

ANALYSIS

Public Defense Services Commission Unrepresented Defendant/Persons Crisis

Analyst: John Borden

Request: Acknowledge receipt of the report.

Analysis: The Public Defense Services Commission (PDSC) was directed by the Emergency Board in December of 2022 (Item #3) to report to no later than January 31, 2023 to the Joint Committee on Ways on Means on the unrepresented defendant/persons crisis.

In December of 2022, PDSC requested \$10 million in supplemental General Fund to address an urgent funding need related to the unrepresented defendant/persons crisis in the current biennium; however, PDSC's request was not accompanied by an expenditure plan. The Emergency Board approved supplemental funding even with this deficiency to ensure the constitutional rights of access to counsel for indigent defendant/persons prior to the passage of the 2023 early session omnibus budget measure.

The Emergency Board, after allocating the \$10 million General Fund to PDSC on a one-time basis, directed that the Commission, prior to the obligation or expenditure of a \$10 million allocation, to provide to the Senate President and the Speaker of the House a written report detailing the Commission's plan to expend the \$10 million to resolve the crisis. PDSC provided the requested report on January 13, 2023, and after receiving no further direction, the Commission voted on January 19, 2023 to implement the agency's proposed supplemental crisis funding plan.

Quantification of the Crisis

The crisis impacts defendants who are both in the physical custody of the local jurisdiction and defendants released, with conditions and on their own recognizance, at the direction of a circuit court judge. Persons eligible for court-appointed counsel can be either adult or juvenile and fall under a slate of case-types, including: major and minor felonies, misdemeanors, contempt, civil commitment, habeas, post-conviction relief, delinquency, and dependency (i.e., there also have been a few unrepresented persons in non-criminal cases). Out-of-custody defendant/persons eligible for court-appointed counsel include both those on pre-trial release, probation violations, and non-criminal cases.

The following table summarizes the extent of the crisis over time, including a possible increase related to the out-of-custody active warrant population. Since December 2022, the crisis has expanded to two additional counties and the number of in-custody defendants/persons has increased by 30 (or +86%).

PDSC notes that a portion of the increase is due to a change in the way in which Judicial Department defines an in-custody unrepresented person. Starting in December of 2022, the Judicial Department began counting persons on the in-custody unrepresented list if they are in-custody in one county where they have a lawyer with a hold from another county where they do not have a lawyer. To date, 11 of the persons who are in custody and unrepresented have a court appointed lawyer on at least one of their cases in one county.

Unrepresented Defendant/Persons	January 2022	August 31, 2022*	September 30, 2022*	October 31, 2022*	November 14, 2022*	January 31, 2023*
In-custody	22	45	37	31	35	65
Out-of-custody - Pretrial	23	762	746	679	693	631
Out-of-custody - Probation Violation	--	34	32	26	37	49
Non-Criminal Case	--	47	37	36	34	38
Sub-Total (active)	45	888	852	772	799	783
Out-of-custody - Active Warrant**	--	370	428	538	555	559
Total (possible)	45	1,258	1,280	1,310	1,354	1,342
Impacted Counties	4	14	12	12	14	16

*source: Oregon Judicial Department (OJD); however, past data is as of the specified date and has not been updated.

**Individuals who were previously unrepresented but did not appear in court and are now in warrant status. These individuals do not need an attorney until they are apprehended and appear in court.

Impact of Commission-Approved Initiatives

Previously, PDSC reported in December of 2022 that the agency has a statewide deficit of approximately 51.21 Maximum Attorney Caseload (MAC or 1.00 full-time equivalent) for mostly adult criminal cases, after taking into consideration the legislature's emergency funding from February of 2022 (\$12.8 million General Fund), and which is fully funded within PDSC's 2021-23 legislatively approved budget.

Current reporting by PDSC indicates that this deficit has been reduced by 41.67 MAC to only 9.54 MAC due to the filling of vacant contracted positions, success of various unrepresented defendant/persons crisis initiatives, and the letting of new contracts. The impact of this added capacity has yet to be reflected in the number of unrepresented defendants/persons awaiting representation; however, it is important to note this new capacity's qualification level may be limited to primarily to misdemeanor cases. Eventually, this new capacity, given experience, may be up qualified to handle felony caseloads.

Supplemental Crisis Funding Plan

PDSC's supplemental crisis funding plan for *one-time* funding includes four new initiatives, which are in addition to the six crisis initiatives previously approved and implemented by the Commission. All four new initiatives are slated to sunset on June 30, 2023, or the conclusion of the biennium, with the exception of any hourly cases that continue into the 2023-25 biennium. PDSC has not provided an estimate of the 2023-25 biennium cost related to these carryover cases. Total supplemental crisis funding plan costs are understated, as PDSC has been unable to estimate the associated non-attorney expenses (e.g., transcriptionists, investigators, interpreters, mitigators, social workers, psychologists, polygraph examiners, and forensic experts, such as firearm experts, arson experts, deoxyribonucleic acid (DNA) experts, and medical experts).

The following table outlines PDSC's supplemental crisis funding plan. PDSC's plan, however, exceeds the \$10 million General Fund allocation provided by the Emergency Board by \$559,335 General Fund. PDSC attributes this difference to the fact that some hourly case costs will be incurred in the 2023-25 biennium rather than the current biennium. Yet, the supplemental crisis allocation requested by the agency, and approved by the Emergency Board, was strictly related to a one-time allocation for the 2021-23 biennium only. PDSC has been unable to provide a biennial breakout of the amounts impacting each biennium. Stated differently, PDSC is not planning to fully expend the \$10 million General Fund

allocation on the crisis this current biennium, which would result in budgetary savings at the end of the biennium. PDSC appears to be relying upon the fact that, by statute, the agency retains unspent General Fund carryforward (i.e., reversions) at the end of each biennium or that the agency can repurpose the savings. PDSC's report does not articulated this issue. In addition, PDSC has been unable to provide any supporting backup documentation for the proposed Civil Bar Attorney Program budgeted amount.

#	PDSC's Supplemental Crisis Funding Plan	General Fund
	2021-23 One-time Emergency Board Allocation for Crisis Funding (December 2022)	\$10,000,000
1	Add a new, five-tiered hourly rate structure with rates varying by \$125 to \$200 per hour depending on case type.	
a)	\$200 per hour for murder and Jessica's Law cases.	\$2,530,640
b)	\$175 per hour for Ballot Measure 11 and felony sex offense cases.	\$1,397,774
c)	\$164 per hour for Class A and B felony, juvenile dependency, termination-of-parental-rights, juvenile delinquency, habeas corpus, post-conviction relief, civil commitment, and Psychiatric Security Review Board cases.	\$449,396
d)	\$158 per hour for Class C felony and felony drug possession cases.	\$1,200,187
e)	\$125 for misdemeanors [not includes in report]	\$21,338
2	Statewide retention incentive payments totaling \$15,000 per full-time attorney, with 12.5% of the funds dispersed each month between February and May 2023 and 50% of the funds dispersed in June 2023. Receipt of retention incentive payments would be conditioned on contractors being current in their caseload reporting obligations and reporting back to PDSC about how the funds were spent, whether on attorney compensation, staff compensation, additional staff hours, or other overhead and expenses (440.12 adult criminal and 100.27 juvenile/non-Parent Child Representation Program = 540.39 MAC x \$15,000 = \$8.1 million, of only \$2.1 million funded by supplemental crisis funding plan with remaining \$6 million self-funded by budget savings).	\$2,105,800
3	Supervised Civil Bar Attorney Program for civil or private bar attorneys to provide uncompensated legal representation in misdemeanor cases. Attorneys shall be supervised by contracted Supervising Attorneys who provide oversight of attorneys appointed to represent financially eligible persons in misdemeanor cases.	\$394,200
4	Hold in reserve a portion of the appropriation to augment any existing initiative that proves successful in reducing the unrepresented defendant/persons crisis.	\$2,500,000
	Total	\$10,599,335
	Difference from approved budget (overage)	+\$559,335

Apart from the \$10 million in supplemental crisis funding, the Commission approved using \$6 million of projected General Fund savings in the Trial Criminal Division's (TCD) 2021-23 legislative approved budget to increase further the retention incentives to existing contract attorneys (Table Item #2). When combined with the \$2.1 million in crisis funding, the total amount for contract attorney retention incentives is \$8.1 million General Fund. At the time of this analysis, PDSC was unable to provide updated current biennium financial projects (budget vs. actuals) in support of what savings may be available to the agency to fund the \$6 million component of the crisis funding plan.

PDSC requested, and the Emergency Board approved, the \$10 million General Fund for the TCD; however, PDSC's plan anticipates some level of expenditures outside of the TCD, and which will necessitate a rebalancing of the \$10 million with a request to the legislature that is due by February 10, 2023.

The quantification of the impact of the new initiatives to reduce unrepresented defendant/persons crisis

was left unspecified by PDSC. In addition, aside from confirming that attorneys accepting appointment on unrepresented persons' cases meet the minimum qualification standards for each case type, the Commission has had no discussions surrounding quality of representation and continues to rely upon the circuit courts to confirm the verification of indigency, which is a predicate for publicly funded services. The continued lack of quality standards related to the crisis, especially given the legislature's investment in a Compliance, Audit, and Performance Division, is disconcerting. The legislature not only wants to know that moneys are being appropriately and timely spent to resolve the crisis, but that outcomes are being achieved for the unrepresented defendant/person population (i.e., assurance of adequacy of counsel).

The Commission has now been provided \$22.8 million in supplemental funding for the unrepresented defendant/persons crisis by the legislature (\$12.8 million) and the Emergency Board (\$10 million) this biennium and has committed another \$20.4 million in savings from the agency's 2021-23 legislative approved budget for a total commitment to the crisis of \$43.3 million General Fund. The financial commitment equates to an estimated \$55,000 per unrepresented defendant/person (based on 783 defendant/persons as of January 31, 2023).

Continued concern exists that PDSC is not reporting discretely on the budget, actual expenditures, and outcomes related to each of the Commission unrepresented defendant/persons crisis initiatives. There exists the possibility that the agency has overcommitted, or double-counted, General Fund savings used to fund the crisis. If PDSC projected savings fail to materialize, the agency will be at risk of overspending the agency's 2021-23 current law budget. Under such a scenario, PDSC does not have the ability to deficit spend and immediate, remedial budgetary action would be required by the Commission, which could compromise Commission-approved crisis funding initiatives. Additional concern remains regarding the absence of a comprehensive plan by the Commission to address the crisis as well as the absence of any formal convening by the Commission of public safety system partners to bring a standardized focus to the crisis, such as is commonly done when the state has faced other extraordinary crises (e.g., wildland firefighting).

Emergent Issues

Current reporting on the number of unrepresented defendant/persons reflects evidence that the current crisis is far from being resolved and will likely extend into the (intermediate) future and may worsen due to unresolved or not fully resolved causation issues discussed previously. More specifically, at least one major public defense provider has expressed concern that contracted caseloads may be met prior to the end of the biennium, which would limit the provider's ability to take on additional cases. This portends the possibility of another wave or increase in unrepresented defendant/persons.

In addition, PDSC's caseload may be impacted by the recent Oregon Supreme Court ruling in *Watkins v. Ackley* that held that the requirement of unanimous jury verdicts in serious criminal cases applies to older criminal cases as well as those still on appeal. The ruling applies to cases where a criminal conviction was final and the appeals, if any, were over before the U.S. Supreme Court ruling decision that was issued in April 2020. An indeterminate number of convictions are involved and could end up going back to circuit courts for new trials.

Legislative Fiscal Office Recommendation: The Legislative Fiscal Office recommends acknowledging receipt of the report.

Public Defense Services Commission Gibson

Request: Report on December 2022 Emergency Board appropriation spending plan by the Public Defense Services Commission.

Recommendation: The Public Defense Services Commission is not under Executive Branch budgetary authority.

Discussion: As requested by the Emergency Board, PDSC submitted a report outlining the agency's intended spending plan for the \$10 million General Fund appropriated at the December 2022 meeting of the Emergency Board.

The report starts with a high-level summary of the unrepresented persons crisis and notes, as of January 2023, 762 people are entitled to court-appointed counsel and are without representation, including 82 currently in custody. The report attributes the high number of unrepresented persons to a need for more public defense attorneys due to high caseloads and low compensation. Additionally, the report outlines the recent efforts PDSC has taken to address the issue, including:

- Increasing contracted capacity by adding 32.63 more maximum attorney capacity (MAC) to the 2022 provider contracts,
- Implementing a tiered contracting model designed to incentivize attorneys to take felony cases by increasing compensation as the complexity increases,
- Establishing an incentive bonus for new public defenders entering the provider community,
- Increasing hourly compensation for attorneys and investigators who accept cases with unrepresented persons currently in custody,
- Adding funding to provider contracts for increased training and supervision needs, and
- Collaborating with system partners to problem solve the issues across the state.

The report outlines PDSC's intention to utilize the \$10.0 million appropriation and \$6.0 million of agency funding to continue stabilization efforts in the public defense workforce. The following is a high-level breakdown of PDSC's spending plan.

Initiative	Expected Cost
Increase hourly rates for all non-contract attorneys accepting unrepresented persons cases using a tiered rate structure	\$5,000,000
Set aside in reserve for investment in initiatives proven successful through data analysis	\$2,500,000
Fund a Supervised Civil Attorney Program	\$394,200
Develop a retention incentive program to reduce current workforce attrition rates	\$8,105,800
Total:	\$16,000,000



Oregon

Public Defense Services Commission

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January 31, 2023

Senator Elizabeth Steiner, Co-Chair
Representative Tawna Sanchez, Co-Chair
900 Court Street NE
Salem, OR 97301-4048

Dear Co-Chairs:

Nature of the Request

On December 9, 2022, the Legislative Emergency Board allocated \$10 million from the Emergency Fund to Public Defense Services to address the unrepresented persons crisis. The Emergency Board directed Public Defense Services to provide to the Senate President and the Speaker of the House a written report detailing the plan to expend the \$10 million.

Agency Action

This report was submitted to the Presiding Officers, at the Emergency Board's direction, on January 13, 2023. The Commission was also directed to report no later than January 31, 2023 to the Joint Committee on Ways on Means on the unrepresented defendant/persons crisis

Action Requested

Public Defense Services requests that the Joint Committee on Ways on Means accept this report on the unrepresented defendant/persons crisis

Legislation Affected

Oregon Law 2021 Chapter 444, Sections 2 and 3

Sincerely,

Jessica Kampfe
Executive Director

cc:

Amanda Beitel, Legislative Fiscal Officer
John Borden, Principal Legislative Analyst, LFO
George Naughton, Chief Financial Officer
Wendy Gibson, Policy and Budget Analyst, CFO

Unrepresented Persons in Oregon

Public Defense Services

January 2023

Scope of the Problem

Oregon is experiencing a public safety crisis, one symptom of which is the unrepresented persons crisis. Over the last 18 months, Oregon has seen a rise in the number of people who are financially eligible for court-appointed counsel in criminal or juvenile cases but remain without an attorney due to a lack of available qualified attorneys willing to accept the appointment. As of this writing, 765 people are entitled to court-appointed counsel but do not have lawyers; 81 of them are in custody.

The systemic under resourcing of public defense has led to these numbers. Significant numbers of attorneys—many of whom are qualified to handle at least minor felony caseloads—are leaving Oregon public defense practice, particularly nonprofit public defender offices, due to low pay and high caseloads. At the same time, felony case filings have increased, particularly in high population jurisdictions such as Multnomah and Washington Counties. Compounding this capacity issue is Public Defense Services' implementation of the Sixth Amendment Center's recommendation to move away from an unconstitutional fixed fee model of contracting for public defense representation and to a maximum attorney caseload model where the agency contracts for attorney time.

High caseloads for public defense attorneys have caused them to be overworked and burnt-out, and ultimately to leave public defense. When an attorney leaves, it has a ripple effect throughout the public defense system, because that attorney's cases must be reassigned to other public defense attorneys, thereby reducing or eliminating those attorneys' capacity to accept new case appointments. This increases the capacity issue more, creating more strain on existing public defense attorneys, leading to faster burnout and quitting. It is a cycle that Public Defense Services is working to break.

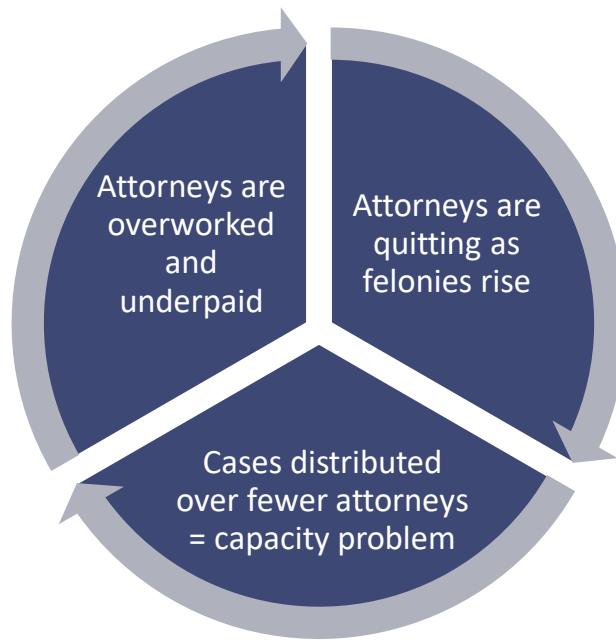


Figure 1 - Public Defense “Churn”

Breaking this cycle means increasing capacity while decreasing workloads for public defense attorneys, which can be a difficult balance. Increasing capacity means bringing on additional attorneys and retaining and training the attorneys we have. More efficiently managing demanding public defense workloads means providing support to attorneys so they can focus on representing their clients and closing their cases, thereby allowing them to take on new cases.

Efforts to Address the Problem

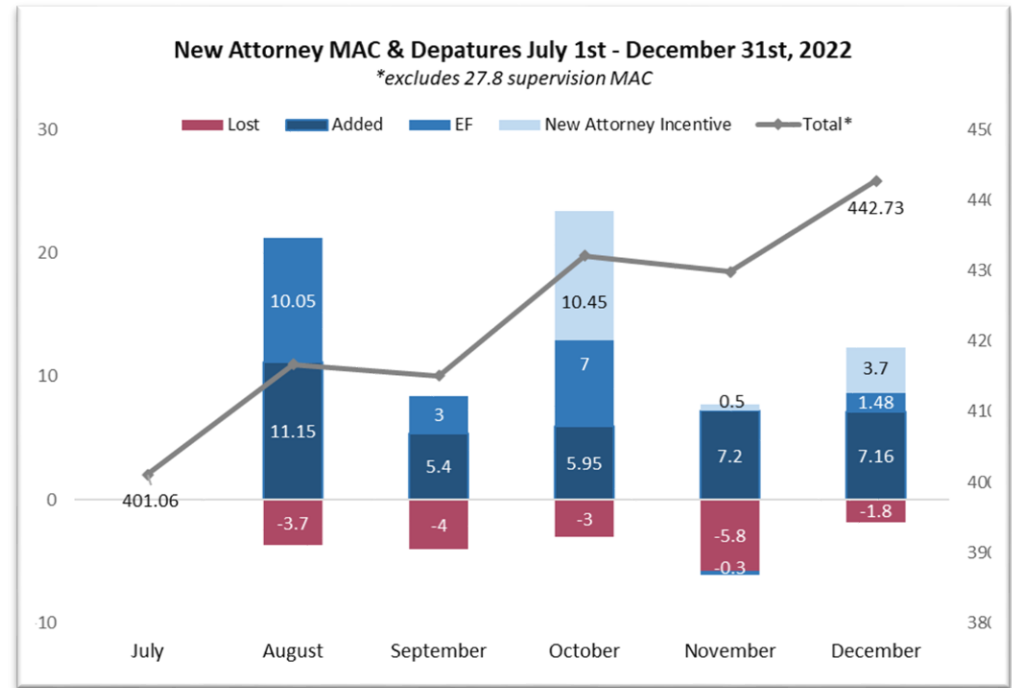
In its efforts to break the cycle of overwork, burnout, and attrition, Public Defense Services has implemented the following initiatives.

Actions to Increase Capacity

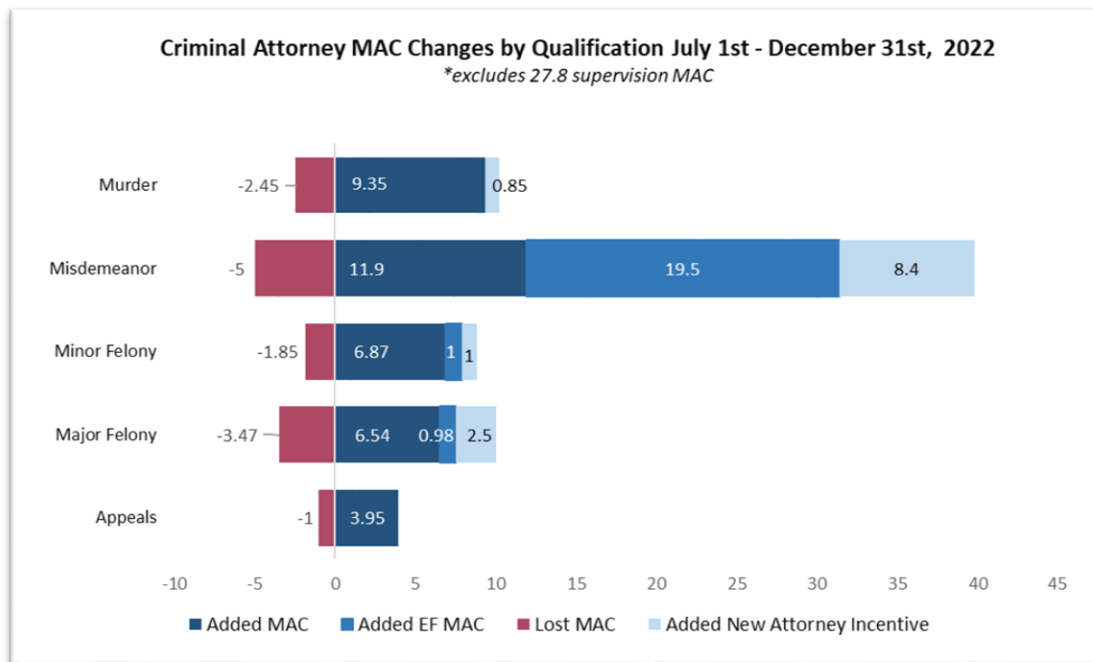
- Increased the pre-July 2022 contracted attorney workforce by entering into new contracts to add 32.63 Maximum Attorney Caseload (MAC), using emergency funding allocated during the 2022 legislative session;
- Implemented a tiered contracting model intended to incentivize attorneys to become qualified to represent persons charged with felonies by providing greater compensation for increasing their case seriousness qualification;
- Attracted new public defense attorneys to practice in Oregon through a new attorney incentive payment program in which contractors receive two lump sum

payments in March and June for the addition to their contracts of attorneys who are new to public defense; and

- Increased hourly compensation rates for attorneys accepting appointments to represent persons who are in custody and unrepresented, as well as for the investigators providing support in those cases.



Source: Public Defense Services Contracting Data



Source: Public Defense Services Contracting Data

Actions Taken to Mitigate the High Caseloads

- Invested in training and supervision for nonprofit public defender offices to adequately resource public defenders who are advocating for individuals on increasingly complex cases;
- Resourced resolution dockets to empower local jurisdictions to find creative solutions for communities with out-of-custody unrepresented persons.
- Met with system stakeholders including, public defense attorneys, district attorneys, judges, and court staff, in counties experiencing the prosecution of unrepresented persons to increase our understanding of that judicial district's needs and explore collaborative solutions; and
- Partnered with the Oregon Judicial Department to improve the quality of data to better quantify the unrepresented person's crisis and improve the agency's ability to respond to this problem that has varied over time and by county.

Proposed Use of \$10 Million Emergency Board Funds

While the programs implemented by Public Defense Services to date have mitigated the growth of the unrepresented persons crisis, many of the underlying factors listed above still exist. Public Defense Services intends to invest the \$10 million Emergency Fund

allocation in the December Emergency Board, as well as existing agency funds, as follows to stabilize the public defense workforce, increase accountability, and add efficiencies.

Increased and Tiered Hourly Rate Structure for All Unrepresented Persons

Goal: Increase capacity by investing \$5,000,000 of the Emergency Fund allocation to increase the hourly rates for non-contract attorneys who accept assignment of cases from the Oregon Judicial Department's "OPDS Unrepresented" list and implementing a tiered rate structure to target the greatest needs.

Public Defense Services' hourly rates for attorneys are not competitive at the rate of \$105 per hour for murder cases and \$75 per hour for all other case types. In July 2022, Public Defense Services implemented a program to address the unrepresented persons crisis by authorizing \$158 per hour for case assignments for any in-custody unrepresented person. While this program has reduced the number of in-custody unrepresented persons, the number of in and out-of-custody unrepresented persons continues to grow. Public Defense Services will expand and extend this program by implementing the following tiered rate structure to address all unrepresented persons whether they are in or out of custody:

- \$125 per hour for misdemeanor, contempt, and probation violation cases
- \$158 per hour for Class C felony and felony drug possession cases
- \$164 per hour for Class A and B felony, juvenile dependency, termination-of-parental-rights, juvenile delinquency, habeas corpus, post-conviction relief, civil commitment, and Psychiatric Security Review Board cases
- \$175 per hour for Ballot Measure 11 and felony sex offense cases; and
- \$200 per hour for murder and Jessica's Law cases.

Public Defense Services will continue to fund the investigator rate under this program at the higher hourly rate of \$75.00.

Strategic Reserves

Goal: Set the Agency up to be as strategic and adaptable as possible for the remainder of the biennium by setting aside \$2,500,000 of the Emergency Fund allocation for investment in programs that are proven to reduce unrepresented people.

Over the past 6 months Public Defense Services has created and funded various programs to reduce the unrepresented population. Now that these programs have been running for anywhere between 3-6 months, the agency needs to reevaluate the data available to determine what programs have been successful. As the unrepresented crisis

continues it is also likely that the Agency will need to make strategic investments between now and the end of the biennium, have funds in reserve should the situation deteriorate, or additional funds should a program- specifically the increased hourly structure for unrepresented persons- require additional investment.

Supervised Civil Attorney Program

Goal: Increase capacity by expanding the pool of attorneys available to represent out of custody persons charged with misdemeanors and minor felonies by investing \$394,200 of the Emergency Fund allocation in a Supervised Civil Attorney Program

Some civil attorneys have expressed a desire to help in reducing the number of unrepresented persons by expanding their law practice to include some public defense cases. The Supervised Civil Bar Attorney Program will fund civil or private bar attorneys to provide legal representation in misdemeanor cases. Attorneys shall be supervised by contracted Supervising Attorneys who provide oversight of attorneys appointed to represent financially eligible persons in misdemeanor cases. Attorneys who accept assignment of cases are required to comply with the policies and procedures for the representation of clients under supervision, including training and performance requirements, evaluation procedures, record-keeping, and data collection. Attorneys accepting court-appointed cases under supervision shall maintain time records and shall report to Public Defense Services on their work, including client communications, hearing and trial preparation, and time in court.

Existing Attorney Retention Incentive Program

Goal: Stabilize existing contractors and increase accountability by investing \$6,000,000 of existing agency funds and \$2,105,800 of the Emergency Fund Allocation in a retention incentive program

High levels of attorney attrition in the provider community resulted in the agency retaining attrition saving in our budget designated to fund public defense contractors. Attorney attrition is a leading cause of the unrepresented person's crisis. The attrition savings will be deployed to retain existing contractors through a retention incentive payment program focused on contract public defense attorneys funded out of Public Defense Services' existing budget. Each package of retention incentive payments will total \$15,000 per full-time attorney, with 12.5% of the funds dispersed each month between February and May 2023 and 50% of the funds dispersed in June 2023. Receipt of retention incentive payments would be conditioned on contractors being current in their caseload reporting obligations and reporting back to Public Defense Services about how the funds were spent, whether on attorney compensation, staff compensation, additional staff hours, or other overhead and expenses.

Conclusion

Oregon must ensure that Public Defense Services meets its constitutional mandate to provide public defense services consistent with the Oregon Constitution, the United States Constitution, and Oregon and national standards of justice. Failure to provide legal representation to those charged with crimes violates the mission of Public Defense Services to ensure that eligible individuals have timely access to legal services, consistent with Oregon and national standards of justice. Moreover, that failure creates a bottleneck in the system which prevents cases from moving forward. Failure to provide constitutionally effective representation creates additional problems, including wrongful convictions, worse public safety outcomes, an increased number of cases returning to trial several years later after post-conviction relief is granted, lack of final resolutions, and a loss of trust in the justice system's ability to handle cases fairly.

While these actions will not solve the unrepresented persons crisis, it will mitigate the exodus of attorneys and bring on new capacity directly targeted at those on the unrepresented peoples list. Looking ahead to the 23-25 biennium, cases will continue to grow, and this crisis may get worse. Public Defense Services will continue to report back to Legislative leadership and Ways and Means throughout the 2023 session. We are dedicated to finding a solution and ensuring that all Oregonians have access to justice and representation.