



SIXTH  
AMENDMENT  
CENTER

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Oregon State Legislature, Senate Judiciary Committee  
Testimony of Jon Mosher, Deputy Director, Sixth Amendment Center  
Thursday, March 29, 2023

Chair Prozanski, Vice-Chair Thatcher, and members of the judiciary committee:

My name is Jon Mosher. I am deputy director of the Sixth Amendment Center, a national nonpartisan nonprofit providing technical assistance to state governments on right to counsel issues.

In 2018, at the request of the Oregon Legislature, my organization conducted a top-to-bottom assessment of the delivery of trial level public defense services in the state of Oregon. Our report, published in January 2019, made two principal findings.

- One, the State of Oregon has created a complex bureaucracy that collects a significant amount of indigent defense data yet does not provide sufficient oversight or financial accountability. In some instances, the complex bureaucracy is itself a hindrance to effective assistance of counsel. And,
- Two, the complex bureaucracy obscures an attorney compensation plan that is at root a fixed fee contract system that pits appointed lawyers' financial self-interest against the due process rights of their clients, and which is prohibited by national public defense standards.

U.S. Supreme Court case law is clear that the Sixth Amendment right to effective counsel is an obligation of state government under the due process clause of the Fourteenth Amendment. Oregon devolves its constitutional obligations onto an array of contractors in each county -- nonprofit public defender organizations, private law firms, consortia of individual attorneys, and occasionally individual lawyers.

The complex bureaucracy that Oregon has created to administer that contract system hides a stunning lack of fiscal and qualitative oversight, with state government expressly permitting consortium contractors to enter into subcontracts, without notice to or oversight by the state. Oregon's subcontractor method of indigent defense services leaves state government with no way of knowing who or how many attorneys are providing right to counsel services on any given day, how much money is spent on overhead and what is acquired, how much money is paid to a contract administrator and what services are provided in exchange, or how much money is paid to the constituent individual attorneys and what services those attorneys provide in exchange. In sum, the subcontractor method of direct services prohibits state government from exercising the sort of oversight required by the Fourteenth Amendment.

In addition to the absence of accountability, we found that the state's fixed fee compensation scheme compounded these problems by creating systemwide financial conflicts of interest that

interfere with defendants' constitutional rights to effective representation provided free from conflicts of interest. In Oregon's fixed fee payment scheme, contractors and their subcontractors are incentivized to handle as many cases as possible and as quickly as possible, to the detriment of their appointed clients. A federal court has said the use of fixed fee contracts is an "intentional choice" of government that purposely compensates defense lawyers "at such a paltry level that even a brief meeting [with clients] at the outset of the representation would likely make the venture unprofitable."

Our report also found that the composition of the Public Defense Services Commission does not adhere to national standards, in that all commissioners are appointed by the judiciary, while the legislative and executive branches of government have no equal voice in the commission's affairs.

In a series of decisions, the U.S. Supreme Court has stated:

- that the "independence" of appointed counsel to act as an adversary is an "indispensable element" of "effective representation" and is "constitutionally protected"; and
- that "[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense."

Heeding the Supreme Court's decisions, national standards call for states to create independent statewide commissions in which members are selected by diverse appointing authorities, so that no single branch of government has the ability to usurp power over the chief defender or has outside influence over the delivery of public defense services. As the American Bar Association explains, "[r]emoving oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense."

In Oregon, the power to appoint the members of PDSC rests entirely with the Chief Justice. Currently, the legislative and executive branches are excluded from holding any stake in or responsibility for the success of the public defense system, as are members of the client community, academicians, researchers, minority constituents, and others who might have much to contribute.

I want to be clear that none of this is to suggest any nefarious conduct or motive on behalf of any Oregon Chief Justice. To the contrary, there is every reason to believe that the most recent Chief Justice fully desired for the PDSC to properly carry out its work, and no doubt the current and future Chief Justices do so as well. It is simply the case that policies regarding the provision of the Sixth Amendment right to counsel should not be controlled by a single branch of government.

To rectify these issues, our 2019 report recommended that the legislature should amend statute to ensure that the oversight commission members are appointed by diverse authorities such that no single branch of government has a majority of appointments, that the legislature should further ensure independence from the judiciary and ensure stronger accountability by placing the defense function within the executive branch of state government, and that the legislature should

expand and clarify the commission's responsibility to set and enforce standards for public defense services.

Additionally, we recommended that the legislature ensure right to counsel services are provided free of conflicts of interest, as is constitutionally required, by abolishing fixed fee contracting and other forms of compensation that produce financial disincentives for public defense lawyers to provide effective assistance of counsel. With the abolition of fixed fee contracting, state government should pay private lawyers at an hourly rate that accounts for both actual overhead and a reasonable fee, and should hire government-employed public defenders for trial level services. And finally, the state should establish and fund proper structures providing oversight of such a hybrid private attorney and state public defender employee system.

To be clear, we first presented these same findings to the legislature in 2019. But because of the failure to enact the necessary statutory reforms in the four years since, the deficient system has been left to try to fix itself. For example, nowhere in our lengthy report did we ever say, "redraft the provider contracts into an FTE formula." By *not* fixing the structural deficiencies, it is not surprising that the state finds itself in the current crisis of having too few lawyers trying to represent too many clients, with some defendants being denied representation altogether. Had the legislature followed our lead, attorneys would have been appropriately compensated and that likely would have prevented attorneys from refusing to take cases. Instead, Oregon's continued flat fee contracting still pits attorneys' financial interests against the constitutional rights of their appointed clients, and in the process prevents the state accountability required by the 14<sup>th</sup> Amendment. Moreover, had the commission been made to follow national standards, the executive and legislative branches would have been informed of the impending problems in real time.

The Sixth Amendment Center applauds you for considering statutory reforms targeting these structural deficiencies. Thank you.