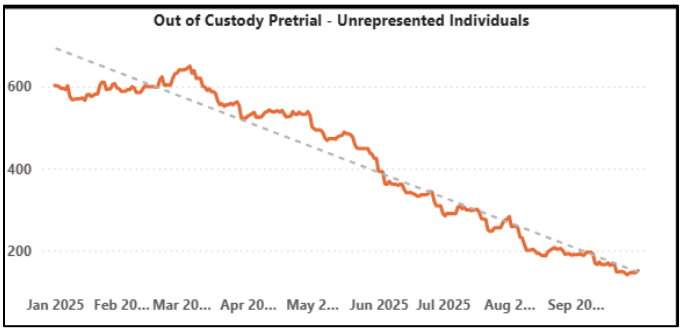
OPDC assignment coordinators identified counsel for 85 cases in September, 9 of which were Betschart cases. As in-custody unrepresented numbers decline, so do the number of Betschart cases.

	8/31/25	9/30/25	Change
Total (Cumulative)	196	205	9
Contractors	26	26	0
Hourly	123	124	1
OPDC Trial Division	47	55	8

Unrepresented Trends

Since the beginning of the year, Marion County has seen a slight decline in in-custody numbers, which remain low, averaging around 15. Out-of-custody numbers have declined significantly during that time frame and currently mirror numbers from August 2023.





Early Resolution Docket

The Oregon Trial Division has been working with the court and DA to establish an early resolution docket. The docket will be held every Thursday in October. Eighteen cases were on the first docket on October 2. Seven failed to appear, 5 were resolved, and 6 were assigned an attorney.

MULTNOMAH

Unrepresented Report

September 2025

In-custody numbers **increased** by 28, and out-of-custody numbers **decreased** by 4, or 0.3% in September.

	7/3/23	8/31/25	9/30/25	Change
In-Custody	4	52	80	28
Out-of-Custody Pretrial	26	1,180	1,176	-4

Multnomah County contract providers took 936 cases in August; their MAC utilization is 88.0%.

	July	August	Change
Total Cases taken July 2023-August 2025	26,492	27,428	936
MAC Utilization	88.2%	88.0%	-0.2%
Consortia	93.4%	92.1%	-1.3%
MDI	76.9%	78.1%	1.3%
MPD	94.0%	93.2%	-0.8%
Other	80.1%	80.1%	-0.1%

The Oregon Trial Division took 25 cases in September.

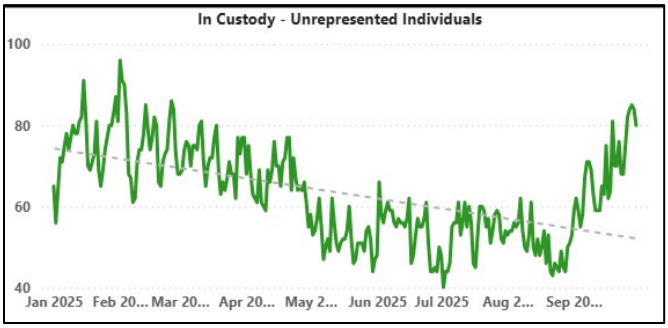
	8/31/25	9/30/25	Change
Total (Cumulative)	462	487	25
Northwest Region	459	477	18
Central Region	3	10	7
Southern Region	0	0	0

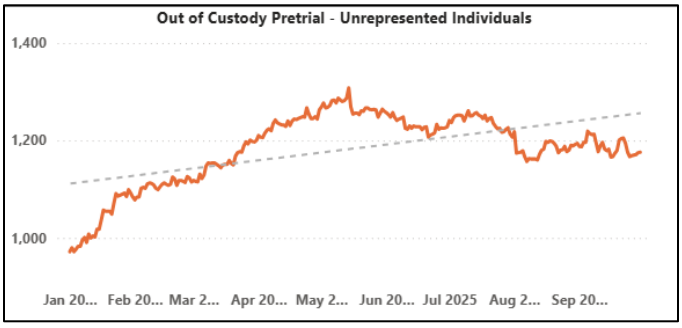
OPDC assignment coordinators identified counsel for 73 cases in September, 30 of which were Betschart cases. As in-custody unrepresented numbers decline, so do the number of Betschart cases.

	8/31/25	9/30/25	Change
Total (Cumulative)	914	944	30
Contractors	43	43	0
Hourly	721	751	30
OPDC Trial Division	151	151	0

Unrepresented Trends

After a steady summer of decline, Multnomah in-custody numbers have increased over the past month. Out-of-custody numbers rose in the first half of the year and have gradually decreased over recent months. This marks the 5th consecutive month with a decrease in out-of-custody figures.





By the Numbers

Multnomah County represents 38.6% of all unrepresented in-custody individuals, and 41.6% of all pretrial out-of-custody individuals.

Contracts

OPDC's 2025-27 contracts will increase capacity in Multnomah County, which will help toward eliminating the backlog of unrepresented cases.

WASHINGTON

Unrepresented Report
September 2025

In-custody numbers increased by 1, and out-of-custody numbers decreased by 6, or 1.2% in September.

	7/3/23	8/31/25	9/30/25	Change
In-Custody	4	43	44	1
Out-of-Custody Pretrial	26	523	517	-6

Washington County contract providers took 993 cases in August; their MAC utilization is 98.8%.

	July	August	Change
Total Cases taken July 2023-August 2025	24,372	25,365	993
MAC Utilization	101.1%	98.8%	-2.3%
Consortia	107.8%	105.6%	-2.2%
Non-Profits	102.1%	100.9%	-1.2%
Other	97.2%	93.1%	-4.1%

The Oregon Trial Division took 9 cases in September.

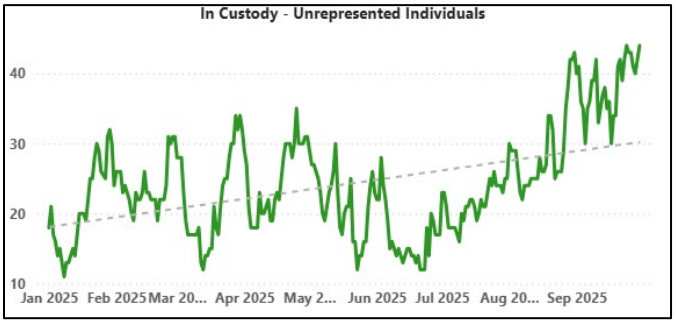
	8/31/25	9/30/25	Change
Total (Cumulative)	335	344	9
Northwest Region	329	336	7
Central Region	6	8	2

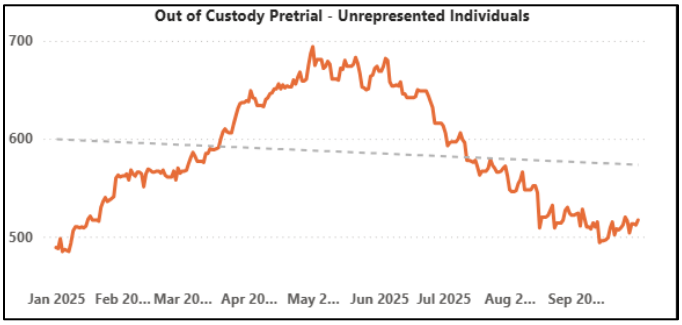
OPDC assignment coordinators identified counsel for 122 cases in September, 51 of which were Betschart cases. As in-custody unrepresented numbers decline, so do the number of Betschart cases.

	8/31/25	9/30/25	Change
Total (Cumulative)	500	551	51
Contractors	38	60	22
Hourly	388	415	27
OPDC Trial Division	81	83	2

Unrepresented Trends

Since the beginning of the year, Washington County has seen in-custody numbers increase. Out-of-custody numbers peaked in the spring and have since declined to similar levels as of January 2025. This marks the 5th consecutive month with a decrease in out-of-custody figures.





By the Numbers

Washington County represents 21.3% of all unrepresented in-custody individuals, and 18.3% of all pretrial out-of-custody individuals.

Contracts

OPDC's 2025-27 contracts will increase capacity in Washington County, which will help to eliminate the backlog of unrepresented cases.

Oregon Public Defense Commission

Financial & Case Management System Update

October 15, 2025

Kenneth Sanchagrin, Interim Executive Director
kenneth.sanchagrin@opdc.state.or.us

David Martin, CIO, FCMS

Oregon Public Defense Commission

FCMS October 2025

Agenda

CONTRACT AWARD STATUS

SCHEDULE

ACCOMPLISHMENTS

UPCOMING MILESTONES

BUDGET

FCMS October 2025

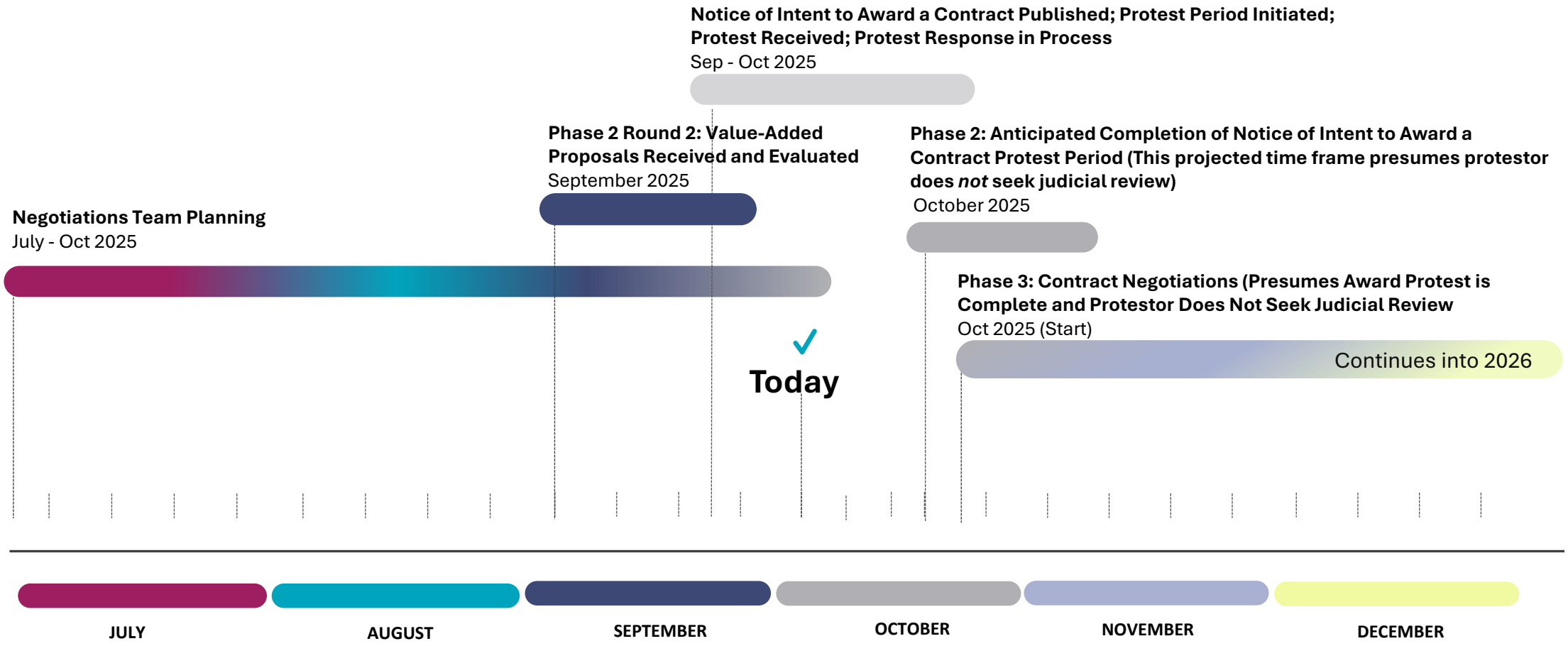
Implementation Planning Phase Approval & Procurement Status

RFP / Procurement:
OPDC Leadership elected to accept the proposal from the remaining proposer, issue a Notice of Intent to Award a Contract, and enter into Phase 3 (Contract Negotiations). OPDC issued a Notice of Intent to Award a Contract and initiated the award protest period.

Implementation Planning:
Enterprise Data Model work to organize and document the data migration planning continues which includes preliminary data mapping along with business and technical process flow mapping and use case creation. Appellate, Trial, Juvenile, Case Manager, and IT Operational process (up to the point of needing vendor input) areas are completed.

FCMS October 2025

Procurement Schedule



Accomplishments

Process flow mapping for Juvenile Dependency and Delinquency are completed along with IT Administrative processes. Use Cases for Trial Section 1 and processes related to documenting inbound contacts are complete.

Procurement Phase 2: OPDC received Phase 2, Round 2 proposals from the two proposers in the secondary competitive range. OPDC issued a Request for Clarification to one of the proposers as part of the required responsiveness review. As a result of the proposer's reply, OPDC issued a Notice of Rejection. The Evaluation Committee evaluated the remaining proposal and presented results, options, and recommendations to FCMS Leadership.

Procurement Phase 3: Leadership elected to accept the proposal from the remaining proposer, issue a Notice of Intent to Award a Contract, and enter into Phase 3 (Contract Negotiations).

FCMS October 2025

Upcoming Milestones

Business and technical use cases for trial sections 2 & 3, case manager vendor type, civil commitment, and juvenile delinquency / dependency. Process flow documentation for trial case intake. Links to requirements traceability matrix (RTM).

Implementation planning refresh work continues with focus on: scope, schedule, budget, project management plan and technical documents.

Proposal approval-notice of intent to award a contract: Sept 18, 2025.

Draft & issue protest findings, determination, and disposition with dept of justice review.

Contract negotiations initiation: following disposition of protest and potential judicial review: anticipated Oct. 8, 2025

FCMS October 2025

Budget

Bond funding for $16.7 million in SB 5505 & HB 5006 passed both chambers for approval and were signed by Gov. Kotek.

Bond Funding Bond Funding planning work for the 25/27 biennium is in progress and spending plan work will begin.

Thank you

Oregon Public Defense Commission

OPDC Agency Overview

SCR	Appropriation	Funding Purpose:	Original Budget Total Appropriation	Unscheduled Appropriation	Available Appropriation	August 2025 Expenditures	Unused Appropriation
	General Funds						
100	Executive Division	Main Appn	$ 3,356,449		$ 3,356,449	$ 205,977	$ 3,150,472
200	Compliance, Audit, and Performance Division	Main Appn	$ 8,645,518		$ 8,645,518	$ 717,456	$ 7,928,062
300	Appellate Division	Main Appn	$ 28,821,352		$ 28,821,352	$ 2,493,368	$ 26,327,984
400	Adult Trial Division	Main Appn	$ 329,576,667	$ (16,500,000)	$ 313,076,667	$ 22,236,469	$ 290,840,198
400	Adult Trial Division	Civil Commitment	$ 1,111,456		$ 1,111,456	$ -	$ 1,111,456
415	Juvenile Trial Division	Main Appn	$ 45,417,129	$ (2,300,000)	$ 43,117,129	$ 4,078,341	$ 39,038,788
425	Preauthorized Expenses Division	Standard-Main Appn	$ 94,115,182		$ 94,115,182	$ 8,296,850	$ 85,818,332
425	Preauthorized Expenses Division	THIP	$ 7,307,131		$ 7,307,131	$ 1,052,410	$ 6,254,721
450	Court Mandated Expenses Division	Standard-Main Appn	$ 52,272,158		$ 52,272,158	$ 3,098,901	$ 49,173,257
450	Court Mandated Expenses Division	THIP	$ 11,121,931		$ 11,121,931	$ 4,550,848	$ 6,571,083
475	Trial Representation Division	Main Appn	$ 18,090,808	$ (1,000,000)	$ 17,090,808	$ 1,407,136	$ 15,683,672
500	Parent Child Representation Program	Main Appn	$ 46,737,940	$ (2,300,000)	$ 44,437,940	$ 4,430,317	$ 40,007,623
600	Administrative Services Division	Main Appn	$ 23,808,787		$ 23,808,787	$ 3,344,284	$ 20,464,503
600	Administrative Services Division	FCMS	$ 693,886		$ 693,886	$ -	$ 693,886
700	Special Programs, Contracts and Distributions Division	Guardianship	$ 1,627,594		$ 1,627,594	$ 130,863	$ 1,496,731
700	Special Programs, Contracts and Distributions Division	County Discovery	$ 6,348,960		$ 6,348,960	$ 103,617	$ 6,245,343
700	Special Programs, Contracts and Distributions Division	Law School Program	$ 3,437,460		$ 3,437,460	$ -	$ 3,437,460
800	Debt Service	Capital Debt Service	$ 2,400,000		$ 2,400,000	$ -	$ 2,400,000
	Total General Funds		$ 684,890,408	$ (22,100,000)	$ 662,790,408	$ 56,146,837	$ 606,643,571
	Other Funds						
415	Juvenile Trial Division	Title IV-E	$ 7,393,486	$ -	$ 7,393,486	$ -	$ 7,393,486
425	Preauthorized Expenses Division	Title IV-E	$ 1,037,357	$ -	$ 1,037,357	$ -	$ 1,037,357
450	Court Mandated Expenses Division	ACP	$ 4,449,667	$ -	$ 4,449,667	$ 22	$ 4,449,645
450	Court Mandated Expenses Division	Title IV-E	$ 2,098,261	$ -	$ 2,098,261	$ -	$ 2,098,261
500	Parent Child Representation Program	Title IV-E	$ 11,684,477	$ -	$ 11,684,477	$ -	$ 11,684,477
600	Administrative Services Division	FCMS	$ 13,800,000	$ -	$ 13,800,000	$ -	$ 13,800,000
600	Administrative Services Division	FCMS	$ 145,219	$ -	$ 145,219	$ -	$ 145,219
	Total Other Funds		$ 40,608,467	$ -	$ 40,608,467	$ 22	$ 40,608,445
	Total All Funds		$ 725,498,875	$ (22,100,000)	$ 703,398,875	$ 56,146,859	$ 647,252,016

Month Ending August 2025

Oregon Public Defense Commission

Date: **October 15, 2025**

To: **Jennifer Nash, Chair of OPDC**
Susan Mandiberg, Vice Chair of OPDC
OPDC Commissioners

Cc: **Kenneth Sanchagrin, Interim Executive Director**

From: **Maddy Ferrando, Senior Research Analyst**

Re: **Cost per Case and Cost per Client Methodology; Preliminary Results for Feedback – October 2025**

Nature of Presentation: Briefing

Background:

1. Overview

Public defense is provided in Oregon through three main areas: capacity contracts with external providers, hourly contracts with external lawyers, and the Oregon Trial Division (OTD) housed at the Oregon Public Defense Commission (OPDC). Capacity contract providers are entities that have a contract with OPDC to deliver public defense based on a number of full-time equivalent attorneys (FTE), which equates to a certain number of appointments in a year under the MAC model.[1] Hourly providers submit bills based on the number of hours they worked on a given case to OPDC to receive payment. The OPDC OTD started in December 2023 and are full time public defenders employed by the state who also follow the MAC model. This report is the first time OPDC is sharing the cost per case and cost per client analyses. Throughout this report cost per case and cost per client methodologies are presented for capacity contracts, hourly contracts, and the Oregon Trial Division. Cost per case/client is assessed in four parts: attorney costs,

[1] OPDC Criminal Contract 2023 – 2025: 1 2023-25 Criminal Contract Terms.pdf

investigation costs, preauthorized expenses (PAE), and court mandated expenses (CME).

The results presented throughout this report should be considered preliminary while OPDC gathers feedback. Additionally, part of this analysis relies on the Department of Administrative Services Office of Economic Analysis Oregon Public Defense Caseload numbers.[2] Currently the most recent forecast is from April 2025 with another scheduled to be published in October 2025. The October 2025 report will contain data for actuals through the 2023 – 2025 biennium which will be used to update this report.

Table 1. Cost per Case for Capacity Contracts and OPDC OTD; Cost per Client for Hourly Contracts

Case Type	Capacity Contracts	OTD[3]	Hourly Contracts
Murder	$99,617.66	$129,389.46	$120,277.42
Jessica Law	$68,613.29	$80,656.61	$46,803.90
Measure 11	$11,455.20	$13,899.95	$17,190.75
Major Felony (A/B)	$2,876.99	$3,883.59	$7,276.95
Minor Felony (C)	$2,164.00	$2,790.55	$3,846.98
Misdemeanors	$1,277.96	$1,062.75	$2,013.68
Probation Violation	$404.36	$496.10	$1,124.95
Treatment Court	$964.26	$264.22	
Appellate	$8,284.87		$9,402.93
Post-Conviction Relief	$9,895.30		$33,917.41
Habeas Corpus	$9,411.46		$8,501.82
Civil Commitment	$1,247.63		$1,418.78

As shown in Table 1, OPDC costs are reported across three main program areas throughout this report. Due to data limitations unique to some program areas, however, results in some instances can be expressed as a cost per case, while others can only be reported as a cost per client. Some of these limitations are explained throughout this report and may be solved with the implementation of a Financial and Case Management System (FCMS). *Cost per client* reflects the total amount paid by OPDC for services divided by the number of clients. For cost per client, case types are reported according to the case with the highest charge for each client (i.e., for a client with multiple cases involving charges of Burglary in the First Degree and an unclassified misdemeanor possession of controlled substances, the combined

[2] Office of Economic Analysis Public Defense Caseload April 2025 New Eligibles Tables: Department of Administrative Services : Public Defense Caseload Forecast : Office of Economic Analysis : State of Oregon

[3] Due to the small number of OTD Murder and Jessica Law cases/clients (< 1%), cost-per-case/client estimates are less precise as they are susceptible to especially high or low costs driven by outliers.

cost for that client would be reported in the Major Felony classification). *Cost per case*, alternatively, reflects the total costs paid by OPDC divided by the total number of cases. Importantly, data for capacity contracts can only be reported as cost per case while some data for hourly providers can only be reported as cost per client. For the OPDC Trial Division, data can be reported for both cost per case as well as cost per client.

2. Oregon Trial Division (OTD)

2.1. OPDC Trial Division Attorney Costs

OPDC was able to conduct both a cost per case and cost per client analysis for OTD attorney costs. OTD currently has three attorney funding levels: Deputy Defender, Senior Deputy Defender, and Chief Deputy Defender. For this analysis OTD case and client counts exclude any cases an attorney may have brought with them if they previously worked for a capacity contract provider.
The following equation was used to calculate the cost per case for the OPDC Trial Division attorney costs. The cost per case for the OTD, represented by $C_{\{OTD\}}$, is equal to the total spent by OPDC per case type divided by the total number of cases taken by the OTD between December 2023 and September 2025 (represented by $\boldsymbol{N_{\{OTD\}}}$). The total spent per case type is determined by calculating the sum across attorney levels (L), where each level is represented by the adjusted case count distribution (D_n) multiplied by the amount paid to an attorney at a given level (A_l) [4], divided by the total number of OTD cases ($\boldsymbol{N_{\{OTD\}}}$). The same formula can be used to calculate the cost per client.

$$C_{\{OTD\}} = \frac{\left(\Sigma_{\{l=1\}}^{\{L\}}(D_n A_l)\right)}{N_{\{OTD\}}}$$

It is important to note that cost calculations for Murder and Jessica's Law cases (or clients) should be viewed with caution. As reported in Table 2, the OTD has only been assigned five murder cases for five clients, along with only 17 Jessica's law cases for 15 clients. Due to the small number of cases/clients in these categories, cost-per-case/client estimates are less precise as they are susceptible to especially high or low costs driven by outliers. As the OTD continues to take additional cases in these two categories, estimates will become more reliable. The results of the cost per case and cost per client analyses for OPDC Trial Division attorney costs are presented in Table 2.

[4] Not all OPDC data provides costs paid broken down by case type. Due to this, OPDC needed to associate a portion of the total cost to each case type. To do this the case weights under the MAC model are used to normalize case counts to account for more complex case types requiring more work and therefore a higher cost. Given that the OTD operates under a MAC model, the counts of cases assigned to the OTD were multiplied by MAC standard case weight to normalize for case complexity.

Table 2. OTD Attorney Cost per Client and Cost per Case

Case Type	Cost per Client	Clients	Cost per Case	Distinct Cases
Murder	$76,610.59	5	$70,767.28	5
Jessica Law	$58,909.44	15	$49,286.71	17
Measure 11	$8,858.06	149	$7,704.82	155
Major Felony	$2,632.11	236	$2,275.83	271
Minor Felony	$2,187.33	466	$1,926.53	765
Misdemeanor	$1,692.46	504	$690.35	1,065
Probation Violation	$439.95	174	$370.50	365
Treatment Court	$1,590.20	33	$799.65	58

2.2. OPDC Trial Division Investigator Costs

When OTD first opened, its attorneys relied on the PAE process for investigators until the OTD was fully staffed with in-house investigators. The OTD transitioned from utilizing external investigators under the PAE system to its own in-house investigators part way through the observation period. The following equation was used to calculate OTD investigator cost per client and cost per case.

$$C_{\{OTDINV\}} = \frac{(D_N OTD_{\{INV\}}) + PAE_{\{INV\}})}{N_{\{OTD\}}}$$

The cost per client for the OTD, represented by $\boldsymbol{C_{\{OTDINV\}}}$, is equal to the total spent by OPDC for investigation by case type divided by the total number of clients for the OTD between December 2023 and September 2025 (represented by $\boldsymbol{N_{\{OTD\}}}$). The total spent per case type is determined by calculating the adjusted case count distribution ($\boldsymbol{D_N}$) multiplied by the total spent on OTD investigation by in-house OTD investigators ($\boldsymbol{OTD_{\{INV\}}}$). This amount was added to the total amount paid for investigation on OTD cases via the PAE process ($\boldsymbol{PAE_{\{INV\}}}$) and the total was divided by the total number of OTD clients ($\boldsymbol{N_{\{OTD\}}}$). This formula can also be used to calculate cost per case. Both cost per client and cost per case are shown in Table 3 for OTD investigation costs.

Table 3. OTD Investigation Cost per Client and Case

Case Type	Cost per Client	Cost per Case
Murder	$28,570.10	$23,860.87
Jessica Law	$22,265.47	$17,045.02
Measure 11	$3,694.88	$3,013.77
Major Felony	$1,230.69	$966.37

Minor Felony	$807.02	$574.21
Misdemeanor	$383.94	$276.30
Probation Violation	$138.88	$99.82
Specialty Court	$358.40	$264.22

3. Capacity Contracts Attorney Cost per Case

Capacity contract providers submit monthly caseload reports to OPDC, which contain case numbers for all an attorney's appointed cases. The monthly caseload reports also contain the client's name, but capacity contractors can report the client's name differently across reports. For example, one month John Smith and next month Johnathan Smith. OPDC does not currently have the capacity to clean the data on client names to allow for a cost per client calculation. Once an FCMS is implemented this should enhance OPDC's ability to analyze cost per case and cost per client for capacity contracts. For now, this analysis is limited to cost per case for capacity contract attorney fees.

Capacity contract attorneys are funded according to attorney level, which numbers one through four based on each individual attorney's qualification level. The total amount paid to each contract for attorney fees is broken out by attorney level. During the observation period, only non-profit contractors could be funded for supervision, and those costs are included as part of this analysis. The following equation was used to calculate the cost per case for the capacity contract provider attorney costs.

$$C_{\{CON\}} = \frac{\left(\Sigma_{\{l=1\}}^{\{L\}(D_n A_l)}\right)}{N_{\{CON\}}}$$

This is the same formula that is used to calculate the OTD attorney cost per case. The cost per case for capacity contracts, represented by $\boldsymbol{C_{\{CON\}}}$, is equal to the total spent by OPDC per case type divided by the total number of cases taken by contract providers between July 2023 and June 2025 (represented by $\boldsymbol{N_{\{CON\}}}$). The total spent per case type is determined by calculating the sum across attorney levels (L), where each level is represented by the adjusted case count distribution (D_n) multiplied by the amount paid to an attorney at a given level (A_l) and divided by the total number of contract cases ($\boldsymbol{N_{\{CON\}}}$). The same formula can be used to calculate the attorney cost per case for consortium/firms and non-profits. Table 4 reports cost per case data by case type for three groups: all capacity contractors, regardless of type; consortia and private firms holding capacity contracts; and non-profit firms holding capacity contracts.

Table 4. Capacity Contract Attorney Cost per Case by Entity Type

Case Type	All Contracts	Consortia/Firm	Non-Profits
Murder	$47,120.12	$45,089.07	$49,551.48
Jessica Law	$46,931.23	$46,121.95	$48,591.97
Measure 11	$6,320.75	$6,181.04	$6,596.70
Major Felony	$2,067.99	$2,032.37	$2,121.44
Minor Felony	$1,691.73	$1,624.24	$1,773.70
Misdemeanor	$1,121.73	$957.68	$1,357.69
Probation Viol	$363.40	$334.91	$404.66
Specialty Court	$964.26	$827.42	$1,170.32
Appellate	$7,219.21	$7,154.22	$7,614.58
Post-Conviction Relief	$6,290.37	$6,008.52	$11,766.98
Habeas	$6,280.13	$6,007.91	$6,260.76
Civil Commitment	$1,217.62	$1,165.70	$1,304.59

4. Capacity and Hourly Contracts Investigation Cost Per Case

Services provided by investigators are provided to capacity contractors in two ways. First, a limited number of capacity contract providers employ in-house investigators paid for by OPDC. Second, capacity contractors who do not employ in-house investigators can request hourly investigatory work via OPDC's PAE process. Between July 2021 and June 2025 approximately $48 million (76%) was paid through the hourly billing system from PAEs for investigators and $15 million (24%) was paid through capacity contracts for in-house investigators. The following equation was used to calculate the cost per case for investigation associated with capacity and hourly contracts.

$$C_{\{INV\}} = \frac{\left((D_N CON_{\{INV\}}) + PAE_{\{INV\}}\right)}{\left(N_{\{FC\}} - N_{\{OTD\}}\right)}$$

The cost per case for investigation, represented by $\boldsymbol{CON_{\{INV\}}}$, is equal to the total spent by OPDC per case type divided by the total number of forecasted cases ($\boldsymbol{N_{\{FC\}}}$) between July 2021 and June 2025 minus the number of OTD cases ($\boldsymbol{N_{\{OTD\}}}$). The total spent per case type is determined by calculating the adjusted case count distribution ($\boldsymbol{D_N}$) by the total spent on capacity contract investigation ($\boldsymbol{CON_{\{INV\}}}$). This amount was added to the total amount paid for non-OTD cases through PAEs ($\boldsymbol{PAE_{\{INV\}}}$). Table 5 presents the cost per case of investigation for capacity and hourly contracts.

Table 5. Capacity Contract and Hourly Investigation Cost per Case

Case Type	Cost per Case
Murder	$17,735.55
Jessica Law	$7,355.99
Measure 11	$1,948.62
Major Felony (A/B)	$166.70
Minor Felony (C)	$182.29
Misdemeanors	$60.01
Probation Violation	$14.50
Treatment Court	$45.91
Appellate	$283.85
Post-Conviction Relief	$1,649.88
Habeas Corpus	$884.65
Civil Commitment	$23.74

5. Hourly Contract Attorney Costs per Client

Attorneys providing hourly public defense services bill OPDC for their time which is coded in the billing system as "Attorney Fees".[5] If a case has had an attorney fee billed it is flagged as an hourly case. Hourly attorneys submit bills for a given client by their highest charge. If a client has five cases, for instance, then the attorney submits a bill under the case number with the highest charge (consequently, there is no record of the other four case numbers). The bill, however, will reflect their time spent across all five cases. Due to this limitation, the analysis provided here can only be expressed as a cost per client. The following equation was used to calculate the hourly attorney cost per client.

$$C_{\{H\}} = \frac{H_{\{Atty\}}}{N_{\{CLIENT\}}}$$

The cost per client for hourly contract attorney costs, represented by $\boldsymbol{C_{\{H\}}}$, is equal to the total spent by OPDC per case type on hourly attorney fees divided by the number of clients served by hourly attorneys between July 2021 and June 2025. Table 6 shows the cost per client by case type as well as the average hours historically billed for attorney fees.

[5] For this analysis attorney fees are inclusive of attorney fees, attorney fees enhanced, attorney travel, and attorney travel enhanced.

Table 6. Hourly Attorney Cost per Client

Case Type	Attorney Costs Paid	Clients	Avg Atty Hours	Cost per Client
Murder	$25,688,839.02	379	475.68	$67,780.58
Jessica Law	$2,838,902.08	113	157.36	$25,123.03
Measure 11	$11,566,276.10	959	87.34	$12,060.77
Major Felony	$6,287,731.86	972	43.81	$6,468.86
Minor Felony	$9,841,140.77	2,916	23.90	$3,374.88
Misdemeanor	$9,685,347.92	5,214	14.20	$1,857.57
Probation Violation	$714,636.04	658	8.36	$1,086.07
Appellate	$859,029.45	103	49.77	$8,340.09
PCR	$5,001,659.62	165	221.17	$30,313.09
Civil Commitment	$181,958.38	131	9.93	$1,389.00
Habeas	$633,805.38	118	49.25	$5,371.23

A limitation of this data is cases can move between areas such as capacity contracts and hourly. An example of this is an attorney could be working for a capacity contract and then decide to shift to being an hourly contract attorney only. When they leave the capacity contract, they may take their existing caseload with them and start to bill hourly on those cases. Of the cases billed by an hourly attorney during the 2023 – 2025 biennium 25% were also reported by a contractor as an appointed case during the biennium. This means the number of hours billed hourly on the case is not necessarily reflective of the total cost of the case. Any case that was ever billed hourly by an attorney regardless of the portion of work completed hourly is included in this analysis.

6. Preauthorized and Court Mandated Expenses for Non-attorney and Non-investigative Cost per Case

In addition to attorney and investigation costs, additional services are funded by OPDC to assist attorneys in representing their clients, such as fees for forensic psychologists, interpreters, mitigation, discovery, and transcription. These costs are borne by the agency via its PAE and CME processes. Due to limitations in identifying which program area a PAE or CME bill is associated with the PAE and CME cost per case is applied to OTD, capacity contracts, and hourly contracts. The following equations were used to calculate the PAE and CME cost per case.

$$C_{\{PAE\}} = \frac{P_{\{PAE\}}}{N_{\{FC\}}} \qquad C_{\{CME\}} = \frac{P_{\{CME\}}}{N_{\{FC\}}}$$

The cost per case for PAE and CME, represented by $\boldsymbol{C_{\{PAE\}}}$ and $\boldsymbol{C_{\{CME\}}}$,

respectively, is equal to the total spent by OPDC on PAE and CME ($\boldsymbol{P}_{\{PAE\}}$ and $\boldsymbol{P}_{\{CME\}}$) divided by the forecasted cases ($\boldsymbol{N}_{\{FC\}}$) between July 2021 and June 2025.[6] The results of these two analyses are presented in Table 7.

Table 7. PAE and CME Cost per Case

Case Type	PAE	CME
Murder	$34,013.06	$748.25
Jessica Law	$14,157.71	$167.17
Measure 11	$3,152.95	$28.41
Major Felony (A/B)	$633.25	$8.14
Minor Felony (C)	$287.29	$2.52
Misdemeanors	$95.32	$0.78
Probation Violation	$26.21	$0.17
Appellate	$778.30	$0.69
Post-Conviction Relief	$1,919.03	$35.41
Habeas Corpus	$2,223.60	$22.34
Civil Commitment	$5.72	$0.32

Fiscal Impact: None

Agency Recommendation:
The Commission reviews the briefing.

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

SHANNON WILSON, Individually and as Executive Director of The Public Defender of Marion County, Inc., Plaintiff, v. OREGON PUBLIC DEFENSE COMMISSION Defendant.	Case No. _____ COMPLAINT NOT SUBJECT TO MANDATORY ARBITRATION FEE AUTHORITY: ORS § 21.135

Plaintiff Shannon Wilson ("Wilson"), individually and as Executive Director of the Public Defender of Marion County, Inc. ("PDMC"), for their complaint against defendant Oregon Public Defense Commission ("OPDC"), alleges as follows:

INTRODUCTION

1.

OPDC is responsible for "[e]stablish[ing] and maintain[ing] a public defense system that ensures the provision of public defense services consistent with the Oregon Constitution, the United States Constitution and Oregon and national standards of justice." ORS §151.216(1)(a). That statutory mandate in turn requires OPDC to adopt policies that ensure that "caseloads are in accordance with the requirements of the Oregon and United States Constitutions," ORS §151.216(1)(b)(A), and that "minimum standards and guidelines [] ensure that public defense providers are providing effective assistance of counsel … as required by statute and the Oregon and United States Constitutions." ORS §151.216(1)(j).

2.

Consistent with the above statutory requirements, after months of hearings and analysis, on May 8, 2024, OPDC adopted public defense caseload standards (the "Oregon Caseload Standards") that were based on national workload standards (the "National Workload Standards") contained in the National Public Defense Workload Study (the "National Workload Study") published in September 2023.

3.

The National Workload Standards resulted from ten years of collaborative effort by and between the National Association of State Courts, the RAND Corporation ("RAND"), the American Bar Association Standing Committee on Legal Aid and Indigent Defense ("ABA SCLAID"), the accounting firm of Moss Adams, LLC, and nationally recognized indigent defense expert Stephen F. Hanlon. The findings in the National Workload Study and the resulting National Workload Standards replaced outdated and unreliable caseload standards that were created in 1973 by the National Advisory Commission on Criminal Justice Standards and Goals (the "1973 NAC Standards").

4.

On September 12, 2025, also in connection with its statutory responsibilities, OPDC published for signature by the state's public defenders the contract that is to govern public defense services for the period of October 1, 2025 through June 30, 2027 (the "Public Defense Contract").

5.

In the Public Defense Contract, OPDC elected not to apply its own Oregon Caseload Standards. Instead, the Public Defense Contract requires that all public defenders (except the public defenders employed in OPDC's own Trial Division) keep a caseload set at a "maximum attorney caseload" standard (the "MAC Standard").

6.

The MAC Standard requires public defenders to handle vastly more cases than the Oregon Caseload Standards previously adopted by OPDC.

7.

In the Public Defense Contract, in addition to the MAC requirement, OPDC identified the myriad ethical requirements that public defenders must satisfy in order to comply with the Public Defense Contract and their own ethical duties, specifically referencing the Oregon Rules of Professional Conduct ("RPC" or "RPCs"), the Report of the Oregon State Bar's Task Force on Standards of Representation in Criminal and Juvenile Delinquency Cases (the "Task Force Report"), and the ABA Ten Principles of a Public Defense System (the "ABA's Ten Principles"). In addition, the Public Defense Contract explicitly sets forth professional services that public defenders must satisfy when representing their clients.

8.

As OPDC well knows, except in instances where public defenders are able to handle only certain high felony case types, public defenders cannot handle caseloads at the MAC levels and still meet their ethical responsibilities, including those referenced in the Public Defense Contract, because doing so would require them to take on more cases than they can ethically handle.

9.

For example, under the MAC Standard, public defenders would have to average no more than 5.26 hours per misdemeanor case to stay within the contract requirements. Minor felonies, on average, would have to be resolved within 9.5 hours. No public defender can resolve those case types, on average, within the hours dictated by MAC and still fulfill their ethical duties and the State's constitutional responsibilities.

10.

In contrast, for those same case types, the Oregon Caseload Standards would allow, on average, 13.8 hours for a low misdemeanor, 22.3 hours for a high misdemeanor, and 35 hours for a minor felony.

11.

This differential was recently noted by the Washington Supreme Court, which rejected its standards and adopted the National Workload Standards. Notably, Washington's prior standards were the same as the MAC Standard in all material ways; indeed, Oregon originally adopted the MAC Standard because it was already being used in Washington.

12.

Further, the Public Defense Contract reintroduces a pay-per-case structure, which was outlawed in 2023 in ORS § 151.216(6)(c). By turning MAC from a caseload ceiling to a caseload requirement, and financially penalizing, and potentially terminating, public defenders who do not meet that requirement, the Public Defense Contract pays lawyers a fixed amount of money for a fixed number of cases. It also creates the same improper incentives found in a traditional pay-per-case system by encouraging public defenders to move their cases quickly and with minimal effort in order to try to meet an unsustainable caseload threshold. In that respect, the Public Defense Contract is worse than the State's prior structure. While that structure also incentivized public defenders to move cases quickly to secure more cases, here public defenders would need to handle excessive caseloads simply to continue their livelihood.

13.

The State of Oregon has an obligation to provide a public defense system that is both ethical and constitutional. To do that, the State must support a system where public defenders have the time and capacity to perform their jobs properly. "Solving" the unrepresented crisis, as the Public

Defense Contract purports to do, merely by attaching overworked lawyers to unrepresented defendants does not result in a constitutionally or ethically compliant system.

14.

Nor will the MAC requirement even achieve that limited goal. The unrepresented crisis arose fundamentally from the fact that there are too many criminal defendants and too few public defenders. That is because past failures to properly fund and maintain Oregon's public defense system have made it extremely difficult to hire and retain a sufficient number of properly trained public defense lawyers. By further burdening already overburdened public defenders, OPDC is making it that much more difficult to hire and retain public defenders who can, for example, move easily to Washington, which already has adopted the National Workload Standards and ordered their implementation over time.

15.

By this lawsuit, Plaintiff seeks a declaration that the MAC requirement in the Public Defense Contract is unenforceable, and must be replaced by the Oregon Caseload Standards.

PARTIES, JURISDICTION, AND VENUE

16.

Plaintiff Wilson is an individual who resides in the State of Oregon. Wilson serves as the Executive Director for PDMC. Wilson brings this action individually and on behalf of PDMC.

17.

Defendant OPDC is an independent body in the executive branch responsible for establishing and maintaining Oregon's public defense system.

18.

This Court has subject matter jurisdiction over the claims here pursuant to ORS § 28.010, which provides that "[c]ourts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed.

No action or proceeding shall be open to objection on the ground that a declaratory judgment is prayed for. The declaration may be either affirmative or negative in form and effect, and such declarations shall have the force and effect of a judgment."

19.

This Court has subject matter jurisdiction over the claims here pursuant to ORS § 28.020, which provides, *inter alia*, that "[a]ny person interested under a … written contract or other writing constituting a contract, or whose rights, status or other legal relations are affected by a … statute [or] contract … may have determined any question of construction or validity arising under any such … statute [or] contract and obtain a declaration of rights, status or other legal relations thereunder."

20.

This Court has personal jurisdiction over OPDC because it is engaged in substantial actions in this state.

21.

Venue is proper in this Court pursuant to ORS § 14.060 because the cause of suit, or some part thereof, arose in Marion County.

FACTUAL ALLEGATIONS

A. An Indigent Criminal Defendant's Right to Counsel.

22.

The Oregon Constitution guarantees that, "[i]n all criminal prosecutions, the accused shall have the right . . . to be heard by himself and counsel." Or Const, Art I, § 11. This language "mandates the appointment of counsel for all indigent defendants whose conviction may result in a loss of liberty." *Stevenson v. Holzman*, 254 Or 94, 104 (1969).

23.

ORS § 135.040 codified that constitutional right to counsel, providing that, if a defendant shows that they are "financially eligible," and they desire appointed counsel, the court "shall" appoint such counsel. *See also* ORS § 151.216(1)(h) (establishing OPDC and providing that OPDC "shall . . . [a]dopt policies, procedures, standards, and guidelines regarding . . . [t]he determination of financial eligibility of persons entitled to be represented by appointed counsel at state expense").

24.

The Oregon Constitution also provides that indigent defendants have a right "not just to a lawyer in name only, but to a lawyer who provides adequate assistance." *Jackson v. Franke*, 369 Or 422, 426 (2022) (quotation omitted) (citing *Montez*, 355 Or at 6 (quoting *State v. Smith*, 339 Or 515, 526 (2005)); *see also Krummacher v. Gierloff*, 290 Or 867, 872 (1981).

25.

In particular, Oregon's Constitution requires that, because a criminal defendant must "be heard by himself and counsel," Or Const, Art. I, § 11, courts must appoint *effective* counsel. *See, e.g., Watkins v. Ackley*, 370 Or 604, 629, 523 P3d 86 (2022)); *Montez v. Czerniak*, 355 Or 1, 6 (2014); *Krummacher v. Gierloff*, 290 Or 867, 872 (1981). And in acting as effective counsel, that counsel must "exercise reasonable professional skill and judgment." *Lichau v. Baldwin*, 333 Or 350, 359 (2002).

26.

As such, the Oregon trial courts are required to appoint "suitable" counsel for qualifying defendants—not simply counsel of convenience. ORS § 135.050(1)-(2).

27.

Additionally, the Oregon Supreme Court has specified that, pursuant to the Oregon Constitution, "[c]ounsel's functions include informing the defendant, in a manner and to the extent

appropriate to the circumstances and to the defendant's level of understanding, of the existence and consequences of nontactical choices which are the defendant's to make, so as to assure that the defendant makes such choices intelligently." *Krummacher v. Gierloff*, 290 Or 867, 874 (1981).

28.

"Counsel [also] must investigate the facts and prepare himself on the law to the extent appropriate to the nature and complexity of the case so that he is equipped to advise his client, exercise professional judgment and represent the defendant in an informed manner." *Id.* at 875.

29.

Constitutionally adequate assistance is thus not confined to the courtroom; criminal defendants are entitled to extensive pre-trial investigative assistance. *Id.*

30.

For example, the Oregon Supreme Court has held that withdrawing an alibi defense without adequately investigating its strength constitutes inadequate assistance of counsel. *See Lichau*, 333 Or at 359.

31.

Similarly, the Oregon Supreme Court has held that failing to investigate aspects of a defendant's juvenile background fell below the required reasonable levels of representation. *Richardson v. Belleque*, 362 Or 236, 258-59 (2017). Under that same framework, failing to interview a potential impeachment witness also qualified as such a failure. *See Stevens v. State*, 322 Or 101, 104-05, 111 (1995).

B. Plaintiff's Ethical Responsibilities.

32.

The Public Defense Contract states in Section J of Exhibit C that public defenders must, when representing their clients, engage in the following non-limiting activities on their clients' behalf:

- Provide representation at all scheduled hearings and court proceedings;
- Seek pretrial release of all detained clients when the client so desires;
- File timely and appropriate motions;
- File or arrange for the filing of petitions for writ of mandamus or habeas corpus arising from the case on which an attorney is appointed;
- Devote sufficient time to interviewing and counseling clients;
- Ensure that a proper investigation is conducted;
- Consult with and/or retain all necessary experts or other professional service providers;
- Pursue all avenues of discovery from the prosecution, both formal and informal;
- Review all available discovery in each case, although a client may waive this duty in writing;
- Conduct or supervise sufficient legal research to fully understand and prepare legal briefings on the client's case;
- Sufficiently prepare for all hearings, trials, and sentencings; and
- Obtain and review all applicable records including, but not limited to, medical, dental, school, employment, military and mental health records.

33.

Section 7 of the Public Defense Contract also requires that public defenders contracting with the State comply, *inter alia*, with the Oregon Rules of Professional Conduct and the Task Force Report.

a. Public Defenders' Ethical Requirements Under Oregon's Rules of Professional Conduct.

34.

Under Oregon's Rules of Professional Conduct ("RPC" or "RPCs"), public defenders, like all Oregon attorneys, must provide the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." RPC 1.1.

35.

The RPCs also require that public defenders "shall not neglect a legal matter entrusted to [them]." RPC 1.3.

36.

All attorneys, including public defenders, have a duty under the RPCs to: (a) keep a client reasonably informed about their matter and promptly respond to reasonable requests for information; and (b) provide clients with sufficient information to make informed decisions on their matter. RPC 1.4.

37.

The RPCs also prohibit conflicts of interest and require all attorneys, including public defenders, to decline representations that would create such conflicts. RPC 1.7(a)(2) specifically provides in pertinent part that "… a lawyer shall not represent a client if the representation involves a current conflict of interest. A current conflict of interest exists if … (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibility to another client…." That happens when public defenders are forced to represent so many clients that they cannot competently represent each client.

38.

The rules on conflicts in particular mandate that an attorney refuse to represent a client, or withdraw from a current representation, if necessary to resolve the conflict: "a lawyer shall not

represent a client or, where representation has commenced, shall withdraw from the representation of a client if: . . . (1) the representation will result in violation of the Rules of Professional Conduct or other law." RPC 1.16(a).

39.

The RPCs also impose obligations specific to supervisory attorneys, such as Wilson, making supervisory attorneys potentially responsible for the ethical violations of the attorneys they supervise, and requiring "remedial action" under certain circumstances. RPC 5.1.

40.

There is no public defense exception to the RPCs. Indeed, the opposite has been made clear. In Formal Opinion No 2007-178, entitled "Competence and Diligence: Excessive Workloads of Indigent Defense Providers," the Oregon State Bar stated that the ethical rules "provide no exception for lawyers who represent indigent persons charged with crimes." Or State Bar, Formal Op No 2007-178 (2007), at 3.

41.

Public defenders are thus "required to provide each client with competent and diligent representation, keep each client reasonably informed about the status of his or her case, explain each matter to the extent necessary to permit the client to make informed decisions regarding the representation, and abide by the decisions that the client is entitled to make." *Id.*

42.

Additionally, for each client, a public defender is "required to, among other things, 'keep abreast of changes in the law; adequately investigate, analyze, and prepare cases; [and] act promptly on behalf of clients.'" *Id.* (quoting ABA Comm on Ethics & Pro Resp, Formal Op 06-441 (2006).

43.

The Formal Opinion also addressed appropriate caseloads, stating that a "caseload is 'excessive' and is prohibited if the lawyer is unable to at least meet the basic obligations outlined above." *Id.*

44.

Further, the Formal Opinion states that, if an attorney "believe[s] that their workload prevents them from fulfilling their ethical obligations to each client, then their workload 'must be controlled so that each matter may be handled competently.'" *Id.* at 4 (quoting Model Rules of Pro Conduct R 1.3 cmt 2 (Am Bar Ass'n (2022)).

45.

The Formal Opinion concluded that "a lawyer who is unable to perform these duties (*e.g.*, adequately investigate, analyze and prepare cases) may not undertake or continue with representation of a client. Oregon RPC 1.16(a)." *Id.* at 3.

b. Public Defenders' Ethical Requirements Under the Task Force Report.

46.

In April 2014, the Oregon State Bar's Task Force on Standards of Representation in Criminal and Juvenile Delinquency Cases (the "Task Force") published the Task Force Report, which provided an updated set of standards required of criminal attorneys.

47.

The Task Force Report sets forth the myriad responsibilities that a public defender must fulfill to meet their ethical responsibilities, including, *inter alia*:

- "The lawyer for a defendant in a criminal 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 shall abide by the Oregon Rules of Professional Conduct and applicable rules of court." (Standard 1.1).

- "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." (Implementation 1 of Standard 1.1).
- "Before agreeing to act as counsel or accept appointment by a court, a lawyer has an obligation to make sure that he or she has sufficient time, resources, knowledge and experience to offer quality representation to a defendant in a criminal matter …. If it later appears that the lawyer is unable to offer quality representation in the case, the lawyer should move to withdraw." (Standard 1.3).
- "A lawyer, whether court-appointed or privately retained, should not accept workloads that, by reason of size or complexity, interfere with the ability of the lawyer to meet professional obligations to each client." (Implementation 1 of Standard 1.3).
- "A lawyer has the duty to conduct an independent review of the case, regardless of the client's admissions or statements to the lawyer of facts constituting guilt or the client's stated desire to plead guilty or admit guilt. 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 trial or hearing, and to best advise the client as to the possibility and consequences of conviction or adverse adjudication." (Standard 3). In particular, "a lawyer should":
    - "Obtain copies of all charging documents and should examine them to determine the specific charges that have been brought against the client." (Implementation 1 of Standard 3).
    - "Engage in research, including a review of all relevant statutes and case law." (Implementation 2 of Standard 3).

- "Conduct an in-depth interview with the client." (Implementation 3 of Standard 3).
- "Consider whether to interview potential witnesses, whether adverse, neutral, or favorable, and when new evidence is revealed during the course of 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 defense witness at the trial or hearing." (Implementation 4 of Standard 3).
- "Attempt to interview all law enforcement officers involved in the arrest and investigation of the case and [] obtain all pertinent information in the possession of the prosecution, juvenile authorities, or law enforcement, including, where relevant, law enforcement personnel records and documentation of prior officer misconduct." (Implementation 5 of Standard 3).
- "Where appropriate, … inspect the scene of the alleged offense under circumstances (including weather, lighting conditions, and time of day) as similar as possible to those existing at the time of the alleged incident." (Implementation 6 of Standard 3).
- "Where appropriate, obtain school, mental health, medical, drug and alcohol, immigration, and prior criminal offense and juvenile records of the client and witnesses." (Implementation 7 of Standard 3).

c. The ABA's Defense Function Standards Also Establish What Constitutes Effective Counsel

48.

The ABA's Defense Function Standards also provide guidance regarding Plaintiff's ethical responsibilities. Those standards are "the result of the considered judgment of prosecutors, defense lawyers, judges, and academics who have been deeply involved in the process" for over half a

century. Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 Crim Just 10, 15 (2010).

49.

The ABA's Defense Function Standards provide important guidance on how public defenders should conduct themselves. *See Missouri v. Frye*, 566 US 134, 145-46, 132 S Ct 1399, 182 L Ed 2d (2012). They are intended to address the performance of criminal defense counsel at all stages of their professional work. Standard 4-1.1 (a).

50.

Those standards are particularly applicable in Oregon, where the OPDC is required to "[e]stablish and maintain a public defense system that ensures the provision of public defense services consistent with . . . national standards of justice." ORS § 151.216(1)(a).

51.

In 1984, when the United States Supreme Court held that "[t]he proper measure of attorney performance [under the Sixth Amendment] remains simply reasonableness under prevailing professional norms," the Court identified the ABA's Defense Function Standards as "guides to determining what is reasonable." *Strickland v. Washington*, 466 US 668, 688, 104 S Ct 2052, 80 L Ed 2d 674 (1984). The Supreme Court further underscored that point in 2010, referring to the ABA's Defense Function Standards as "valuable measures of the prevailing professional norms of effective representation." *Padilla v. Kentucky*, 559 US 356, 367, 130 S Ct 1473, 176 L Ed 2d 284 (2010).

52.

The ABA's Defense Function Standards begin by stating that "[d]efense counsel is essential to the administration of criminal justice. A court properly constituted to hear a criminal case should be viewed as an entity consisting of the court (including judge, jury, and other court

personnel), counsel for the prosecution, and ***counsel for the defense***." ABA's Defense Function Standard 4-1.2(a) (emphasis added).

53.

According to the ABA's Defense Function Standards, defense counsels' many duties in their role in the administration of justice include the following:

- "a duty to communicate and keep the client informed and advised of significant developments and potential options and outcomes" (*Id.* at Standard 4-1.3(d));
- "a duty to be well-informed regarding the legal options and developments that can affect a client's interests during a criminal representation" (*Id.* at Standard 4-1.3(e));
- "a duty to continually evaluate the impact that each decision or action may have at later stages, including trial, sentencing, and post-conviction review" (*Id.* at Standard 4-1.3(f));
- a duty to "keep the client reasonably and currently informed about developments in and the progress of the lawyer's services, including developments in pretrial investigation, discovery, disposition negotiations, and preparing a defense" (*Id.* at Standard 4-3.9(a));
- "a duty to investigate in all cases, and to determine whether there is a sufficient factual basis for criminal charges," which duty is not terminated by "factors such as the apparent force of the prosecution's evidence, a client's alleged admissions to others of facts suggesting guilt, a client's expressed desire to plead guilty or that there should be no investigation, or statements to defense counsel supporting guilt" (*Id.* at Standard 4-4.1(a), 4-4.1(b)); and
- a "[d]uty to [e]xplore [d]isposition [w]ithout [t]rial" under which defense counsel "should consider the individual circumstances . . . of the client…." (*Id.* at Standard 4-6.1(b)(emphasis added)).

54.

To properly carry out each of these duties requires defense counsel to have enough time to dedicate to each individual case.

55.

The ABA's Defense Function Standards also address appropriate workloads, specifying that "[d]efense counsel should not carry a workload that, by reason of its excessive size or complexity, interferes with providing quality representation, endangers a client's interest in independent, thorough, or speedy representation, or has a significant potential to lead to the breach of professional obligations." *Id.* at Standard 4-1.8(a).

56.

The ABA's Defense Function Standards also state that a "defense counsel whose workload prevents competent representation should not accept additional matters until the workload is reduced, and should work to ensure competent representation in counsel's existing matters." *Id.*

57.

Notably, the ABA's Defense Function Standards also require that, "[i]n every criminal matter… [defense counsel] should not recommend to a client acceptance of a disposition offer unless and until appropriate investigation and study of the matter has been *completed*. Such study should include discussion with the client and an analysis of relevant law, the prosecution's evidence, and potential dispositions and relevant collateral consequences." *Id.* at 4-6.1(b)(italics added).

C. The ABA's Ten Principles of a Public Defense Delivery System

58.

Section 7 of the Public Defense Contract incorporates the ABA's Ten Principles, which was published in 2023.

59.

Among the principles contained therein are the following:

- Principle 1: "Public Defense Providers and their lawyers should be independent of political influence and subject to judicial authority and review only in the same manner and to the same extent as retained counsel and the prosecuting agency and its lawyers."
- Principle 2: "For state criminal charges, the responsibility to provide public defense representation rests with the state; accordingly, there should be adequate state funding and oversight of Public Defense Contractors."
- Principle 3: "The workloads of Public Defense Contractors should be regularly monitored and controlled to ensure effective and competent representation. Workloads should never be so large as to interfere with the rendering of quality representation or to lead to the breach of ethical obligations."

D. Overview of How Public Defense Services Are Delivered in Oregon.

60.

As of July 13, 2023, the Legislature abolished the Oregon Public Defense Services Commission ("PDSC") and transferred its "duties, functions and powers" to OPDC.

61.

OPDC was originally established as part of the judicial branch, but as of January 1, 2025, OPDC transferred from the judicial branch to the executive branch.

62.

OPDC is required to "[e]stablish and maintain a public defense system that ensures that the provision of public defense services consistent with the Oregon Constitution, the United States Constitution and Oregon and national standards of justice." ORS §151.216(1)(a).

63.

OPDC is required to "[a]dopt policies for public defense providers that … [e]nsure compensation, resources and caseloads are in accordance with the requirements of the Oregon and United States Constitutions." ORS §151.216(1)(b)(A).

64.

OPDC is required to "[r]eview the caseload policies described in paragraph (b)(A) of this section annually, and revise the policies as necessary and at least every four years." ORS §151.216(1)(d).

65.

OPDC is required to "[a]dopt a statewide workload plan, based on the caseload policies described in paragraph (b)(A)." ORS §151.216(e).

66.

OPDC is required to "[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 Constitution." ORS §151.216(1)(j).

67.

OPDC is required to "[e]nter into contracts and hire attorneys to bring the delivery of public defense services into and maintain compliance with the minimum policies, procedures, standards and guidelines described in this subsection." ORS §151.216(1)(m).

68.

Through its contracted providers, OPDC provides counsel to defendants eligible for public defense services in adult criminal, juvenile delinquency, juvenile dependency, and civil commitment proceedings at the trial and direct appellate levels.

69.

OPDC contracts with two different types of providers to provide public defense services: nonprofit public defender organizations and consortia attorneys, the latter of which are made up of law firms and individual attorneys.

70.

If a defendant appears at their arraignment unaccompanied by counsel, the judge must inform that defendant of their right to counsel and ask whether the defendant wishes to have counsel appointed. ORS § 135.040. This same procedure applies regardless of the type of court in which the defendant appears. *See* ORS § 135.050.

71.

If a defendant responds that they would like to have counsel appointed, the court must appoint such counsel if the defendant shows that they are "financially eligible." ORS § 135.050.

72.

OPDC creates the standards for financial eligibility. ORS § 151.216(1)(h(A)) (stating the OPDC "shall" "[a]dopt[] policies, procedures, standards and guidelines regarding: [t]he determination of financial eligibility of persons entitled to be represented by appointed counsel at state expense").

73.

Defendants typically must complete a detailed financial statement and provide documentation on their income, assets and debts. ORS § 135.050. Defendants need not show they are penniless. Under the promulgated standards, defendants must show only that the cost of obtaining an attorney would result in "substantial hardship" for themselves or their dependents. *Id.*; *see also* ORS §151.485(1) (stating "a person is financially eligible for appointed counsel if the person is determined to be financially unable to retain adequate counsel without substantial

hardship in providing basic economic necessities to the person or the person's dependent family under standards established by the [OPDC].").

74.

Court employees are responsible for reviewing defendants' documents and recommending to judges whether defendants should be found financially eligible or not under ORS § 135.050. Ultimately, whether defendants are found financially eligible, not financially eligible, or partially financially eligible is a factual determination that is within the discretion of the trial court.

75.

If a defendant is found only partially financially eligible, they may be required to pay a portion of their appointed attorney's fee or a court application fee. *See* ORS §151.487(1). If a defendant is ultimately convicted, they may be ordered to repay part, or all, of the costs of their defense.

76.

Each circuit court has a circuit court administrator responsible for administering the daily arraignment docket for all criminal matters and determines which criminal defendants are eligible for public defense services.

77.

One of the circuit court judges is designated the "assigning judge." The assigning judge is responsible for assigning cases of financially eligible defendants to public defense attorneys. As noted previously, there are two broad categories/groups of attorneys to which the courts assign cases: non-profit public defender offices and the consortia.

78.

The non-profit public defender offices are 501(c)(3) organizations with nonprofit status ("Nonprofit Public Defender Offices"). The Nonprofit Public Defender Offices are run by Executive Directors that are each monitored and overseen by an independent nonprofit board.

79.

Similar to traditional law offices, the Nonprofit Public Defender Offices have ethical obligations to adequately train and supervise all employees within the office and to ensure that attorneys meet the required ethical obligations and competency standards for public defense work. They employ staff, investigators, attorneys, case managers and law students on an ongoing basis.

80.

Most of the employees at a Nonprofit Public Defender Office are full-time employees. The Nonprofit Public Defender Offices pay for all of the organization and employee business costs, office overhead, legal trainings, liability insurance, membership dues, medical and retirement benefits, regular business reimbursements, and employees' paid time off.

81.

Nonprofit Public Defender Offices contract with OPDC for a certain number of fulltime ("FTE") attorneys. Nearly all attorneys', support staff's, and law students' overhead costs, salaries and benefits are deducted from the total attorney FTE amount provided by OPDC. Approximately half of the investigators' overhead, costs, salaries and benefits are also taken from the total attorney FTE amount.

82.

A consortium is a group of attorneys that contract together with OPDC during any given contract period ("Consortium Public Defender Offices"). Consortium Public Defender Offices are typically comprised of solo attorneys or small for-profit businesses, and do not hold 501(c)(3) nonprofit status.

83.

In contrast to the Nonprofit Public Defense Offices, the Consortium Public Defender Offices are not overseen by an independent board.

84.

The attorneys providing public defense in Consortium Public Defender Offices often maintain their own private caseload in addition to a public defense caseload.

85.

Consortium Public Defender Office attorneys receive a flat amount of OPDC attorney FTE funds, depending on the details of their agreement with OPDC.

E. The Oregon Project

86.

In 2020, in order to understand the then current state of the Oregon public defense system, the PDSC engaged ABA SCLAID to conduct a study of the Oregon public defense system (the "Oregon Project"). That project was funded by the Oregon Legislature.

87.

The PDSC commissioned that study to understand historical public defense caseloads for the State of Oregon; calculate the average amount of time that a public defense attorney should spend on a given case type in order to meet the minimum standards required to effectively represent a defendant; and compare those minimum standards with the then existing caseloads in order to determine whether a deficiency existed.

88.

The ABA SCLAID engaged Moss Adams LLP ("Moss Adams"), the largest accounting firm west of the Mississippi, with offices in Portland, Eugene and Medford, to conduct the analysis.

89.

In January 2022, Moss Adams produced a report entitled "The Oregon Project, An Analysis of the Oregon Public Defense System and Attorney Workload Standards" (the "Oregon Report").

90.

In performing its analysis, Moss Adams employed the Delphi Method, an analytical tool developed by RAND at the direction of the U.S. Air Force during the Cold War to assess atomic bomb needs. The Delphi Method has been repeatedly validated in the research literature in the ensuing half century.

91.

The Delphi Method has been used in a wide range of industries and professions. Since being developed to forecast the effect of technology on warfare, the Delphi method has been applied to military, healthcare, education, environmental science and management applications. For example, the Delphi Method was used to predict probable targets that the Russian government might choose to attack the United States. Researchers also have applied the Delphi Method to "program planning, needs assessment, policy determination, and resource utilization." Chia-Chien Hsu & Brian A. Sandford, *The Delphi Technique: Making Sense of Consensus*, 12 Prac Assessment Rsch & Evaluation 1, 1 (2007).

92.

Prior to its use here, the Delphi method also has been applied to the study of public defender caseloads. Previous studies have used the Delphi method to analyze public defense systems in Missouri, Louisiana, Colorado, Rhode Island, Indiana, and New Mexico. Since at least 1979, court systems also have used the Delphi method for judicial workload analysis and planning.

93.

Using the Delphi Method, the Oregon Project determined the amount of time required for a public defense attorney to provide reasonably effective assistance of counsel pursuant to prevailing professional norms for a range of case types and task types. Specifically, the Oregon Project determined the total number of hours, on average, that a typical case of a specific category requires to meet minimum constitutional levels of representation, based on the tasks required for

that case type. Those standards then were applied to statewide caseload data to determine the total number of hours required to perform the necessary work (3.9 million hours), and how many attorneys were required to perform those hours (1,888 attorneys). Those values were compared to the total number of full-time attorneys actually employed in the system (592 attorneys).

94.

The Oregon Project concluded that the state's public defense system in 2022 needed an additional 1,296 full-time attorneys, two-thirds more than employed at the time, for public defenders to meet their duty to provide reasonably effective assistance of counsel under prevailing professional norms.

F. The Promulgation of National Public Defense Caseload Standards.

95.

In September 2023, RAND published the 2023 National Workload Study. That work resulted from a collaboration between the National Center for State Courts, RAND, ABA SCLAID, Moss Adams, and Stephen F. Hanlon.

96.

The National Workload Study resulted in the National Workload Standards, which set forth guidelines for determining how many cases, based on case types, an attorney could be assigned and still meet their ethical responsibilities to their clients.

97.

Prior to the development of the National Workload Standards, the 1973 NAC Standards, created more than a half century ago by the National Advisory Commission on Criminal Justice Standards and Goals, had been widely used by governmental bodies, public defense attorneys, policymakers and other stakeholders in setting and evaluating public defender caseloads.

98.

The 1973 NAC Standards were not based on data or data analytics, nor any kind of evidence-based analysis of public defense caseloads. It also did not employ any accepted methodology. *See* Lefstein, Norman, Executive Summary and Recommendations, Securing Reasonable Caseloads, Ethics and Law in Public Defense, 2012, at 34 ("Public defender agencies and programs that furnish private lawyers to provide indigent defense representation should not rely upon 'national caseload standards' published in 1973 by the National Advisory Commission on Criminal Justice Standards and Goals (NAC)…. The NAC's caseload standards were derived from a committee report of the National Legal Aid & Defender Association, which the NAC simply 'accepted' since they did no research of the subject and had no numbers of their own to suggest.").

99.

In developing the National Workload Standards, the National Workload Study developed an updated weighted caseload model for jurisdictions to use based upon the consensus professional judgment of 33 experienced criminal defense expert practitioners from across the country.

100.

To develop the updated weighted caseload model, the National Workload Study divided the types of cases to which public defenders are assigned into eleven categories: Felony-High-LWOP, Felony-High-Murder, Felony-High-Sex, Felony-High-Other, Felony-Mid, Felony-Low, DUI-High, DUI-Low, Misdemeanor-High, Misdemeanor-Low and Probation/Parole Violations.

101.

Each case type is designated, based on empirical data, an average number of hours it takes a public defender to effectively represent a client facing that type of charge. For example, an attorney representing a client facing Felony-High-LWOP requires an average of 286 hours to provide effective legal counsel to that client, whereas an attorney representing a client facing

Probation/Parole Violations requires an average of 13.5 hours to provide effective legal representation.

102.

Based on an attorney working 2,080 annual hours and using the newly calculated hours per case, the National Workload Study created guidelines indicating the maximum amount of cases per year per case type that an attorney could be assigned before their workload created a significant risk that they could not provide effective legal representation.

103.

The National Workload Study also confirmed what other caseload studies have been suggesting for more than 15 years: The 1973 NAC standards should not be applied to determine appropriate public defense caseloads.

104.

Changes in the demands of public defense attorneys since 1973 include, *inter alia*:

> 1) scores of new criminal offenses that did not previously exist; 2) ever-increasing complexity in criminal practice, procedure and sentencing laws; 3) an explosion in the number of people charged each year with criminal offenses; 4) a ballooning system of "collateral consequences" of criminal convictions; 5) greater volume of discovery, especially video, in an increasing number of cases; 6) increasingly harsh criminal penalties; 7) new standards of practice in cases, especially death penalty and juvenile life cases. Additionally, the NAC standards do not account for travel that is especially time consuming and necessary in rural jurisdictions. These factors have drastically increased the amount of time, knowledge, skills, and staffing required for a lawyer to provide effective representation to each client.

NAPD Policy Statement on Workloads, p. 6.

105.

Further, the National Workload Study concluded that "[s]ignificant evidence exists that many public defense providers are overloaded, even when judged against the 1973 NAC standards. In validating the concerns that the 1973 NAC standards are outdated, the results of this study strongly suggest that the caseloads of public defense attorneys are more excessive than previously

thought and that decisive action is needed to ensure that public defense clients receive the effective assistance of counsel required by the Constitution." National Workload Study, p. xv-xvi.

106.

For example, the NAC felony standard is 150 felonies per year, or 13.9 hours per felony. Under the National Workload Standards, and assuming that a public defender is working 2,080 per year, applying the Felony–Low case weight of 35 hours per case, the proper caseload for that attorney is 59 cases per year.

107.

Put another way, the National Workload Study found that an attorney representing only clients with Felony-Low cases and shouldering an annual caseload at the NAC maximum for felonies would have more than ***2.5 times as many cases*** as that lawyer can ethically handle.

108.

Similarly, if one compares the 1973 NAC Standards for misdemeanors (400 per year or 5.3 hours per case based on 2,080 annual hours) with the Misdemeanor–Low case weight from the National Workload Study (13.8 hours or 150 cases per year based on 2,080 annual hours), an attorney working at the NAC upper limits would have more than ***2.6 times as many cases*** as that lawyer could ethically handle.

109.

Below is an illustrative chart comparing the National Workload Standards, as well as the results from state-level caseload studies, against the 1973 NAC Standards, showing that the 1973 NAC Standards far exceed a public defender's ethical caseload for effective legal representation to their

clients:

Case Type	NAC Standards (maximum cases per year)	State-Level Study Medians (illustrative maximum cases per year)[a, b]	NPDWS Results (illustrative maximum cases per year)[a]
Felony–High–LWOP	150 (all felonies)	8	7
Felony–High–Murder		7	8
Felony–High–Sex		13	12
Felony–High–Other		27	21
Felony–Mid		30	36
Felony–Low		84	59
DUI–High	N/A	83	63
DUI–Low		171	109
Misdemeanor–High	400 (all misdemeanors)	100	93
Misdemeanor–Low		260	150
Probation and Parole Violations	N/A	346	154

G. OPDC Adopts the National Workload Standards.

110.

In 2024, OPCD began the process of building and implementing a statewide caseload plan for public defense attorneys, as required by ORS §151.216. Its goal was to "quantify the number of public defense lawyers needed to represent all persons who qualify for a court-appointed attorney, and to do so within constitutionally mandated caseloads." OPDC Comprehensive Public Defense Report dated November 15, 2024 ("OPDC Report") at 5.

111.

OPCD also sought at that time to quantify the number of non-attorney staff needed to support public defenders' work, and the financial costs of providing those services. *Id.*

112.

In performing that analysis, OPDC assessed four factors: (1) how many cases it projected would require a public defender; (2) how many attorney hours were needed per case; (3) what the attorney-core staff ratios should be; and (4) compensation. *Id.*

113.

OPDC concluded that its forecast for 2025 through 2027 showed a substantial increase in cases, which was largely attributable to increases in misdemeanors (34.4%) and probation violations (21%), but also felony cases (8.4%). *Id.*

114.

Much of this increase is due to Oregon's decision to recriminalize certain conduct without any additional public defense support to handle those additional cases.

115.

In assessing appropriate caseload standards, OPDC operated under, *inter alia*, under the mandate, as set forth in ORS 151.216, that caseloads conform with the requirements of the Oregon and United States Constitution. *Id.* at 6.

116.

In response to these and other obligations, OPDC considered attorney caseload standards at meetings in March through May 2024. Specifically, OPDC considered the caseload standards from the Oregon Project and the National Workload Study. *Id.* at 7.

117.

On May 8, 2024, OPDC adopted the Oregon Workload Standards, which in turn adopted the National Workload Standards for criminal cases and the Oregon Project caseload standards for juvenile delinquency and dependency cases. *See* Transcript from May 8, 2024 Meeting of OPDC and ORS §151.216(1)(a). OPDC, however, adopted an annual workload of 1,578 case-specific hours per year for full-time public defense attorneys, rather than the 2080 hours used in the National Workload Standards, which is consistent with the annual case-related hours requirements for fulltime attorneys at the Oregon Department of Justice. OPDC Report at 8.

118.

Additionally, in connection with OPDC's Trial Division, OPDC employs the National Workload Standards. June 2025 Memo at 32. In other words, OPDC is applying one caseload standard—the National Workload Standards—for its own Trial Division—and a different caseload standard—the MAC Standard—for all of the State's other public defenders.

H. The OPDC's Historical Use of the MAC Standard as a Maximum Caseload

119.

In December 2020, the PDSC, as the predecessor to OPDC, approved public defense contracts that had a caseload limit of 115% of the 1973 NAC standard of 400 misdemeanors or 150 felonies per year.

120.

In December 2021, the PDSC extended those contracts for six months, to expire on June 30, 2022.

121.

For contracts beginning in July 2022 to the present, the caseload limits were reduced to 300 misdemeanors per year, and with that number as the foundation, case weights were used to establish caseload limits for minor felonies, major felonies, ballot measure 11 cases, murder, Jessica law cases and probation violations.

122.

Specifically, the contract now in effect set a maximum caseload, referred to earlier as the MAC (*maximum* attorney caseload), of "300 weighted cases per year, which corresponds to 25 weighted cases per month. Excluding murder and Jessica law cases, the number of appointments per month for an attorney shall not be 15% greater than 25 weighted cases per month without written preapproval by the OPDC, and that limitation shall be adjusted proportionally to the attorney's FTE."

123.

Oregon set that caseload limit because it was the one being used in Washington and New York at that time, which were in turn modified from the 1973 NAC Standards.

124.

The caseload limit in the present contracts was not based on what OPDC believes to be a workable caseload standard, under which public defenders could work in an ethical manner. Rather, the caseload limits were selected as a number that the OPDC could afford within its budget.

I. OPDC Elects Not Only to Stay with the MAC Standard in the Public Defense Contract, but Has Turned the Standard From a Maximum Caseload to a Required Caseload.

125.

In a meeting on March 6, 2025, OPDC stated that, notwithstanding its adoption of the Oregon Caseload Standards, it would continue to use the unsupported and inaccurate MAC standard in the Public Defense Contract.

126.

Exhibit B in the Public Defense Contract sets forth the "Caseload Standards for Criminal Contract." It starts by listing the caseloads that, as OPDC itself has noted, had previously been identified as the *maximum* number of cases that a public defense lawyer would be allowed to handle. June 2, 2025 memorandum titled "Response to Letter of Expectations from Governor Kotek, dated 17 April 2025" ("June 2025 Memo") at 21. *See also* Brief of Amicus Curiae for Oregon Public Defense Services in Supreme Court Case No. SC S070205 at 8 ("the MAC sets only an upper limit on the number of cases any attorney can take, not a quota").

127.

Without so much as even changing the word "maximum," the Public Defense Contract converts the prior *maximum* caseloads into newly *required* caseloads, stating that "with the

exception of murder and Jessica Law cases, a 1.0 FTE attorney's MAC weight per month for new cases assigned is 0.083 MAC weight per month unless the attorney qualifies for an adjusted caseload." Public Defender Contract at Exhibit B, §B. In other words, were Wilson to sign the Public Defense Contract as written, they would be committing their attorneys to handling 300 misdemeanors per year, or the weighted equivalent of that number of cases for other case categories.

128.

Further, OPDC has repeatedly communicated to Wilson that, should any public defender office fall below 90% of the MAC Standard for any significant period of time, that office will be subject to punitive action by OPDC. Such action could include, *inter alia*, the refusal to pay for personnel, other financial penalties, and ultimately termination of their contract.

129.

In addition, it appears that neither PDMC's lawyers nor other public defenders would receive credit for their existing cases when assessing against the MAC Standard. If that is the case, and PDMC lawyers would be expected to take on full MAC caseloads in addition to their existing cases, that scenario would be totally unfeasible.

J. Wilson Is Ready, Willing and Able to Sign the Public Defense Contract if the MAC Requirement Is Removed.

130.

On August 15, 2025, Wlson informed OPDC, on behalf of PDMC, that the "use of MAC is unlawful and is not the correct caseload standard to use for these contracts."

131.

Because the Public Defense Contract requires that PDMC's lawyers handle caseloads compliant with the MAC Standard, and because doing so would require those attorneys to violate

their ethical requirements, Wilson has refused to sign the Public Defense Contract on behalf of themselves or PDMC.

132.

In August 2025, the following written suggestion was posed to OPDC:

> The contract simultaneously requires attorneys to follow ethical and ABA guidelines, but also enforces a caseload standard that will make it impossible to do -- especially for attorneys handling misdemeanors and minor felonies. Evidence-based studies designed to determine an ethical and constitutionally appropriately caseload have demonstrated that the MAC numbers for misdemeanors and minor felonies are too high. The contract should make clear that the ethical and constitutional standards are the expectation, and that MAC will not be enforced in a way that impairs those standards.

133.

In response, OPDC stated:

> OPDC currently offers two types of contracts, a MAC contract, and an hourly contract. If an attorney or entity feels that they cannot fulfill the terms of the capacity-based contract, OPDC encourages them to discuss transitioning to an hourly contract.

134.

Accordingly, on September 16, 2025, Plaintiff met with OPDC to discuss the possibility, among other things, of an hourly contract for them and PDMC's lawyers as a whole. OPDC stated that an hourly contract would not be available to PDMC.

135.

At that meeting and thereafter, Wilson sought to enter into the Public Defense Contract without the MAC requirement. Wilson specifically asked that that provision be removed, and explained that Wilson was prepared to sign the Public Defense Contract for themselves and PDMC if the provision was removed. OPDC refused to do so.

136.

At no time during any of Wilson's communications with OPDC did OPDC representatives ever assert that the MAC Standard was the appropriate standard to use, or that it was proper to use MAC as a contractual requirement.

137.

At no time during any of Wilson's communications with OPDC did OPDC claim that the MAC requirement would *not* cause public defenders to violate their ethical duties.

138.

In addressing the MAC requirement during communications with Wilson, OPDC has said only the MAC requirement is in the Public Defense Contract because the Legislature requires it.

K. The Washington Supreme Court Has Rejected the MAC Standard and Adopted the National Standards.

139.

The Washington Supreme Court recently reevaluated caseload standards for public defense attorneys. It began by asking the Washington State Bar Association Counsel on Public Defense (the "Washington Bar") to review the National Workload Standards and make recommendations to that Court with regard to those standards. Order of the Supreme Court of Washington dated June 9, 2025 ("Washington Order").

140.

The result of the Washington Bar's extensive review process was the wholesale adoption of the National Workload Standards, as modified to conform to local state practices and statutes.

141.

The Washington Supreme Court published the Washington Bar's proposed standards in June 2024, and thereafter held two public hearings in September and October. *Id.* The Court also solicited and received over 700 written comments. Boruchwitz, Robert, *The Washington Supreme Court Should Adopt Revised Standards to Address the Crisis in Public Defense* ("Boruchwitz Article").

142.

After reviewing the Washington Bar's report and considerable public comment, the Washington Supreme Court adopted the recommendations of the Washington Bar, and in doing so adopted the National Workload Standards, as modified to conform to local practice, as the new caseload standards for the state. Washington Order at 2. Prior to that adoption, Washington, like Oregon, had been operating from a version of the outdated and unsupportable 1973 NAC Standards. Boruchwitz Article.

143.

The Washington Supreme Court's adoption of the National Workload Standards also makes clear that the National Workload Standards, and not the MAC Standard or the 1973 NAC Standards, establish accurate ethical caseload limits. As stated above, Washington's prior use of 300 misdemeanors and associated limits for other case types formed in significant part Oregon's justification for using that threshold when developing the MAC Standard. The Washington Supreme Court's rejection of that standard and adoption of the National Workload Standards makes OPDC's employment of the MAC Standard all the more unjustifiable.

L. The MAC Standard Leads to Ethical Violations, Particularly for Low Felony and Misdemeanor Cases.

144.

Assuming that a public defender works the same number of case-specific hours that a lawyer at the Department of Justice works (1578 hours), the average number of hours per case type under the MAC Standard is set forth below:

Case Type	Number of cases per MAC	Average number of hours per case under MAC
Murder	6	263
Jessica Law	6	263
Ballot Measure 11	45	35
Major (A/B) felonies	138	11.4
Minor (C) felonies	165	9.5
Misdemeanors	300	5.26
Probate violation	825	1.9

145.

Comparing the above numbers to the Oregon Caseload Standards, the number of hours allocated to murder and Jessica Law cases are comparable, indeed the MAC Standard even anticipates more hours in some cases. But after that, the variance is significant:

Case Type	Average number of hours per case under MAC	Average number of hours under the Oregon Caseload Standards
Murder	263	248
Jessica Law	263	167
Ballot Measure 11	35	99
Major (A/B) felonies	11.4	99
Minor (C) felonies	9.5	35
Misdemeanors	5.25	13.8 (low) and 22.3 (high)
Probate violation	1.9	13.5

146.

Plainly, public defenders cannot properly represent their clients if, on average, they can spend no more than the time allotted for most of the MAC categories above. Yet, the Public Defense Contract requires that those cases, on average, be disposed of within that time.

147.

Public defenders cannot properly represent their clients and operate at the MAC caseload levels in part because cases are far more complex than they were when the 1973 NAC Standards – upon which the MAC Standard is based – were created. For example, when body cam footage is available, for a typical misdemeanor case, it takes, on average, five hours just to get through the footage, meet with the client and attend a court appearance. For a public defender to meet the MAC requirement, on average, the case must be disposed of by that point.

148.

To be clear, the fundamental flaw with imposing the MAC Standard is not at the two highest felony levels, where that standard mostly aligns with the National Workload Standards and Oregon Caseload Standards, but at all other felony and misdemeanor levels, where the two standards wildly diverge.

149.

In a world where, unlike the Trial Division lawyers, most public defenders do not have the ability to select their case types, misdemeanors and most felony cases are overwhelming them.

150.

Fundamentally, if OPDC's goal is to try to hold public defenders who are weighed down with low felony and misdemeanor cases to the MAC standard, there is no possible way that those lawyers can effectively and consistently discharge their ethical duties. And this situation will only worsen, since studies project a sharp uptick in misdemeanor cases.

M. The Collateral Consequences to a Misdemeanor Conviction Are Significant and Require This Court's Attention.

151.

The consequence of OPDC's requirements with respect to misdemeanor and low felony defense has a particularly harmful impact on indigent defendants, but also to society as a whole.

152.

Even where no jail time is involved, the collateral consequences to the individual "will often be far more punitive." Alexandra Natapoff, *Appreciating the Full Consequences of a Misdemeanor*, Collateral Consequences Resource Center. Collateral consequences may include reduced employment opportunity and earning capacity, loss of housing and public assistance, loss of student aid, ineligibility to foster or adopt children, ineligibility for health care programs, loss of voting rights and the right to run for office, unavailability of tax credits, and the loss of driving privileges, immigration status and educational opportunities. *Id*.; Brett Smith and Philip Schradle, *Collateral Consequences—Work Group Report—HB 2367-2*, Oregon Law Commission ("Oregon Law Commission Report").

153.

In Oregon in particular, the legal ramifications that result as a matter of law for a criminal conviction total "some 1,105 collateral consequences." Oregon Law Commission Report at 2. *See also Oregon—Snapshot of Employment-Related Collateral Consequences*, The National Reentry Resource Center, Justice Center, The Council of State Governments at 1 ("Oregon Snapshot") (stating that 1,086 provisions of Oregon law impose collateral consequences on those with a criminal conviction). Many of these legal restrictions are employment-related, restricting access to occupational licenses, business licenses for self-employment, and "directly limiting the ability of employers to hire or retain workers with certain conviction histories." *Id.* at 1. And almost 80% of those restrictions are indefinite in duration. *Id.* at 2.

154.

The utter failure of the MAC Standard to properly allow for a constitutionally acceptable level of representation for those defendants accused of misdemeanors and low felonies has a powerful and lasting negative effect on their lives.

N. The Public Defense Contract Improperly Reintroduces a Pay-Per-Case Public Defense Model.

155.

In its report entitled "The Right to Counsel in Oregon" produced in January 2019, the Sixth Amendment Center published its analysis of the many problems endemic to Oregon's public defense system. One of the key failures that it identified was that the system employed a "fixed fee contract system that pits appointed lawyers' financial self-interest against the due process rights of their clients and is prohibited by national public defense standards." The Right to Counsel in Oregon at iii. The fundamental problem with a fixed fee system is that lawyers are paid a flat fee for a case no matter how much work they do, thereby encouraging them to work less in order to take on more cases and make more money.

156.

In response, in 2023, Oregon appropriately moved away from that model, and passed legislation abolishing a fixed fee system. ORS § 151.216(6)(c)("The commission may not enter into a contract or agreement that pays appointed counsel a flat fee per case").

157.

The Public Defense Contract violates that mandate. By turning MAC from a ceiling to a requirement, and financially penalizing public defenders who do not meet that requirement, the Public Defense Contract pays lawyers a fixed amount of money for a fixed number of cases.

158.

The Public Defense Contract also creates all of the improper incentives found in a traditional pay per case system: it encourages, indeed requires, public defenders to move their cases quickly and with minimal effort in order to try to meet an unsustainable caseload threshold and avoid a claim that they have violated their contract.

CAUSES OF ACTION

COUNT I – DECLARATORY RELIEF

159.

Wilson realleges paragraphs 1 through 158 as set forth herein.

160.

ORS § 28.020 states, *inter alia*, that "[a]ny person interested under a … written contract or other writing constituting a contract, or whose rights, status or other legal relations are affected by a … statute [or] contract … may have determined any question of construction or validity arising under any such … statute [or] contract and obtain a declaration of rights, status or other legal relations thereunder."

161.

ORS §28.010 states, *inter alia*, that "[c]ourts of record within their respective jurisdictions shall have the power to declare rights, status and other relations, whether or not further relief is or could be claimed."

162.

In ORS §151.216(1)(a), the Legislature requires OPDC to "[e]stablish and maintain a public defense system that ensures that the provision of public defense services consistent with the Oregon Constitution, the United States Constitution and Oregon and national standards of justice."

163.

In ORS §151.216(1)(b)(A), the Legislature requires OPDC to "[a]dopt policies for public defense providers that [e]nsure compensation, resources and caseloads are in accordance with the requirements of the Oregon and United States Constitutions."

164.

In ORS §151.216(d), the Legislature requires OPDC to "[r]eview the caseload policies described in paragraph (b)(A) of this section annually, and revise the policies as necessary and at least every four years."

165.

In ORS §151.216(e), the Legislature requires OPDC to "[a]dopt a statewide workload plan, based on the caseload policies described in paragraph (b)(A)."

166.

In ORS §151.216(j), the Legislature requires OPDC to "[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 Constitution."

167.

In ORS §151.216(m), the Legislature requires OPDC to "[e]nter into contracts and hire attorneys to bring the delivery of public defense services into and maintain compliance with the minimum policies, procedures, standards and guidelines described in this subsection."

168.

In fulfilling the above-listed obligations, OPDC considered caseload standards at public meetings from March through May 2024. In particular, OPDC considered the findings in the Oregon Study and the National Workload Study. OPDC Report at 7.

169.

Also in fulfilling the above-listed obligations, on May 8, 2024, OPDC voted to adopt the Oregon Caseload Standards, which adopted the National Workload Standards for criminal cases, and the Oregon Project caseload standards for juvenile delinquency and dependency cases. OPDC also

established an annual caseload of 1,578 case specific hours per year for full-time public defense attorneys. OPDC Report at 8.

170.

In so doing, OPDC determined that the Oregon Caseload Standards represent the appropriate guidelines for determining the maximum caseload that public defenders may handle while still satisfying their ethical obligations to their clients.

171.

In so doing, OPDC determined that the Oregon Caseload Standards represent national and regional best practices for public defender caseloads.

172.

In so doing, OPDC determined that adoption of the Oregon Caseload Standards furthers OPDC's statutory mandate to establish and maintain a public defense system that ensures that the provision of public defense services are consistent with the Oregon Constitution and Oregon and national standards of justice.

173.

In so doing, OPDC determined that adoption of the Oregon Caseload Standards furthers OPDC's statutory mandate to establish and maintain a public defense system that ensures 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 Constitution.

174.

Despite adopting the Oregon Caseload Standards, OPDC has failed to enforce and implement those standards in the Public Defense Contract.

175.

Specifically, prior to adopting of the Oregon Caseload Standards, and specifically in the Public Defense Contracts in effect prior to FY 2025, OPDC employed in those contracts the MAC standard, which was based on the outdated and unsupported 1973 NAC Standards.

176.

In a meeting on March 6, 2025, OPDC stated that, notwithstanding its adoption of the Oregon Caseload Standards, it would continue to use the outdated and inaccurate MAC standards in the Public Defense Contract.

177.

Notwithstanding that the MAC standards previously were articulated as a caseload ceiling in the Public Defense Contracts, the Public Defense Contract treats the MAC standards as a requirement.

178.

Wilson has made clear to OPDC that they and PDMC stand ready, willing and able to sign the Public Defense Contract if OPDC is willing to remove the MAC requirement.

179.

Wilson has made clear to OPDC that they cannot sign the Public Defense Contract with the MAC requirement because it would force PDMC's lawyers to handle caseloads beyond their ethical capacity, which would result in ethical violations.

180.

OPDC has offered Wilson and PDMC a contract with the MAC requirement, but has refused to offer a contract without the MAC requirement. In so doing, OPDC has not denied that the MAC requirement would cause PDMC's lawyers to take on more cases than they can ethically handle.

181.

Absent relief from this Court, Wilson and PDMC will be forced to wind down its office and will lose their livelihood as presently constituted.

182.

A contract is unconscionable and thus unenforceable if it violates public policy as expressed in relevant constitutional and statutory provisions and in case law. *Bagley v. Mt. Bachelor, Inc.*, 356 Or. 543, 552 (2014). Specifically, a contract is procedurally unconscionable if either there are deficiencies in the contract formation process, such as whether one party had "meaningful choice about whether and how to enter the transaction." Alternatively, a contract is substantively unconscionable if the substantive terms of the contract are unreasonably favorable to the more powerful party or "otherwise contravene the public interest or public policy; terms . . . that attempt to alter in an impermissible manner fundamental duties otherwise imposed by the law." *Id.* at 553 (quoting Richard A. Lord, 8 *Williston on Contracts* § 18.10, 91 (4th ed 2010)).

183.

By insisting that Wilson enter into Public Defense Contract using the MAC Standard rather than the Oregon Caseload Standards, OPDC is violating the statutory duties listed above, including, *inter alia*, OPDC's obligations to ensure that "caseloads are in accordance with national and regional best practices" and that "the provision of public defense services [are] consistent with the Oregon Constitution …and Oregon and national standards of justice."

184.

By insisting that Wilson enter into Public Defense Contract using the MAC Standard rather than the Oregon Caseload Standards, OPDC seeks to force Wilson to enter into a contract that violates ORS §151.216(6)(c).

185.

By insisting that Wilson enter into Public Defense Contract using the MAC Standard rather than the Oregon Caseload Standards, OPDC seeks to force Wilson to enter into a contract that would render the public defense system unethical and unconstitutional.

186.

By insisting that Wilson enter into Public Defense Contract using the MAC Standard rather than the Oregon Caseload Standards, OPDC seeks to force Wilson and the lawyers at PDMC to violate their ethical duties.

187.

By insisting that Wilson enter into Public Defense Contract using the MAC Standard rather than the Oregon Caseload Standards, OPDC seeks to force Wilson to sign an unconscionable and unenforceable agreement that is against public policy.

188.

By insisting that Wilson enter into Public Defense Contract using the MAC Standard rather than the Oregon Caseload Standards, OPDC seeks to force Wilson to sign an unenforceable agreement just so that Wilson and PDMC's lawyers can maintain their livelihood.

COUNT II –INJUNCTION

189.

Wilson reallege paragraphs 1 through 158 as set forth herein.

190.

Wilson is suffering irreparable injury by reason of OPDC's continuing violation of its statutory obligations and the Oregon Constitution, in that OPDC seeks, through the Public Defense Contract, to perpetuate a public defense system that forces Wilsonad n PDMC to operate beyond their ethical capacity and in violation of the Oregon Constitution and ORS § 151.216(6)(c), creating a significant risk that the representation of each of Wilson's and PDMC's clients will be materially

limited by their responsibilities to their other clients and result in a denial of their clients' constitutional rights.

191.

Plaintiff has no adequate remedy of law.

PRAYERS FOR RELIEF

192.

Wherefore, Wilson respectfully requests that judgment be entered in their favor against Defendants as follows:

I. A declaration from this Court stating that:

a. The Public Defense Contract is unenforceable, at least because it causes public defenders to violate their ethical duties, violates ORS §151.216(6)(c) and OPDC's enabling statutes, and results in a violation of the Oregon Constitution (no claim under the U.S. Constitution is asserted);

b. Wilson has an ethical duty to handle only as many cases and case types as allows them the time and opportunity to ethically represent each of their clients;

c. No contract may require a public defender to act in an unethical manner;

d. The Oregon Caseload Standards establish the caseload guidelines that public defenders must consider when determining whether they are satisfying their ethical obligations to their clients;

e. By choosing to implement and enforce the MAC standard and not the Oregon Caseload Standards in the Public Defense Contract, OPDC has violated its statutory duties;

f. By choosing to implement and enforce the MAC standard and not the Oregon Caseload Standards in the Public Defense Contract, OPDC has violated ORS § 151.216(6)(c);

g. By choosing to implement and enforce the MAC standards and not the Oregon Caseload Standards in the Public Defense Contract, OPDC is creating an unethical and unconstitutional public defense system;

h. By choosing to implement and enforce the MAC standards and not the Oregon Caseload Standards in the Public Defense Contract, the Public Defense Contract is unconscionable and is unenforceable as against public policy; and

i. Caseloads resulting from the MAC Standard contained in the Public Defense Contract require public defenders to violate their ethical obligations.

II. An injunction from this Court:

a. Allowing PDMC to operate under its existing contract with OPDC pending resolution of PDMC's Motion for a Preliminary Injunction;

b. Staying the implementation of the MAC Standards in the Public Defense Contract until such time as this Court may rule upon Plaintiff's request for permanent relief; and

c. Replacing the MAC Standards in the Public Defense Contract with the Oregon Caseload Standards.

III. Any other relief that the Court deems just and proper.

Dated this 30 day of September, 2025.

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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MARION

SHANNON WILSON, Individually and as Executive Director of The Public Defender of Marion County, Inc., Plaintiff, v. OREGON PUBLIC DEFENSE COMMISSION Defendant.	Case No. _____ **MOTION FOR PRELIMINARY INJUNCTION** NOT SUBJECT TO MANDATORY ARBITRATION FEE AUTHORITY: ORS 21.135

Pursuant to Oregon Rule of Civil Procedure ("ORCP") 79, the plaintiff, Shannon Wilson ("Wilson"), on their behalf and on behalf of The Public Defender of Marion County, Inc. ("PDMC") as its Executive Director, seeks an order preliminarily enjoining the defendant, Oregon Public Defense Commission ("OPDC"), from including in OPDC's contract a requirement that PDMC's lawyers satisfy the maximum attorney caseload, or MAC, contained in that contract. As explained herein, Wilson makes that request because that requirement would force PDMC's attorneys to be responsible for more cases than they can ethically handle, rendering the contract unenforceable as against public policy. Wilson also asks that this Court ultimately replace the MAC requirement in that contract with standards previously adopted by OPDC that are based on national workload standards published in 2023.

INTRODUCTION

In speaking for the majority in *Gideon v. Wainwright,* 372 U.S. 335, 344 (1963), Justice Black recognized these truths:

> [I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth.

* * * * * *

> The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

In Oregon's criminal justice system, indigent defendants do not stand "equal before the law." Instead, in far too many instances, those defendants receive little to no justice at all. That is because, for too long, Oregon's public defenders have been forced to take on more cases than they are able to competently handle. As a result, Oregon's public defenders do not have the time that they need to perform the steps that are basic to their role, such as investigating charges, reviewing digital and scientific evidence, conducting necessary interviews, performing needed legal research, and making sure that a proposed plea is appropriate to the circumstances. Those failures result in profound inequities, which in turn force indigent defendants to accept pleas that, in many instances, are entirely unwarranted for their circumstances.

OPDC sought to address this glaring failure. In May 2024, it adopted new workload standards for public defenders, attempting with those standards to establish guidelines from which they and other stakeholders could assess whether public defenders were handling appropriate workloads. Those standards were based on national standards that had been created one year earlier, which in turn replaced outdated and unsupported standards that had been created a half century before.

For over a year, Wilson has been using the national standards to assess the workloads of PDMC's lawyers. Wilson believes it to be their ethical duty to continue doing so when the new public defense contracts are implemented on October 1, 2025. Notwithstanding OPDC's prior adoption of those standards, however, it refuses to let Wilson consider the new national standards. Instead, it is requiring that Wilson—indeed all public defenders—sign a contract that requires them to handle excessive caseloads based on the long-outdated standards created a half century ago. That mandate, enforced by OPDC, actually derives from the Legislature which, unmoved by its

own statutory requirement that its public defense system be "in accordance with the requirements of the Oregon and United States Constitutions," H.B. 2614, Gen. Ass., Reg. Sess. (Or 2025), §4(b)(A), has refused to effectuate OPDC's adoption of the new national standards. As a consequence, were Wilson to sign the required contract on behalf of PDMC, PDMC would be contractually bound to comply with caseload requirements that Wilson knows would cause PDMC's lawyers to violate their ethical duties.

The ostensible reason for this new contractual requirement is to stem the tide of unrepresented indigent defendants that have been languishing in the State's jails, awaiting the appointment of a lawyer so that their most basic and fundamental constitutional right—the right to have a lawyer represent them through the complex labyrinth of the criminal justice system—could be effectuated. But rather than dedicating real resources to that problem, or engaging in a difficult but long overdue reevaluation of the State's prosecutorial practices, penal code and diversionary programming strategies, the State's short-sighted solution is to foist the problem onto already overworked public defenders, demanding even more of them. OPDC attempts to do so despite knowing that those attorneys, due to the excessive caseloads required of them, simply cannot fulfill their ethical responsibilities to their clients nor meet this State's constitutional obligations to those defendants.

"Defense counsel is essential to the administration of criminal justice. A court properly constituted to hear a criminal case should be viewed as an entity consisting of the court (including judge, jury, and other court personnel), counsel for the prosecution, and ***counsel for the defense***." ABA's Defense Function Standard 4-1.2(a) (emphasis added). Counsel for the defense is necessary because our court system is adversarial in nature—zealous advocacy from all interested parties is required to reveal the truth. But when one side—in this case the State—time and again enjoys an imbalance of power due to a misallocation of scarce resources, justice cannot be achieved and safeguards cannot be preserved. Worse, in such a system, past injustices perpetuate themselves, becoming the standard against which future decisions are measured. The contract that OPDC requires not only perpetuates those past injustices, it amplifies them by further limiting by

contract the amount of time a public defender can allocate to their clients. Justice cannot be served under such circumstances.

For too long, Oregon's court system—indeed the legal community as a whole—has been an enabler of Oregon's failed public defense efforts. Time and again, the legal community has sat silently by as it has watched public defenders be forced to take on far more cases that—as judges and lawyers—it knows they can ethically handle.

In the past, no empirical study explained how many cases were too many for a public defender to competently handle. With the publication of the national workload standards, however, that time has passed. Oregon's courts can no longer turn a blind eye to what is before them. They must follow the lead of the Washington Supreme Court who, faced with these same issues, formally adopted the national workload standards and ordered that they be implemented over time. The national workload standards inform this Court on the number of cases that a public defender can reasonably handle and still meet their ethical responsibilities and thereby satisfy the State's constitutional responsibilities. With that information, Oregon's court system must act to fulfill its fundamental mission: ensuring that its courts are ethical, fair, and constitutionally constituted. To do that, the national workload standards, and not the unsupportable MAC standard, must form the basis the new public defense contracts.

FACTUAL BACKGROUND

I. The Promulgation of the National Workload Standards

A. The Need for and Creation of Reliable Workload Standards

Excessive caseloads are proscribed by ethical rules, and for good reason. When public defenders have too many cases, they cannot give the necessary time and attention that each of their clients needs. As a result of excessive caseloads, public defenders typically will not have sufficient time to investigate the charges, evaluate the evidence, or file appropriate motions. Instead, public defenders with excessive caseloads act in a triage mode, focusing only on the most mission-critical, time-sensitive tasks in front of them. In such circumstances, while some clients may receive an appropriate level of attention, the vast majority do not. That circumstance, in turn, results in ethical

violations and a failure to deliver legal services at the level required by the Oregon Constitution. Declaration of Malia N. Brink. ("Brink Decl.") at ¶12, Exhibit A.

Because determining when public defenders are overloaded on a systemic level can be challenging, it is important to have reliable standards to help evaluate public defender workloads. Workload standards effectively act like a canary in a coal mine for public defenders. Individual public defenders may be able, at any given moment, to handle more or less cases than a standard dictates. But when an attorney exceeds that standard, that situation should effectively act as an early warning system to make sure that that lawyer is operating within their ethical capacity. Standards should never, however, be used as a target, and certainly never as a contractual requirement. Rather, workload standards represent presumptive limits on appointments, not a measure of optimal caseload levels. *Id.* at ¶¶ 13-15.

In light of the above need, over ten years ago, researchers embarked on a study of appropriate workloads in order to assist governmental bodies, policymakers and other stakeholders when planning for and managing the provision of public defense services. The purpose of the study was to create functional metrics that identified workloads that a public defender could reasonably handle. Those metrics were to be determined based upon recognized ethical standards and prevailing professional norms. *Id.* at ¶¶ 16.

The study's focus was on the amount of time that was likely to be needed, on average, for a public defender to competently represent a client for particular types of cases. It was not to be based, in contrast, on what public defenders had historically expended. Doing that would have simply locked in existing imbalances that presently exist in the system. Rather, the goal of the study was to develop metrics that truly reflected the amount of time necessary to provide reasonably effective assistance of counsel in a manner consistent with ethical rules and prevailing professional norms. *Id.* at ¶ 19.

The above work resulted in the publication, in September 2023, of the National Public Defense Workload Study (the "National Workload Study" or "Study"). That Study resulted from a collaboration between the RAND Corporation ("RAND"), the National Center for State Courts

("NCSC"), the ABA's Standing Committee on Legal Aid and Indigent Defense ("ABA SCLAID"), the accounting firm of Moss Adams LLP ("Moss Adams"), and national expert Stephen F. Hanlon. Brink Decl. at ¶16. The National Workload Study resulted in new national workload standards (the "National Workload Standards"). Those standards were designed to replace standards created in 1973 by the National Advisory Commission on Criminal Justice Standards and Goals (the "1973 NAC Standards"). The 1973 NAC Standards have been heavily criticized over the years for a number of reasons. First, they were criticized almost immediately as being too high. Based on the 1973 NAC Standards, assuming a public defender worked 40 hours per week just on case-specific work, and worked all 52 weeks of the year, that public defender could average only 13.9 hours per felony and 5.2 hours per misdemeanor. That amount of time is not remotely close to the time needed for a public defender to fulfill their ethical and professional duties to their clients. *Id*. at ¶¶ 51-52.

Second, the 1973 NAC Standards were not evidence- or data-based in any way. Indeed, no methodology was used at all in coming up with the case numbers in that standard. *Id*. at ¶ 53.

Third, the 1973 NAC Standards were overly broad, failing to differentiate among, for example, different types of felonies. Under the 1973 NAC Standards, a homicide charge was treated the same as a charge for minor drug possession. *Id*. at ¶ 54.

Fourth, whatever value the 1973 NAC Standards once may have had, those standards were developed more than a half century ago and are hopelessly outdated. At a minimum, the 1973 NAC Standards do not account for the tremendous expansion of digital discovery, forensic evidence and the expanding role of a public defender's responsibilities that are critical to current representations. *Id*. at ¶¶ 55-56.

B. <u>The Methodology Used for the National Workload Study</u>

For the Study, researchers assembled an expert panel of highly regarded and experienced criminal defense attorneys from around the country (the "Expert Panel"). Those experts were nominated by five major national associations whose focus is on the provision of effective assistance of counsel in criminal cases. The organizations were asked to nominate attorneys with

strong track records and reputations, and that had expertise in adult criminal defense work at the state level. The researchers also sought a diverse group in terms of gender, ethnicity, geography and practice type. They wanted attorneys with significant experience in both misdemeanor and felony cases, but avoided criminal defense lawyers that focused on white collar work. *Id*. at ¶ 34.

Ultimately, the researchers settled on 33 experts from around the country that met the researchers' requirements. After some initial work, explained more fully in the Brink Decl. at ¶¶ 34-41, the expert panel gathered for an in-person meeting. The purpose of the meeting was to produce a reliable professional consensus on the amount of time, on average, public defenders needed for particular case types to be able to satisfy the *Strickland v. Washington* standard of reasonably effective assistance of counsel. In that regard, for the Study, the researchers emphasized that "reasonably effective assistance of counsel" did not mean ideal or unlimited assistance, but rather that the panel should draw upon prevailing professional norms and applicable ethical rules for understanding what services a criminal defense attorney needed to perform for their clients. Because the Supreme Court has approvingly referred to the ABA's Defense Function Standards and the ABA's Model Rules when discussing *Strickland*, the researchers used those standards and rules as key resources when defining professional norms needed for providing reasonably effective assistance of counsel. *Id*. at ¶¶ 27-29.

The Study then used the Delphi method to create a consensus around appropriate hours for various types of cases. The Delphi method is a feedback technique first developed by RAND researchers to systematically coalesce expert opinion on complex questions that are otherwise difficult to answer. The Delphi method has been used in a wide range of industries and professions. It was initially developed to forecast the effect of technology on warfare. Since then, the Delphi method has been applied in a number of public policy settings, including national security, healthcare, education, environmental science and management. Notably, the Delphi method also has been used by the Administrative Office of the U.S. Courts and the National Center for State Courts to analyze the numbers of judges, probation offices and district attorney offices needed in various jurisdictions. Brink Decl. at ¶¶ 24-26.

C. The Results from the National Workload Study

The results from the National Workload Study are set forth below. The table is expressed in terms of: (1) case types,[1] (2) the amount of hours, on average, public defenders should work to have handled that case type reasonably effectively under *Strickland*, and (3) an annual caseload based on those hours, assuming a public defender works 2080 hours on case-specific work per year:[2]

Case Type	Case Weight (Hours per Case)	Annual Caseload Standard at 2080 hours
Felony–High–LWOP	286.0	7
Felony–High–Murder	248.0	8
Felony–High–Sex	167.0	12
Felony–High–Other	99.0	21
Felony–Mid	57.0	36
Felony–Low	35.0	59
DUI–High	33.0	63
DUI–Low	19.0	109
Misdemeanor–High	22.3	93
Misdemeanor–Low	13.8	150
Probation/Parole Violations	13.5	154

Brink Decl. at ¶48.

[1] The National Workload Standards used a weighted caseload model to establish workload standards. A weighted case model determines the average time needed per case for particular types of cases, rather than working from a more generalized annual caseload model. In so doing, the Expert Panel considered necessary hours for a variety of case types that cover most of the work that public defenders handle. Brink Decla. at ¶ 30.

[2] The Study used 2080 hour as a representative number. How many hours a public defender should work in a given year was left to local jurisdictions to decide. The numbers in the table would need to be adjusted based on that determination. Brink Decl. at ¶ 49.

D. OPDC Adopts the National Workload Standards

In 2024, OPCD began the process of building and implementing a statewide caseload plan for public defense attorneys, as required by ORS 151.216. Its goal was to "quantify the number of public defense lawyers needed to represent all persons who qualify for a court-appointed attorney, and to do so within constitutionally mandated caseloads." Declaration of Shannon I. Wilson ("Wilson Decl."), Exhibit B, OPDC Comprehensive Public Defense Report dated November 15, 2024 ("OPDC Report") at 5, at Exhibit G. [3] In assessing appropriate caseload standards, OPDC operated, *inter alia*, under the mandate, as set forth in ORS 151.216, that caseloads conform with the requirements of the Oregon and United States Constitution. *Id.* at 6.

On May 8, 2024, after months of hearings and analysis, OPDC unanimously adopted new standards in order to fulfill its mandate (the "Oregon Workload Standards"). *See* Transcript from May 8, 2024 Meeting of OPDC, Part 2, pp. 20-22; ORS 151.216(1)(a), at Exhibit 4. In voting for those new standards, OPDC explicitly adopted the National Workload Standards, referring to them as "well researched and well sourced … [and] unassailable." *Id.* at 17, 20-22. OPDC also in that vote implicitly rejected MAC, noting for example that "I think everyone agrees that 300's [misdemeanors] the wrong number, and the national standard [of] 150's the right number." *Id.* at 6.

Unlike the National Workload Study, however, OPDC did not assume that a public defender would work 2080 case-specific hours per year. Rather, it adopted an annual workload of 1,578 case-specific hours per year, which was consistent with the annual case-related hour requirements of fulltime prosecutors at the Oregon Department of Justice. Transcript of May 8, 2024 Meeting of OPDC at 20-22, at Exhibit 4; OPDC Report at 8, at Exhibit G. Thereafter, OPDC also adopted a six-year plan designed to bring Oregon's public defense system into compliance with the new standards. *Id.* at 1.

[3] All references to exhibits to the Brink Decl. will be numerical references. All references to exhibits to the Wilson Decl. will be alphabetical references. All references to the Krumholz Decl. will be in duplicate letters (e.g., AA, BB, CC).

Further, OPDC presently is applying the National Workload Standards to its own internal Trial Division lawyers. June 2, 2025 memorandum titled "Response to Letter of Expectations from Governor Kotek, dated 17 April 2025" ("June 2025 Memo") at 32, at Exhibit 5. In so doing, OPDC has decided that one set of standards—the modern-day National Workload Standards—should apply to its own in-house attorneys, but the standards based on the thoroughly unsupported and outdated 1973 NAC Standards should apply to everyone else.

II. The Public Defense Contract Employs an Unsupported and Outdated Workload Standard as a Contractual Requirement

Except in very limited circumstances discussed *infra,* the new contract that OPDC requires that Wilson and other public defenders sign (the "Public Defense Contract") is internally impossible to satisfy. It requires PDMC's lawyers to comply with a host of ethical responsibilities, but then requires them also to handle caseloads that are so excessive that it makes it impossible for the attorneys to meet those requirements.

A. OPDC Makes the MAC Standard a Contractual Requirement

In December 2020, the Oregon Public Defense Services Commission ("PDSC"), as the predecessor to OPDC, approved a public defense contract that had a caseload limit of 115% of the 1973 NAC Standard of 400 misdemeanors and 150 felonies per year. Brink Decl. at ¶ 51. For contracts beginning in July 2022 to the present, those caseload limits were arbitrarily reduced to 300 misdemeanors per year, and with that number as the foundation, case weights were used to establish caseload limits for minor felonies, major felonies, ballot measure 11 cases, murder, Jessica law cases, and probation violations. Declaration of Eric J. Deitrick Regarding the Current Status of Oregon's Public Defense System, filed in the District of Oregon, CA No, 23-cv-1097 ("Deitrick Decl."), ¶ 43, at Exhibit 7. Oregon adopted those arbitrary caseloads primarily because Washington and New York already were using those same limits. *Id.*

Notably, even in those contracts, the caseload limits reflected only a *maximum* number of cases that a public defense lawyer would be allowed to handle, *i.e.* the *Maximum* Attorney Caseload, or MAC (the "MAC Standard"). June 2025 Memo at 21, at Exhibit 5. *See also* Brief of

Amicus Curiae for Oregon Public Defense Services in Supreme Court Case No. SC S070205 at 8 ("the MAC sets only an upper limit on the number of cases any attorney can take, not a quota"), at Exhibit 6. And even in that context, there was a "consensus amongst public defense providers, agency staff, and commission members, that the caseload limit was still too high." Deitrick Decl., ¶ 44.

In the Public Defense Contract, which public defenders like Wilson must sign if they wish to continue pursuing their livelihoods and representing their existing clients, without so much as even changing the name, OPDC converted the prior *maximum* caseloads into *required* caseloads, stating that, "with the exception of murder and Jessica Law cases, a 1.0 FTE attorney's MAC weight per month for new cases assigned is 0.083 MAC weight per month unless the attorney qualifies for an adjusted caseload." Public Defender Contract at Exhibit B, §B. Further, OPDC and the Legislature have repeatedly communicated that, should any public defender office fall below 90% of MAC for any significant period of time, that office will be subject to punitive action by OPDC. *See, for example*, HB 5031 Budget Report and Measure Summary, Joint Committee on Ways and Means at 3, 5-6, Budget Note ("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."); Wilson Decl. at ¶¶ 60-72. Such action could include, *inter alia*, a forced reduction in personnel, financial penalties, and ultimately termination of their contract. Public Defense Contract at §§ 9, 13-15, Exhibit B at §§B, E, M; Wilson Decl. at ¶ 60-74.

For example, Section M of Exhibit B in the Public Defense Contract states that if an attorney in a public defender office is "shutoff," such that that attorney cannot comply with the MAC requirement, the office is "responsible for the MAC weight during the shutoff period unless the entity would like to remove the funding from their contract." In other words, if one lawyer cannot stay at the MAC Standard, other lawyers in the office must pick up the difference, whatever their caseload, or run the risk of losing funding on their contract. In short, were Wilson to sign the Public Defense Contract as written, they would be committing their attorneys to handling 300

misdemeanors per year, and the weighted equivalent of that number of cases for other case categories.

To be clear, OPDC is not imposing the MAC Standard in the Public Defense Contract out of choice. Rather, OPDC has admitted that it was forced to apply the MAC Standard as a contractual requirement by the Legislature. Public Defense Contract at §§ 9, 13-15, Exhibit B at §§B, E, M, at Exhibit B; Wilson Decl. at ¶ 74. *See also* Deitrick Decl., ¶ 43 (admitting that the MAC Standards originally were "not selected based upon what the agency believed to be a workable caseload standard. Rather, they were selected as a number the agency could afford within its budget."), at Exhibit 7. OPDC's preference would have been to implement the standards that it approved—the National Workload Standards as modified for Oregon. April 16th Transcript at 10-13, at Exhibit H.

B. The Ethical Requirements in the Public Defense Contract

Section 7 of the Public Defense Contract requires that public defenders contracting with the State comply, *inter alia*, with the Oregon Rules of Professional Conduct and the Report of the Task Force on Standards of Representation in Criminal and Juvenile Delinquency Cases (the "Task Force Report"). The Public Defense Contract also enumerates specific acts that public defenders must take to properly represent their clients and comply with the contract.

1. The Oregon Rules of Professional Conduct

Formal Opinion 2007-178, entitled "Competence and Diligence: Excessive Workloads of Indigent Defense Providers," which was approved by the Oregon State Bar Board of Governors in 2007, sets forth the ethical responsibilities of Oregon's public defenders. Declaration of Joshua C. Krumholz ("Krumholz Declaration"), at Exhibit AA, OSB Formal Op No 2007-178 (2007) ("Formal Opinion"). The Formal Opinion begins with what should be obvious, namely that the ethical rules "provide no exception for lawyers who represent indigent persons charged with crimes." *Id.* at 3. The Formal Opinion goes on to explain that public defenders are thus "required to provide each client with competent and diligent representation, keep each client reasonably informed about the status of [their] case, explain each matter to the extent necessary to permit the

client to make informed decisions regarding the representation, and abide by the decisions that the client is entitled to make." *Id.* For each client, a public defender is "required to, among other things, 'keep abreast of changes in the law; adequately investigate, analyze, and prepare cases; [and] act promptly on behalf of clients.'" *Id.* (quoting ABA Comm. on Ethics & Pro. Resp., Formal Op. 06-441 (2006)).

The Formal Opinion also explicitly addresses public defender workloads, stating that a "caseload is 'excessive' and is prohibited if the lawyer is unable to … keep abreast of changes in the law, adequately investigate, analyze and prepare cases, [and] act promptly on behalf of clients." *Id.* (quoting ABA Comm on Ethics & Pro Resp, Formal Op 06-441 (2006)). Further, if an attorney "believe[s] that their workload prevents them from fulfilling their ethical obligations to each client, then their workload 'must be controlled so that each matter may be handled competently.'" *Id.* at 4 (quoting Model Rules of Pro. Conduct R. 1.3 cmt. 2 (Am. Bar Ass'n (2022)). The Formal Opinion concludes by stating that "a lawyer who is unable to perform these duties (*e.g.*, adequately investigate, analyze and prepare cases) may not undertake or continue with representation of a client." *Id.* at 3.

2. The Task Force Report

In April 2014, the Task Force on Standards of Representation in Criminal and Juvenile Delinquency Cases (the "Task Force") published the Task Force Report, which provided an updated set of standards required of criminal attorneys. The Task Force Report sets forth the myriad responsibilities that a public defender must fulfill in order to meet their ethical responsibilities. They include, *inter alia*:

- "Before agreeing to act as counsel or accept appointment by a court, a lawyer has an obligation to make sure that he or she has sufficient time, resources, knowledge and experience to offer quality representation to a defendant in a criminal matter …. If it later appears that the lawyer is unable to offer quality representation in the case, the lawyer should move to withdraw." (Standard 1.3).

- "A lawyer, whether court-appointed or privately retained, should not accept workloads that, by reason of size or complexity, interfere with the ability of the lawyer to meet professional obligations to each client." (Implementation 1 of Standard 1.3).
- "A lawyer has the duty to conduct an independent review of the case, regardless of the client's admissions or statements to the lawyer of facts constituting guilt or the client's stated desire to plead guilty or admit guilt. 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 trial or hearing, and to best advise the client as to the possibility and consequences of conviction or adverse adjudication." (Standard 3).

3. <u>The ABA's Eight Guidelines of Public Defense Related to Excessive Workloads</u>

Section E of Exhibit C requires compliance with the ABA's Eight Guidelines of Public Defense Related to Excessive Workloads ("ABA's Eight Guidelines"). Guideline 1 states:

> The Public Defense Provider avoids excessive lawyer workloads and the adverse impact that such workloads have on providing quality legal representation to all clients. In determining whether these objectives are being achieved, the Provider considers whether the performance obligations of lawyers who represent indigent clients are being fulfilled, such as:
>
> - Whether sufficient time is devoted to interviewing and counseling clients;
> - Whether prompt interviews are conducted of detained clients and of those who are released from custody;
> - Whether pretrial release of incarcerated clients is sought;
> - Whether representation is continuously provided by the same lawyer from initial court appearance through trial, sentencing, or dismissal;
> - Whether necessary investigations are conducted;
> - Whether formal and informal discovery from the prosecution is pursued;

- Whether sufficient legal research is undertaken;
- Whether sufficient preparations are made for pretrial hearings and trials; and
- Whether sufficient preparations are made for hearings at which clients are sentenced.

4. The Ethical Requirements Explicitly Stated in the Public Defense Contract

In addition to the references in the Public Defense Contract to the above ethical standards, the Public Defense Contract itself also lists duties that public defenders must perform in order to comply with the contract. They include:

- Providing representation at all scheduled hearings and court proceedings;
- Seeking pretrial release of all detained clients when the client so desires;
- Filing timely and appropriate motions;
- Filing or arranging for the filing of petitions for writ of mandamus or habeas corpus arising from the case on which an attorney is appointed;
- Devoting sufficient time to interviewing and counseling clients;
- Ensuring that a proper investigation is conducted;
- Consulting with and/or retaining all necessary experts or other professional service providers;
- Pursuing all avenues of discovery from the prosecution, both formal and informal;
- Reviewing all available discovery in each case, although a client may waive this duty in writing;
- Conducting or supervising sufficient legal research to fully understand and prepare legal briefings on the client's case;
- Sufficiently preparing for all hearings, trials, and sentencings; and
- Obtaining and reviewing all applicable records including, but not limited to, medical, dental, school, employment, military and mental health records.

Public Defense Contract, Exhibit C, Section J, at Exhibit B.

Accordingly, between the above actions and the reference to existing ethical standards, a public defender's contractual duty is clear: they must comply with their ethical obligations, which include, at a minimum, that they actively investigate their client's case before recommending a plea deal. Of course, those obligations exist with or without the contractual requirements.

C. Wilson's Efforts to Employ the National Workload Standards in Order for Wilson to Comply with Their Ethical Obligations

As the Executive Director of PDMC, Wilson understands that they have an ethical obligation to make sure that the lawyers in that office are acting in an ethical manner. That responsibility includes making sure that those lawyers are managing caseloads that are not excessive, and that those lawyers are able to perform the duties required of them in conformance with their ethical responsibilities. Wilson Decl., ¶ 65.

In furtherance of that responsibility, in 2024, PDMC initiated, at Wilson's direction, the Public Defense Ethics Project. The first phase of that work involved training PDMC lawyers on how to accurately track the time that they were spending on case-specific work. It also involved, *inter alia*, coding all cases within PDMC's case management system to be consistent with the National Workload Standards. *Id.*, ¶¶ 32-39. Using that information, Wilson has been able to track the case work performed by PDMC's attorneys to the categories set forth in the National Workload Standards.

Wilson has used the above information as a guideline when assessing whether PDMC's lawyers are working beyond their ethical capacity. Wilson also considers other information when making that assessment, including, *inter alia*, a lawyer's years of experience, their current number of clients, the complexity of their existing caseload, the volume of discovery for their cases, the case types for which they are responsible, client language barriers, custody status and upcoming court appearances. Through this process, Wilson has been able to effectively manage PDMC lawyers to ensure that they are working within their ethical limits. *Id.*, ¶¶ 30-31.

As a consequence of this thorough and data-driven analysis, as well as other information that Wilson has accumulated over time, Wilson has reached two conclusions: (1) the National

Workload Standards offer the best guidelines for determining the ethical capacity of PDMC's lawyers; and (2) the MAC Standard is completely unreliable for that purpose. Accordingly, when it became clear that OPDC was going to require in the Public Defense Contract that PDMC's lawyers operate at the MAC caseload levels, Wilson objected. At a meeting and in writing, Wilson also asked that the MAC requirement not be extended to PDMC, specifically because it would require PDMC's lawyers to work at unethical caseload levels. *Id.,* ¶¶ 63-67.

OPDC has rebuffed Wilson's requests. At a meeting on September 16, 2025, OPDC representatives told Wilson that, based on current caseloads at PDMC, OPDC would be reducing the number of FTEs that it would financially support. Specifically, OPDC told Wilson that it would financially support only enough lawyers that required those lawyers to operate at least at 90% of MAC caseload levels. *Id.,* ¶¶ 64-72.

On September 23, 2025, Wilson wrote to OPDC, explaining in part that they "cannot agree to a baseless case quota number," nor ask their attorneys to "prioritize OPDC's contract case quota over fulfilling their ethical duties." Wilson therefore asked that OPDC waive the "90% MAC case quota requirement." *Id.*, at Exhibit I.

On September 24, 2025, OPDC rejected Wilson's request, stating that "OPDC cannot make changes to the contract." *Id.*, Exhibit J.[4] Notably, at no time has anyone at OPDC ever claimed that the MAC Standard was the appropriate standard for assessing ethical caseload capacity, nor has anyone questioned the National Workload Standards for that purpose. Similarly, no one at OPDC has ever stated that reliance on the MAC Standard as a contractual requirement will *not* lead to ethical violations. Rather, OPDC representatives have stated only that the Public Defense Contract contains the MAC requirement because the Legislature requires it. *Id.*, ¶ 74.

Wilson stands ready, willing and able to sign, on behalf of PDMC, the Public Defense Contract proposed to them, as long as it does not contain the unethical MAC requirement. Wilson cannot, however, fulfill their ethical obligations and simultaneously sign a contract that they know

[4] That email pays lip service to "the importance of the ethical obligations that [Wilson] outlined," but offers no acknowledgement that the MAC requirement makes ethical compliance impossible for the vast majority of situations. *Id.*

will cause their attorneys to act unethically. As such, pending a ruling from this Court, Wilson has not signed a new contract with OPDC for PDMC. *Id.*, ¶ 71.

III. Public Defenders Cannot Comply with the MAC Standard and Still Meet Their Ethical Responsibilities

Except in those instances where a public defender is only handling certain types of high felony cases, it is impossible for a public defender to comply both with the MAC Standard and their ethical duties. That is because the MAC Standard requires public defenders to take on more cases than they can ethically handle.

Specifically, the Public Defense Contract, in applying the MAC Standard as a contractual requirement, requires that public defenders handle a specific number of cases per year:

Case Type	Number of cases per MAC
Murder	6
Jessica Law	6
Ballot Measure 11	45
Major (A/B) felonies	138
Minor (C) felonies	165
Misdemeanors	300
Probate violation	825

Public Defense Contract, Exhibit B, Section B.

To do that, and assuming a public defender works 1578 case-specific hours a year, public defenders would have to average the following hours per case:

Case Type	Average number of hours per case under MAC
Murder	263
Jessica Law	263
Ballot Measure 11	35
Major (A/B) felonies	11.4
Minor (C) felonies	9.6
Misdemeanors	5.3
Probate violation	1.9

Brink Decl. at ¶ 65.

The unreasonableness of such a requirement is clear on its face, but becomes even clearer when compared to the National Workload Standards:

MAC Case Type	Average number of hours per case under MAC Standards	NPDWS Case Type	Average number of hours under the National Standards
Murder	264	Felony-High-Murder	248
Jessica Law	264	Felony-High-Sex	167
Ballot Measure 11	35	Felony-High-Other	99
Major (A/B) felonies	11	Felony-Mid	57
Minor (C) felonies	9.5	Felony-Low	35
Misdemeanors	5.3	Misdemeanor-Low	13.8
Probation violation	1.9	Probation/Parole Violations	13.5

Id. at ¶ 68.

The difference arises because the MAC Standard is not based on any evidence, data, or indeed any analysis of any kind. It also did not apply any known methodology. Rather, it is loosely based off the 1973 NAC Standard, which itself has no evidentiary basis and used no accepted

methodology. *Id*. at ¶ 53. The National Workload Standards, on the other hand, are based on accepted methodology used in similar applications applied in a rigorous context. *Id*. at ¶¶ 16-20. If the MAC Standard is enforced, rather the National Workload Standards, the result will be an unconstitutional public defense system that requires its public defenders to act unethically.

IV. The Public Defense Contract Reintroduces the Outlawed Pay-Per-Case Public Defense Model

In its report entitled "The Right to Counsel in Oregon" produced in January 2019, the Sixth Amendment Center published its analysis of the many problems endemic to Oregon's public defense system. The Right to Counsel in Oregon, at Exhibit 8. One of the key failures that the Sixth Amendment Center identified was that Oregon's system employed a "fixed fee contract system that pits appointed lawyers' financial self-interest against the due process rights of their clients and is prohibited by national public defense standards." The Right to Counsel in Oregon at iii. The fundamental problem with a fixed fee system is that lawyers are paid a flat fee for a case no matter how much work they do, thereby encouraging those lawyers to work less in order to take on more cases and make more money. That creates a conflict between a client's interest in a thorough defense and their lawyer's own financial interests. In response, in 2023, Oregon appropriately moved away from that model, and passed legislation abolishing a fixed fee system. ORS 151.216(6)(c)("The commission may not enter into a contract or agreement that pays appointed counsel a flat fee per case").

The Public Defense Contract violates that mandate. By turning the MAC Standard from a ceiling to a contractual requirement, and financially penalizing public defenders who do not meet that requirement, the Public Defense Contract pays lawyers a fixed amount of money for a fixed number of cases.

ARGUMENT

I. The Standard for a Preliminary Injunction

ORCP 79 permits a court to issue a preliminary injunction upon notice to the adverse party. *See* ORCP 79(B), (C). The issuance of a preliminary injunction is a matter committed to

the sound discretion of the trial court. *See State ex rel. Keisling v. Norblad*, 317 Or 615, 623 (1993). A preliminary injunction may be allowed, pursuant to ORCP 79 and subject to the requirements of ORCP 82 A(1), when it appears that: (1) "a party is entitled to relief demanded in a pleading, and such relief * * * consists of restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce injury to the party seeking the relief"; or (2) "the party against whom a judgment is sought is doing or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the rights of a party seeking judgment concerning the subject matter of the action, and tending to render the judgment ineffectual." ORCP 79 A(1).

Injunctive relief depends upon broad principles of equity and may, in the discretion of the court, be granted or denied in accordance with justice and the equities of the case. Oregon courts require a party seeking a preliminary injunction to demonstrate the likelihood of success on the merits and that irreparable injury is likely to result to the moving party if equitable relief is denied. *Arlington School District No. 3 v. Arlington Education Association*, 184 Or App 97, 102 (2002); *Northern Alaska Environmental Center v. Hodel*, 803 F.2d 466, 471 (9th Cir 1986). Courts also balance the equities between the parties in determining what, if any, relief to provide. *Hickman v. Six Dimension Custom Homes Inc*., 273 Or 894, 898 (1975).

II. Wilson's Claims Are Highly Likely to Succeed

The MAC Standard in the Public Defense Contract is unenforceable because it violates OPDC's own statutory and contractual requirements, requires public defenders to violate their ethical duties, and renders Oregon's public defense system unconstitutional.

A. The Law of Unenforceable Contracts

In general, contracts that are unconscionable or otherwise violate public policy are unenforceable. *See Trinity v. Apex Directional Drilling LLC*, 363 Or 257, 261 (2018) (addressing the issue of enforceability of forum selection clauses). Unconscionability can result from both substantive and procedural unfairness, although both are not required. *Id.*; *Bagley v. Mt. Bachelor, Inc.*, 356 Or 543, 553-555 (2014) (citing Richard A. Lord, 8 Williston on Contracts § 18.10, 91

(4th ed. 2010)); *Hatkoff v. Portland Adventist Medical Center*, 252 Or App 210 (2012) (noting that, if a challenged provision is substantively unconscionable, it is unenforceable regardless of whether it is procedurally unconscionable).

Contracts are substantively unfair when the "terms contravene the public interest or public policy." *Id.* (citing Restatement of Contracts § 208 cmt. a.8). In particular, if a contract term requires an attorney to violate an ethical standard, that term contravenes public policy, is substantively unfair, and consequently cannot be enforced. *See, e.g.*, *Gray v. Martin*, 63 Or App 173 (1983) (finding that a contractual provision violated disciplinary rules and was unenforceable); *Sheppard Mullin v. J-M Manufacturing Company*, 6 Cal.5th 59, 73 (2018) ("It follows that an attorney contract that has as its object conduct constituting a violation of the Rules of Professional Conduct is contrary to the public policy of this state and is therefore unenforceable."). Indeed, as at least one court has stated, it would be "absurd" to enforce an agreement that could "result in professional discipline." *Evans and Luptak PLC v. Lizza*, 251 Mich.App. 187, 198 (2002) (citing *Abrams v. Feldstein, PC,* 456 Mich. 867, 569 N.W.2d 160 (1997) (Griffin, P.J., dissenting)).

Contracts that contravene a statute similarly are unenforceable. *Uhlmann v. Kin*, 97 Or 681, 689 (1920) ("Plain examples of illegality are found in agreements made in violation of some statute; and, stating the rule broadly, an agreement is illegal if it violates a statute or cannot be performed without violating a statute."); *Planned Parenthood Asso. v. Dept. of Human Resources,* 297 Or 562, 564 (1984) (finding that an agency rule was unenforceable because it did not comply with ORS § 183.400). This rule holds especially true when the statute in question is designed to protect the public. *Hunter v. Cunning*, 176 Or 250, 287 (1945) ("the rule [iterated in *Uhlmann*], which avoids a contract made in contravention of a statute, will *always* be applied when the statute is intended for the protection of the public against those evils which we know from experience society must be guarded against by protective legislation.").

Further, contracts that contravene the Oregon Constitution run contrary to public policy and also cannot be enforced. *Bagley*, 356 Or at 553, n. 5. Where indigent defense is involved, in order to establish that the contract provision is unconscionable, the complaining party must

establish that there is a significant risk that the contract will result in constitutional deprivation. *Luckey v. Harris*, 860 F.2d 1012, 1017 (11th Cir. Nov. 23, 1988).

B. The Public Defense Contract is Unenforceable as Against Public Policy

Wilson will prevail in establishing that the Public Defense Contract is unenforceable as a matter of law because: (1) the Public Defense Contract compels public defenders to act unethically; (2) the Public Defense Contract violates the no pay-per-case requirement set forth in ORS 151.216(2)(6)(b) and violates OPDC's statutory obligation to establish appropriate caseload standards; and (3) the Public Defense Contract creates an unconstitutional public defense system.

1. Contracts That Require Unethical Behavior Are Unenforceable

As noted above, contracts that require a lawyer to engage in unethical conduct are unenforceable as a matter of law. *See Sheppard Mullin v. J-M Manufacturing Company*, 6 Cal.5th 59, 73 (2018); *Johnson Family Law, P.C. v. Bursek*, 541 P.3d 605, 610-611 (2024); *Rademacher v. Becker*, 374 P.3d 499, 502 (2015); *Evans and Luptak PLC v. Lizza*, 251 Mich.App. 187, 198 (2002). Enforcing the MAC Standard in the Public Defense Contract unquestionably will cause public defenders to engage in unethical conduct.

For example, under the MAC Standard, a public defender may only work, on average, 5.3 hours on a misdemeanor case. 5.3 hours is barely enough time to meet with a client, attempt to address pretrial conditions and release, negotiate with a prosecutor, address a potential offer, and enter a plea. In other words, requiring that public defenders work at the MAC Standard would require that they plead out virtually all of their misdemeanor cases without a semblance of an investigation. It also would be rare to impossible for public defenders to effectively challenge a charge, and virtually impossible for them to take a weak case to trial. Brink Decl. at ¶ 80.

Yet, at the same time, the Public Defense Contract requires that public defenders interview clients and witnesses, conduct necessary investigations, engage in formal discovery, review digital and scientific evidence, prepare for and attend hearings, file timely motions, and prepare for and conduct a trial where necessary. Formal Opinion 2007-178; Task Force Report, Standards 1.3 and 3; ABA's Eight Guidelines, Guideline 1; Public Defense Contract, Exhibit C, Section J. Under

any objective analysis, except in those rare instances where public defenders handle only a particular type of the most serious felony case, public defenders simply cannot comply with the MAC Standard and meet the duties described above. Fundamentally, under the caseloads contained in the Public Defense Contract, public defenders like Wilson and PDMC's lawyers would find themselves forced to pursue resolutions without having performed the basic work to which their clients are ethically entitled. *Id.* at ¶ 81.

And that problem will only worsen. While felony cases are predicted to grow by nearly 8.5% in the 2025-27 biennium, and 3.4% in the 2027-29 biennium, misdemeanors are expected to grow by 34.4% and 8.7% respectively. June 2025 Memo at 6, at Exhibit 5. In other words, the problem of inadequate representation for indigent defendants accused of misdemeanors and low felonies is only going to get worse.

Ultimately, the failure of the MAC Standard is that it is based on the unsupported and outdated 1973 NAC Standards. By enforcing that standard, the Public Defense Contract simply ignores present reality. The tremendous expansion of digital discovery from body-worn cameras, public cameras such as traffic cameras, and private cameras such as doorbell cameras, commonly result in hours of footage that need to be reviewed. New types of digital evidence, such as cellphone data, social media data, and text messages need to be reviewed as well. Recorded telephone calls with incarcerated clients also must be considered. Brink Decl. at ¶ 55.

Similarly, the increased use of forensic evidence, such as DNA testing, and more debatable evidence, such as tool marks, bite marks, tire marks, accident reconstruction, and blood splatter require a public defender's time to analyze, evaluate, and, as necessary, rebut. *Id*. at ¶ 56. Public defender's obligations also now may include the need to advise clients on the collateral consequences that attend criminal convictions, as well as address issues of mental health, substance abuse, cognitive disabilities, and other issues bearing upon brain development, all of which add hours to a public defender's responsibilities.

The objective data, as developed by the National Workload Study, establishes the baseline standards required to determine if public defenders are acting within their ethical capacity. That

data shows that the MAC Standard requires public defenders to take cases far in excess of what they can ethically handle. As such, the MAC Standard in the Public Defense Contract is unenforceable as against public policy. *See Sheppard Mullin v. J-M Manufacturing Company*, 6 Cal.5th 59, 73 (2018); *Johnson Family Law, P.C. v. Bursek*, 541 P.3d 605, 610-611 (2024); *Rademacher v. Becker*, 374 P.3d 499, 502 (2015); *Evans and Luptak PLC v. Lizza*, 251 Mich.App. 187, 198 (2002).

2. The Public Defense Contract is Unenforceable Because it Violates Oregon Law and OPDC's Statutory Mandate

By reinstituting a pay-per-case model, the Public Defense Contract violates ORS 151.216(2)(6)(b). Specifically, under the Public Defense Contract, in order to be paid a contractually set amount, a public defender must, on a consistent basis, stay at or above 90% of the case amounts set forth in that contract. If a public defender office fails to do that, that office can be financially penalized and potentially lose its contract, and thereby lose the livelihood of the lawyers that work in that office.

Put simply, public defenders under the Public Defense Contract are to receive a fixed amount of money for a fixed number of cases. Clearly, that *quid pro quo* violates ORS 151.216(2)(6)(b). A contract that violates a state statute is unenforceable. *Uhlmann*, 97 Or at 689; *Planned Parenthood Asso.,* 297 Or at 564. That is particularly true where, as here, that statute is designed to protect "the public against those evils which we know from experience society must be guarded against." *Hunter*, 176 Or at 287.

Indeed, the Public Defense Contract represents an even worse conflict than the prior system that was criticized by the Sixth Amendment Center and then outlawed by the Legislature. In the prior system, a lawyer was paid a fixed amount per case, and was incentivized to work less on a case because they were paid the same amount no matter how much work they performed. Under the Public Defense Contract, public defenders risk losing their contract and therefore their livelihood if they do not push their cases at breakneck speed. The conflict in incentives in such a circumstance is real, and highly detrimental to a public defender's clients.

Beyond that statutory breach, OPDC also has breached, through implementation of the MAC Standard, its own statutory obligations. OPDC is statutorily required, *inter alia*, to: (1) "[e]stablish and maintain a public defense system that ensures the provision of public defense services consistent with the Oregon Constitution, the United States Constitution and Oregon and national standards of Justice" (ORS §151.216(1)(a)); (2) "[e]nsure compensation, resources and caseloads are in accordance with the requirements of the Oregon and United States Constitution" (ORS §151.216(1)(b)(A));[5] "[r]eview the caseload policies described in paragraph (b)(A) of this section annually, and revise the policies as necessary and at least every four years" (ORS §151.216(d)); (3) "[a]dopt a statewide workload plan, based on the caseload policies described in paragraph (b)(A) of this subsection, that takes into account the needs of each county or jurisdiction, practice structure and type of practice overseen by the commission" (ORS §151.216(e)); (4) "[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 Constitution" (ORS §151.216(j)); and (5) "[e]nter into contracts and hire attorneys to bring the delivery of public defense services into and maintain compliance with the minimum policies, procedures, standards and guidelines described in this subsection" (ORS §151.216(m)).

In addition, OPDC explicitly cites the ABA's Ten Principles of a Public Defense System ("ABA's Ten Principles") in the Public Defense Contract. Principle 3 states that "[w]orkload standards should ensure compliance with recognized practice and ethical standards and should be derived from a reliable data-based methodology. Jurisdiction-specific workload standards may be employed when developed appropriately, but national standards should never be exceeded."

OPDC satisfied Principle 3 and fulfilled its statutory duties when it adopted the Oregon Workload Standards. Those standards adopted the National Workload Standards, which are

[5] Wilson acknowledges that the Legislature recently amended ORS 151.216 to remove the requirement that caseloads be "in accordance with national and regional best practices." The requirements of the Oregon Constitution govern this lawsuit and motion, not the language stricken by the Legislature.

current, evidence-based standards designed specifically to assist governmental bodies like OPDC when they plan for and manage public defense systems. Brink Dec., ¶50.

In the Public Defense Contract, however, OPDC declined to employ the very standards that it adopted. Instead, it adopted a requirement in the MAC Standard that is not based on reliable methodology, does not conform to ethical standards, and is contrary to national standards. In addition, nothing in the literature suggests that workload standards can or should ever be used as a contractual requirement. *Id*. at ¶52. As such, OPDC is violating its own statutory and contractual mandate. For that reason as well, the Public Defense Contract must be found unenforceable as against public policy to the extent it seeks to enforce the MAC Standard. *Uhlmann*, 97 Or at 689; *Planned Parenthood Asso.,* 297 Or at 564.

3. <u>The Public Defense Contract Results in the Loss of Constitutional Rights by Public Defenders' Clients</u>

The enforcement of the MAC Standard in the Public Defense Contract plainly creates a significant risk that its enforcement will result in constitutional deprivation. *Bagley*, 356 Or at 553, n. 5 (stating that contracts that contravene constitutional provisions are illegal). Adequate assistance of counsel requires "undivided" attention from the lawyer to the defendant whom they represent. *Krummacher v. Gierloff*, 290 Or 867, 872, 847 (1981) ("The mere act of appointment of counsel to represent an indigent accused is not sufficient to provide the protection afforded by the [Sixth Amendment]."); *see also Kimmelman v. Morrison*, 477 U.S. 365, 377 (1986) ("the right to counsel is the right to effective counsel"). The Oregon Constitution also provides that an indigent defendant has a right "not just to a lawyer in name only, but to a lawyer who provides adequate assistance." *Jackson v. Franke*, 369 Or 422, 426 (2022) (quotation omitted) (citing *Montez v. Czerniak*, 355 Or 1, 6, *adh'd to as modified on recons.*, 355 Or 598 (2014) (quoting *State v. Smith*, 339 Or 515, 526 (2005)). That requirement includes that counsel "exercise reasonable professional skill and judgment." *Lichau v. Baldwin*, 333 Or 350, 359 (2002).

While acknowledging that formulating a single specific rule for the effective assistance of counsel may be "a fool's errand," the Oregon Supreme Court in *Krummacher* provided examples

of conduct that are necessary to provide adequate assistance. *Krummacher*, 290 Or at 874. As a baseline, "[a]dequate assistance of counsel requires the lawyer's devotion to the interests of the defendant." *Id*. Additionally, "[c]ounsel's functions include informing the defendant, in a manner and to the extent appropriate to the circumstances and to the defendant's level of understanding, of the existence and consequences of nontactical choices which are the defendant's to make, so as to assure that the defendant makes such choices intelligently." *Id*. "[C]ounsel [also] must investigate the facts and prepare himself on the law to the extent appropriate to the nature and complexity of the case so that he is equipped to advise his client, exercise professional judgment and represent the defendant in an informed manner." *Id*. at 875. Constitutionally adequate assistance is thus not confined to the courtroom; criminal defendants are entitled to extensive pre-trial investigative assistance. *Id.*

Oregon courts also have developed extensive jurisprudence regarding the constitutional duty to investigate defenses. For example, the Oregon Supreme Court has held that withdrawing an alibi defense without adequately investigating its strength constitutes inadequate assistance of counsel. *See Lichau*, 333 Or at 362. Similarly, the Supreme Court held that failing to investigate aspects of a defendant's juvenile background fell below the required reasonable levels of representation. *Richardson v. Belleque*, 362 Or 236, 258–59 (2017). Under that same framework, failing to interview a potential impeachment witness also qualified as such a failure. *See Stevens v. State*, 322 Or 101, 109–10 (1995).

Fundamentally, when a lawyer does not have time to investigate a case, test the charges, interview witnesses, study digital and forensic evidence, file proper motions or take a weak case to trial, no one can reasonably argue that that lawyer's client is receiving reasonably effective assistance of counsel. *See*, *e.g.*, *Waters*, 370 S.W.3d at 597 (counsel "in name only" does not equate to "effective and competent" representation as required by the Sixth Amendment); *see also Kimmelman v. Morrison*, 477 U.S. 365, 377 (1986) ("the right to counsel is the right to effective counsel"). Yet, at least for misdemeanors and low felonies, public defenders that are forced to meet the MAC Standard will routinely be denied the opportunity to take those steps. That inability will

result in an unconstitutional criminal justice system caused by the enforcement of the MAC Standard in the Public Defense Contract. For that reason as well, the Public Defense Contract is unenforceable.

III. Wilson and PDMC's Clients Will Suffer Irreparable Harm if the MAC Standard Is Enforced

As detailed herein, *supra* at § II(A), Wilson has expended considerable time and effort insuring that PDMC's lawyers operate within ethical workloads. A major focus of that effort has been the application of the National Workload Standards. Through that work, in part, Wilson has properly concluded that the MAC requirement in the Public Defense Contract constitutes an unsustainable and unethical workload requirement. For that reason, Wilson has asked that the MAC requirement be removed from PDMC's contract. OPDC has refused.

As such, without a stay of the provision requiring compliance with the MAC Standard, Wilson is left with a Hobbesian choice. On the one hand, they can sign a contract that requires the lawyers at PDMC to violate their ethical duties by taking on more cases than they know they can handle. On the other hand, Wilson can refuse to sign the Public Defense Contract, and risk losing the livelihood of themself and all of PDMC's lawyers as public defenders, as well as putting at risk the jobs of all of the other individuals employed by PDMC. Neither option is, of course, acceptable, and both choices result in irreparable harm.

Further, under either scenario, the harm to PDMC's clients is even more severe and irreparable. If Wilson does not sign the Public Defense Contract, hundreds of indigent defendants may have no lawyer at all, depending upon how OPDC handles a winddown. And even if PDMC's lawyers continue representing their clients, those lawyers will be scrambling for other jobs and discontinuity would be inevitable. Further, if other lawyers are found instead, delay and discontinuity still will inevitably result, and in any event those clients will be prejudiced by the fact that their new lawyers, operating under the MAC requirement, also will be overworked.

If Wilson instead signs the Public Defense Contract, PDMC's clients immediately are in conflict with each other because there is too much work to do and not enough time for all clients

to be served properly. Where such a situation exists, the ethical rules require that a lawyer withdraw from the case(s) that make them overburdened. *See, for example,* Formal Opinion at 3, at Exhibit AA. The Public Defense Contract, however, does not let them do so. The result is the deprivation of PDMC's clients' constitutional rights, which is presumed irreparable harm. *See, e.g.*, *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of freedoms guaranteed by U.S. Const. amend. I, for even minimal periods of time, unquestionably constitutes irreparable injury for purposes of granting a preliminary injunction.").

And lest there be any doubt, these deprivations are not theoretical, especially when it comes to misdemeanors, which are given little time for proper disposition under the MAC Standard. It is, of course, not atypical for a misdemeanor conviction to result in probation and/or a fine, but not jail time. The collateral consequences to the individual for such a conviction, however, can be far more punitive. Alexandra Natapoff, *Appreciating the Full Consequences of a Misdemeanor*, Collateral Consequences Resource Center, at Exhibit 9. Collateral consequences may include reduced employment opportunity and earning capacity, loss of housing and public assistance, loss of student aid, ineligibility to foster or adopt children, ineligibility for health care programs, loss of voting rights and the right to run for office, unavailability of tax credits, and the loss of driving privileges, immigration status, and educational opportunities. *Id.*; Brett Smith and Philip Schradle, *Collateral Consequences—Work Group Report—HB 2367-2*, Oregon Law Commission ("Oregon Law Commission Report"), at Exhibit 10.

In Oregon in particular, the legal ramifications that result as a matter of law for a criminal conviction total "some 1,105 collateral consequences." Oregon Law Commission Report at 2. *See also Oregon—Snapshot of Employment-Related Collateral Consequences*, The National Reentry Resource Center, Justice Center, The Council of State Governments at 1 ("Oregon Snapshot") (stating that 1,086 provisions of Oregon law impose collateral consequences on those with a criminal conviction), at Exhibit 11. Many of these legal restrictions are employment-related, restricting access to occupational licenses, business licenses for self-employment, and "directly

limiting the ability of employers to hire or retain workers with certain conviction histories." *Id.* at 1. And almost 80% of those restrictions are indefinite in duration. *Id.* at 2.

The utter failure of MAC to properly allow for a constitutionally appropriate level of representation for those defendants accused of misdemeanors and low felonies has a powerful and lasting negative effect on their lives. These defendants are faced with human rights issues, poverty issues, generational trauma issues, failed medical care, and mental health issues. Yet, they receive the least amount of consideration and resources while being exposed to the largest amount of government control and action. Unwarranted "low level" criminalization wreaks havoc on the individual defendant as well as their community, and can create insurmountable hurdles for them to overcome.

IV. The Balancing of the Equities Strongly Favors Wilson

As explained in ABA Defense Function Standard 4-1.2, a "court properly constituted to hear a criminal case should be viewed as an entity consisting of the court (including judge, jury, and other court personnel), counsel for the prosecution, and counsel for the defense." A contract that requires that the "counsel for the defense" handle more cases than they can competently manage, by its very nature, subverts the concept of a "properly constituted" court. A lawyer without sufficient time cannot provide reasonably effective assistance of counsel. There is no public interest in preserving that sham.

The apparent purpose for imposing the MAC Standard, meanwhile, is to try to solve the unrepresented problem. June 2025 Memo, at Exhibit 5. As a preliminary matter, as noted above, the unrepresented problem is not solved by offering an unrepresented defendant a lawyer that has no time to handle their case. Just as importantly, however, OPDC's MAC strategy will not achieve even the goal of assigning a warm body. The fundamental reason for the unrepresented crisis is that there are too many defendants and too few public defenders. By jamming even more cases down the throats of already overwhelmed public defenders, OPDC will cause even more public defenders to flee the state, and similarly will make recruitment that much more difficult.

Perhaps that is why states are running away from Oregon's purported solution. In Massachusetts, for example, when the state's Supreme Judicial Court recently was faced with the same crisis of unrepresented indigent defendants, it did not opt to force public defenders to take on more cases than they could handle. Instead, that Court ordered that, if a defendant had been held for more than seven days without counsel, they were to be released, and if no counsel had been appointed in forty-five days, their case was to be dismissed without prejudice until a lawyer was appointed. *See* Order dated July 3, 2025 in *Committee for Public Counsel Services v. Middlesex and Suffolk County Courts*, pp. 22-3, at Exhibit BB. Further, in so holding, the Massachusetts Supreme Judicial Court required only that the public defense committee show that it had made a good faith effort to secure counsel. *Id.* at 24. Nothing in that court's decision suggested that it was appropriate to try to "solve" that state's unrepresented problem by further burdening already heavily burdened public defenders. In response, the Massachusetts Legislature recently supplemented its budget and made changes to its public defense system to try to resolve the crisis.

And in Washington, where that state is faced with its own public defense challenges, the Washington Supreme Court looked intensely at these issues and rejected that state's equivalent of the MAC Standard, ordering instead that the National Workload Standards be implemented over time. The Washington Supreme Court began that process by asking the Washington State Bar Association Counsel on Public Defense (the "Washington Bar") to review the National Standards and make recommendations to that Court with regard to those standards. Order of the Supreme Court of Washington dated June 9, 2025 ("Washington Order") at Exhibit CC. The result of the Washington Bar's extensive review process was the wholesale adoption of the National Workload Standards, as modified to conform to local state practices and statutes.

The Washington Supreme Court published the Washington Bar's proposed standards in June 2024, and thereafter held two public hearings in September and October. *Id.* The Court also solicited and received over 700 written comments. Boruchwitz, Robert, *The Washington Supreme Court Should Adopt Revised Standards to Address the Crisis in Public Defense* ("Boruchwitz

Article") at Exhibit DD. After reviewing the Washington Bar's report and considerable public comment, the Washington Supreme Court adopted their recommendations, and in doing so adopted the National Workload Standards, as modified to conform to local practice, as the new caseload standards for the state. Washington Order at 2. Prior to that adoption, Washington, like Oregon, had been operating under a modification of the outdated and unsupported 1973 NAC Standards. Boruchwitz Article.

Washington's prior use of 300 misdemeanors and associated limits for other case types formed in significant part Oregon's justification for using that threshold when developing MAC. Deitrick Decl., ¶ 43. The Washington Supreme Court's rejection of that standard and adoption of the National Workload Standards makes OPDC's deployment of MAC as a contractual requirement all the more unjustifiable. The National Workload Standards, and not MAC or the 1973 NAC Standards, must be what this Court enforces.

CONCLUSION

The Oregon courts have a fundamental responsibility to ensure that their criminal justice system conducts its business fairly, ethically and constitutionally. The MAC Standard in the Public Defense Contract makes those goals unreachable. There must be a relationship between the amount of people that the state chooses to prosecute and the resources made available to defend those people from government overreach. The Legislature must strike that balance, and it cannot shirk its responsibilities by forcing OPDC to force public defenders to act beyond their ethical capacity. This Court must fulfill its ethical and constitutional responsibilities and strike the MAC Standard from the Public Defense Contract and replace it with the National Workload Standards as guidelines, as previously adopted by the OPDC.

Dated this 30th day of September 2025.

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