



June 13, 2024

Dear Governor Kotek:

District Attorneys across Oregon remain committed to public safety in our communities and believe that the criminal justice system must operate reliably and responsibly to ensure the protection of all Oregonians. We know that our court process must sustain its Constitutional obligations, and an effective and efficient defense is essential. As your office prepares to assume governance over the Public Defense Commission and public defense services in our state, we wanted to share some of the solution-driven conversations we have had both in local stakeholder meetings pursuant to SB 337 (2023), and in more recent collaborations, as this defense attorney shortage has not been mitigated despite sharp criticism from our public safety partners and the attention of the Federal Court.

We believe these solutions should be prioritized as you continue your efforts to secure defense representation across the State and provide appropriate oversight and accountability for the Office of Public Defense Services. We offer the following:

- **Raise the “MAC”:** Dramatically scaling back the number of cases an attorney can accept per year (“maximum allowable caseload” or MAC) has created this “crisis.” The MAC is not a limitation imposed by the Constitution or Oregon courts, but rather rests exclusively with the PDC. No court in Oregon has ruled that the MAC for an indigent defense attorney is 300 credits. Current MAC case counts are artificially inflated by the assignment of two attorneys to the same low-level case, cases in warrant status, and cases that have resolved. The MAC further fails to account for an individual attorney’s experience, abilities, and expertise. Recent discussion at the Commission and before the Joint Meeting of House and Senate Judiciary Committee last week suggested that every lawyer has the exact same objective, numerical, performance and ethical limit to their caseloads. Blanket acceptance of this arbitrary number runs contrary to the goal of attracting and rewarding smart, hard-working, capable attorneys to this crucial work and ignores the existence of the Oregon State Bar who ensures that ethical standards are met by admitted and practicing lawyers. We suggest that a “rolling” case count system that subtracts cases not in active status would more accurately reflect what an individual attorney manages at any given time and lessens the likelihood that lawyers would reach a yearly maximum months before contract expiration. Any responsible MAC should also respect the unique professionalism of each lawyer to recognize their own ethical limits.
- **Increased Transparency from Public Defense Commission (PDC)** - the 2023 and 2024 Legislatures funded historic levels of new funds into PDC yet there remains a growing number of unrepresented defendants and confusion about how those dollars have been used in each county and the effect. Because the number of unrepresented defendants has not decreased, and more counties are forced to release potentially dangerous individuals, we remain concerned about the value Oregon taxpayers are receiving for their substantial investment. For transparency, the PDC

should publicly post a county-by-county analysis of: how many attorneys each contract provides, the average contract dollar value by contracted attorney, whether the contract has resulted in the hiring of new attorneys, and, if so, how many. Many of our local workgroups identified that the recruitment of more attorneys - either through hiring or via contracting with currently available private defense counsel - could all but eliminate the current concerns.

- **Increased Accountability for PDC** -A Secretary of State Audit is now necessary to identify several areas where increased accountability and more responsible spending could ensure that taxpayer money is sensibly managed and dependably dedicated to increasing defense attorney capacity. It could further identify areas of potential savings, such as limiting low-level cases to a singular lawyer, attorney time that is misappropriated to social-work endeavors or administrative tasks, and surplus spending on investigation and excessive expert fees. What is clear from the data is that, even while district attorneys have filed 17,767 fewer criminal cases statewide than in 2019, this problem continues to grow<sup>1</sup>.
- **Fidelity to the Mission** – OPDC’s website states that their mission is to “ensure constitutionally competent and effective legal representation for persons eligible for a public defender.” In times of identified crisis, we must focus solely on these Constitutional mandates, despite the attraction to provide “holistic” social-type services. Using scarce defense resources to find people housing or jobs for example, should not take priority over the mission of providing legal counsel. Similarly, the PDC sets the threshold under which an individual qualifies for a court appointed attorney thus setting its own customer base. No oversight nor clear legislative mandate exists for the calculus of that economic amount. Legislative or judicial review of that standard, with regular updating, could result in a refined level that ensures indigent defense services reach only those persons truly in need of a public defender.
- **Broader Access to Dashboard for Indigent Appointments** – It is our understanding that currently only a few Courts have access to up-to-date dashboard information about local attorney capacity and contractual limits and the current dashboard does not include capacity by individual attorney level. This information should be made available to Courts, local defense public defense and consortia offices and District Attorneys. This transparency would allow Judges to appoint attorneys more efficiently and expeditiously.<sup>2</sup>

Just as we firmly believe that the right solutions must be implemented, District Attorneys are equally convinced in what are *not* appropriate responses to this issue. Specifically, we do not believe that filing fewer criminal cases or rolling back Oregon’s sentencing minimums for violent felonies is the answer. When a crime is committed, accountability must be sought. And this failure of our state’s public defense system should not be borne on the backs of our community’s public safety. Similarly, we do not believe that the premature release of potentially dangerous individuals is appropriate either. Defendants must be appointed defense counsel. Anything less creates a perverse incentive for public defense to continue to fail in its mandate.

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<sup>1</sup> See Chart enclosed. *Data from OJD Cases Filed* data found at:

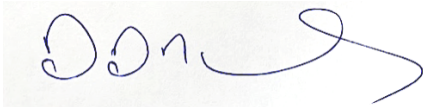
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<sup>2</sup> See example of (outdated) dashboard attached. This example was shared with us as DAs do not have access.

We work with some of the most qualified, dedicated, diligent, ethical and conscientious defense counsel every day. Like prosecutors, they are a cornerstone of our criminal justice system. We are grateful for the hard work that these people do to guarantee that the Constitutional rights of their clients are protected. And we call on the State to ensure that they can continue to do their good work in a way that respects their worth and compensates them fairly.

Thank you for this opportunity to offer additional potential solutions to the Defense Attorney Shortage. As District Attorneys, we stand ready to assist in this process in ways that will promote and protect public safety.

Sincerely,

A handwritten signature in blue ink, appearing to read "Dan", with a stylized flourish extending to the right.

Dan Primus  
President, Oregon District Attorneys Association  
District Attorney Umatilla County

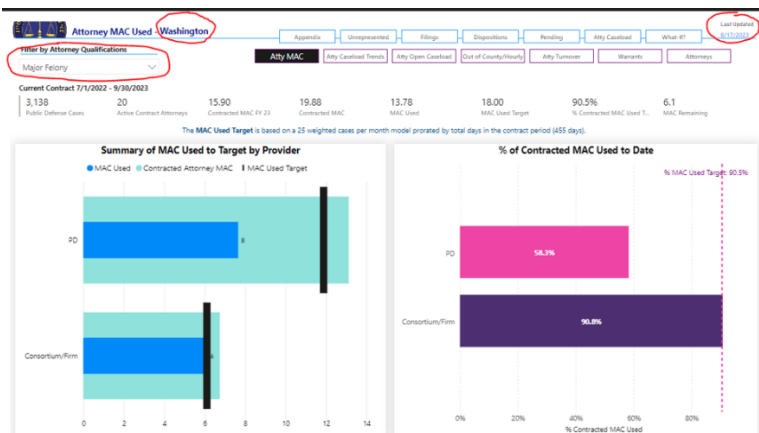
Cc: Public Safety Legislative Leadership

## Footnotes:

### 1 - Increased Accountability for PDC

Cases Filed:	2017	2018	2019	2020	2021	2022	2023
<b>Criminal - Felony</b>	31506	26265	26598	24283	22096	21921	21454
<b>Criminal - Misdemeanor</b>	48418	54459	51536	40143	36977	36678	38913
<b>TOTAL</b>	79924	80724	78134	64426	59073	58599	60367
<b>Y2Y Difference</b>		800	-2590	-13708	-5353	-474	1768
<b>Difference 4-year look back (2019)</b>							<b>-17767</b>

### 2 - Broader Access to Dashboard for Indigent Appointments





September 28, 2023

Co-Chair Sollman and Evans:

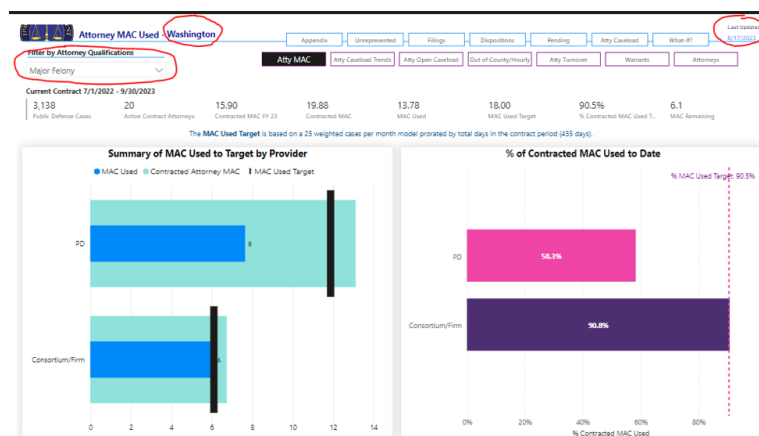
District Attorneys across Oregon recently participated in local stakeholder meetings pursuant to SB 337 (2023) in an effort to find solutions - both short and long-term - to the Defense Attorney shortage in our state. As the top elected prosecutors in each of our counties, we are committed to ensuring that our court process upholds its Constitutional obligation to everyone within the criminal justice system. An effective and efficient defense is as necessary for those charged with crimes as it is for victims of crime.

We specifically wanted to highlight a few of those solution-driven conversations that we believe should be prioritized as you continue your efforts to secure defense representation across the State and provide oversight and accountability for the Office of Public Defense Services. We offer the following:

- **Increased Transparency from Oregon Public Defense Services (OPDS)** - the 2023 Legislature funded historical levels of new funds into OPDS yet there is significant confusion about how those dollars will be used in each of our individual counties. Transparency should include how many actual attorneys each contract provides for by County, the average contract dollar value by contracted attorney by County and whether or not the contract allows for the hiring of new attorneys and how many. Many of our local workgroups identified that the hiring of more attorneys would all but eliminate the current concerns.
- **Increased Accountability for OPDS** -The Secretary of State Audit must identify several areas where increased accountability and more responsible spending could assist with ensuring that taxpayer money is responsibly managed and dependably dedicated to increasing defense attorney capacity.
- **Clarifying the Mission of OPDS** - Our local workgroups often struggled to answer the question of who in fact is the customer of this State Agency. There could be significantly different outcomes if the customers are the lawyers providing services throughout the state, the Courts, the defendants themselves, or the taxpayers. Simplifying the core mission could result in increased efficiencies.
- **Eliminating the Appearance of/Actual Conflict in the Setting of Indigency Threshold with Regular Revisions** - currently the Public Defense Services Commission (PDSC), the body charged with the supervision of OPDS, sets the threshold under which an individual qualifies for a court appointed attorney. There is no oversight of that threshold and no clear legislative mandate for the calculus of that economic level. Legislative or judicial review of that standard, with regular

updating, could potentially result in a higher threshold that ensures indigent defense services reach those truly in need of indigent services.

- **Standardizing Indigency Review** - Courts across the State seem to employ different processes for determining and confirming indigency and thus necessitating court appointed counsel. Standardizing this process via the Oregon Judicial Department and ensuring courts are adequately staffed to make decisions could more accurately refine the numbers of people needing court appointed counsel.
- **Provide Broader Access to Dashboard for Indigent Appointments** – It is our understanding that currently only a few Courts have access to up-to-date information about local attorney capacity and contractual limits. It's also our understanding the current dashboard does not include capacity by individual attorney level. This information should be made available to Courts, local defense public defense and consortia offices and District Attorneys. This transparency would allow Judges to appoint attorneys more efficiently and expeditiously. Example of current dashboard (shared with us as DA does not have access):



- **Expedite Change to Executive Branch Oversight** - the 2023 Legislature delayed the Supervision of OPDS from the Judicial to the Executive Branch to 2025. Given the current pressures mounting on this Agency, with no immediate relief in sight, we believe increased oversight is necessary now to address the current problems.

Thank you for this opportunity to offer additional potential solutions to the Defense Attorney Shortage. As District Attorneys, we stand ready to assist in this process in ways that will promote and protect public safety.

Sincerely,

Dan Primus  
President, Oregon District Attorneys Association  
District Attorney Umatilla County



August 17, 2023

Governor Kotek and Legislative Leaders on Public Defense Funding,

On behalf of the Oregon District Attorneys Association, we would like to draw your attention to an urgent matter that has an immediate and dire impact not only on public safety in our communities, but also on access to justice for victims and defendants.

As you are likely aware, on August 15, 2023, a federal judge issued a ruling in *Caleb Aionia, et al. v. Patrick Garrett, et al.*, (3:23-cv-01097-CL) requiring the Washington County Sheriff to release from jail unrepresented defendants facing criminal charges within 10 days. The broader habeas case, which will consider both in-custody and out-of-custody defendants without appointed counsel, will likely be heard later this fall and will certainly have statewide application. See **National ‘embarrassment’: Judge sets 10-day deadline to release people held in jail without lawyer** We have already learned that at least one other county (Jackson) will apply the recent federal court ruling in their jail. We expect other counties may follow.

We wholeheartedly agree that defendants, especially those who are in custody, have a constitutional right to representation. And we support efforts to ensure these rights are honored. However, a mandatory and blanket forced release rule for unrepresented in-custody defendants creates significant concerns. As you are aware, defendants who remain in-custody pending trial, especially after SB 48 (pre-trial release reform), represent a narrow scope of individuals facing significant public safety charges. We cannot stand by as defendants facing charges involving domestic violence, sexual assault, child abuse and prolific property crime are released into our communities.

We want to continue to work as partners with you in this effort to improve the indigent defense system. As you are aware, the PDSC is required by law to establish AND maintain a public defense system that ensures the provisions of public defense services consistent with constitutional requirements and standards of justice. See ORS 151.216(1). Additionally, the PDSC is required to establish the Office of Public Defense Services (OPDS) to ensure public defense services are available for indigent criminal defendants in Oregon. **It is clear that both the PDSC and OPDS have failed to meet these statutory obligations, and they continue to fail even after the 2023 Legislature allocated [historic funding levels](#) to public defense.**

District Attorneys across Oregon are committed to working toward a solution. To that end, we have worked in our communities to create greater efficiencies and we have participated in the Unrepresented Crisis Plan Team Meetings as directed by SB 337 and the Chief Justice’s Order. While we are encouraged by the attention the legislature has given this important issue, we



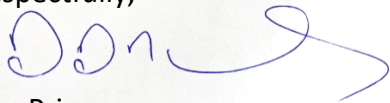
were alarmed to hear from OPDS representatives during recent Crisis Plan Team Meetings that OPDS believes none of the newly allocated \$100 million in funding may be used to hire additional defense attorneys. We hope that the OPDS interpretation is not accurate. If that is the case, we respectfully request that you clarify with both the PDSC and OPDS your expectations regarding the use of these funds.

Additionally, in the spirit of offering constructive ideas, we offer the following concepts. If these concepts are implemented without delay, we believe they would make the new federal court release order unnecessary.

1. **Raise and adjust the Maximum Attorney Caseload (MAC).** We have learned in our Crisis Plan Team meetings that the MAC number is arbitrary and often detached from the true ethical capacity of individual attorneys. The MAC problems are numerous and well-recognized by both practitioners and OPDS. We believe a change to the MAC will have an immediate and positive impact on defense attorney capacity.
2. **Raise the threshold for what qualifies for indigent defense services.** We frequently see examples of individuals in courtrooms throughout the state who are deemed eligible for a court appointed attorney, but their eligibility appears to defy common sense. We believe a reexamination of eligibility is warranted, along with a clear statewide standard that is uniformly applied. These changes will have an immediate and positive impact on defense attorney capacity. See [Attorney seeks probation for disgraced ex-judge who admitted possessing child sex abuse images](#).<sup>1</sup>
3. **Hire more defense attorneys.** We strongly support the hiring of more defense attorneys and hope that the new resources you have allocated will be spent doing exactly that. Current contract consortia should be immediately given the authority to hire new attorneys. We have many examples in recent months where our local defense attorneys have been told 'NO' by OPDS when they have asked to bring attorneys on board. This is the opposite direction of where we should be headed. In addition, we support greater investment in serious and complex case appointments.

We appreciate your time and commitment to this important issue, and we look forward to continuing to partner with you to find solutions.

Respectfully,



Dan Primus  
President, Oregon District Attorneys Association  
District Attorney, Umatilla County

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<sup>1</sup> "Taylor declined to answer questions about why Mann was appointed a defense attorney at taxpayer expense despite making \$167,000 a year before he was [removed from his post as chief judge for the state's administrative hearings office](#), which handles appeals to rulings made by state agencies."