

Members:

Addie Smith, Chair
Peter Buckley
Tom Lininger



Nonvoting Member:

Sen. Floyd Prozanski

Executive Director:

Jessica Kampfe

**Oregon Public Defense Commission
Legislative Committee**

Meeting will occur virtually
Wednesday, July 10, 2024
12:00 PM - 1:30 PM PST

AGENDA

12:00 – 12:05	Welcome	Chair
12:05 – 1:30	Briefing: Discussion of Unrepresented Crisis Report Due to Governor by August 1, 2024	Lisa Taylor
1:30	***Adjourn***	

**To join the Zoom meeting, click this link <https://zoom.us/j/92132624579> 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 opds.info@opds.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.*



Oregon

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July XX, 2024

The Honorable Governor Tina Kotek
900 Court Street NE
H-178 State Capitol
Salem, OR 97301-4048

Dear Governor Kotek:

The Oregon Public Defense Commission (OPDC) is unwavering in its commitment to ensure that all eligible defendants in Oregon have access to counsel. We are working tirelessly to identify and connect attorneys with clients, prioritizing those in custody on serious charges, those subject to the *Betschart* ruling, and those who could pose a public safety risk.

Background

OPDC is combatting the entrenched problem of too few public defenders to meet the need in Oregon and the ensuing constitutional crisis of unrepresented persons who qualify for a public defender but do not have access to representation. This systemic problem requires robust solutions that will stabilize our public defense workforce through caseload and workload standards that allow for constitutionally adequate representation and competitive wages.

The American Bar Association's Ten Core Principles for Public Defense outlines the best practices for public defense systems. These standards incorporate decades of caselaw, defense standards, and nationwide rules. Those core principles include the adoption of workload standards, which the Legislature affirmed when they amended Oregon's public defense statute in 2021. The statute now requires the Commission to ensure public defense caseloads are in accordance with national and regional best practices and adopt a workload plan. Following this guidance, the Commission first adopted annual caseload maximums in 2021 and, in doing so, revealed the scope of Oregon's public defender shortage.

The Commission and policymakers have taken steps to address the constitutional crisis by making improvements to Oregon's public defense system. However, many of these improvements are still in the early stages of implementation. The problem remains significant and will only fully improve when we have caseload and workload standards that allow public defenders to provide constitutionally adequate representation to their clients at a competitive wage.

To date, OPDC has enacted the following initiatives¹:

- Opened three state trial offices with state employees providing direct representation to public defense clients in Oregon's circuit courts;
- Increased the number of public defenders appointed to represent clients under contracts with OPDC;

¹OPDC Initiatives

- Increased the number of part-time public defenders appointed to represent clients under hourly agreements with OPDC;
- Funded recruitment and retention efforts for contracted public defenders;
- Collaborated with public safety partners to improve coordination and communication regarding unrepresented persons;
- Improved ongoing data collection and sharing.

Despite numerous efforts and initiatives, the in-custody list remains consistent at around 100 defendants, while the out-of-custody list has grown.

Crisis Plan

In the next 90 days, OPDC will enact the following initiative to reduce the unrepresented numbers:

- With Legislative permission, redirect HB 4002 attorneys to prioritize unrepresented in-custody cases;
- Work with public safety partners on case resolution dockets.

OPDC will request funding from the Emergency Board to:

- Extend and increase the Temporary Hourly Increase Program through the end of the biennium;
- Stabilize hourly attorney rate prior to July 2025;
- Establish a state trial office serving the southwest;
- Add additional assignment coordination staff within OPDC;
- Add additional level 1 MAC.

In addition to these new initiatives, OPDC will Continue effective existing programs.

In the intermediate term, OPDC is requesting the following through Policy Option Packages for the 2025-2027 biennium:

- Add additional accounts payable and preauthorized expenses staffing;
- Stabilize the hourly attorney [rate](#);
- Add additional state trial office attorneys and staff.

Finally, while OPDC continues to tackle the day-to-day challenges of finding counsel for unrepresented defendants, we are also working on finding long-term solutions to prevent this crisis in the future. We do this by building, stabilizing, and maintaining the public defense workforce. OPDC has built a 6-year plan² to do this. While this report is focused on immediate and near-term solutions, we know that fixing the underlying problems within Oregon's public defense system is the only way to fully resolve this crisis.

Sincerely,

Jennifer Nash
Chair
Oregon Public Defense Commission

Jessica Kampfe
Executive Director
Oregon Public Defense Commission

² 6-year plan

Crisis Plan

90-Days

New Initiatives

With Legislative permission, redirect HB 4002 attorneys to prioritize unrepresented in-custody cases

Action: HB 4002 provides OPDC with eight additional state trial attorneys to take on the additional misdemeanor and drug crimes resulting from HB 4002 (2024). With the support of the Governor and Legislature, OPDC could redirect these resources to the unrepresented list. This is a policy question about whether the greatest public safety need is in providing representation for people held in jail pretrial and people charged with person crimes, or if the greatest need is to provide representation to people charged with drug crimes. 4002 prioritizes representation for people charged with drug crimes, so OPDC would need legislative permission to use the positions for a different purpose.

Cost: None; funding already allocated.

Expected Outcome: Elimination of C felony and misdemeanor in custody cases. Assuming that the C Felony in custody list continues at its current rate of decay, roughly 6 cases per month, and that these attorneys are fully dedicated to taking in-custody C felonies and misdemeanors, once fully onboarded, these attorneys could eliminate the current in-custody C felony and misdemeanor list by November 2024.

In addition to clearing these cases, they could also take over the lower-level cases that the state attorneys have had to pick up, clearing up their capacity to take on more high-level felonies. Current low-level felonies should clear by January 2025, increasing current state attorneys' capacity.

Timeline: September-November 2024.

Barriers: 4002 Commitments and Expectations: These attorneys were funded through 4002 with the legislative direction that the staff added under this measure would need to be assigned to regional offices commensurate with the location of caseloads for felony charges for delivery of a controlled substance and drug enforcement misdemeanors. Some counties are setting up deflection programs, and we have already begun to work with them on how state attorneys can help. Statewide, the Criminal Justice Commission is compiling a detailed summary of all 4002 proposals. Based on early information, OPDC anticipates that 4002 will add a significant number of new drug charges to existing case filings. The legislature directed that these state employees provide targeted representation on drug cases. Using state employees to represent unrepresented persons in-custody deviates from that directive.

Unrepresented List Changes: The unrepresented list is a moving target; while it has 82 C Felonies today, that will change tomorrow and a month from now. State attorneys can clear the backlog, but more cases will join the list as that happens. This could be further impacted by C Felony rates increasing as 4002 goes into effect or future disruptions to regional public defense providers like the staffing problems we've seen in Deschutes and Coos counties.

Staffing limitations: Attorneys will likely be onboarding and training through the end of August. Additionally, OPDC only has three offices, making it challenging to assign cases to central and eastern Oregon and the southern coast. Those cases require extensive travel time, which limits how many other cases an attorney can take.

Supports: Public safety partners: The courts could support this effort by accommodating out-of-town attorneys through efficiencies like remote appearances, and sheriffs can support this effort by providing remote or telephonic access to defendants in jail.

Legislature: Legislative leadership's support for redirecting these resources would be needed for OPDC to move forward.

Work with public safety partners on case resolution dockets

Action: Case Resolution Dockets are special dockets that a court holds with a singular focus. Drug and driving offenses are the most common type of resolution dockets, and they have successfully addressed large numbers of similar cases quickly. For example, the state trial office in Medford participated in a two-day driving docket in April that removed 24 misdemeanors from Jackson County's out-of-custody unrepresented list.

These dockets require commitments from courts, prosecutors, and defense attorneys. They are most successful when these parties are committed to meaningful participation.

Cost: Varies; some costs can be absorbed within the current budget, while others may require additional funding. OPDC will work with courts to use hourly or state trial resources to keep the cost within current resources and avoid using Maximum Attorney Caseload.

Expected Outcome: Resolution dockets could significantly impact the unrepresented list, primarily the out-of-custody list. Of the 1,593 out-of-custody pretrial misdemeanor cases, 10% are driving charges, including criminal driving while suspended or revoked, driving while using an electronic device, failure to perform duties of a driver- property damage, and reckless driving. A DUII docket could capture up to 32% of the out-of-custody pretrial misdemeanor cases.

Timeline: Memo to courts. OPDC will send a memo to courts about our willingness to fund and participate in resolution dockets. If jurisdictions choose to use these tools, these dockets usually take 2-3 months to set up and execute.

Barriers: Leadership and coordination: Resolution dockets cannot happen without cooperation and initiation from all partners, defense, district attorneys, and courts. Courts would need to create docket time and staffing resources, district attorneys would need to provide discovery and attractive resolutions, and defense attorneys would need to communicate with their clients about the benefits and risks of resolving their cases on these dockets.

Supports: OJD and local courts: Several jurisdictions identified resolution dockets as a tool in their crisis plans. OJD and local courts have been supportive in setting up previous resolution dockets.

September Legislative Emergency Board Requests

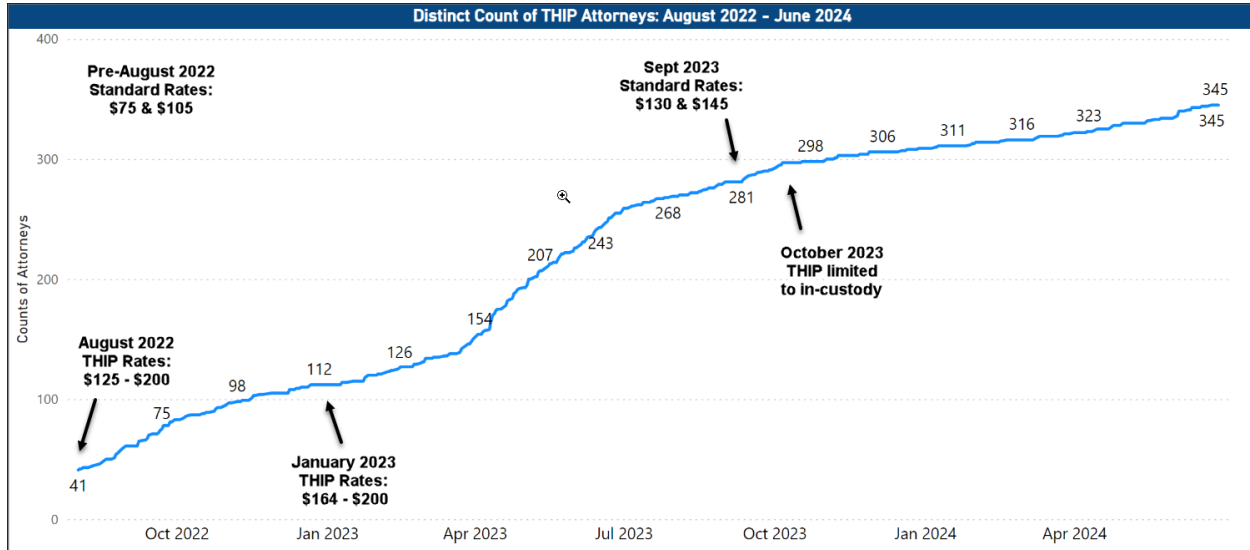
Extend and increase the Temporary Hourly Increase Program through the end of the biennium

Action: In August 2022, OPDC began the Temporary Hourly Increase Program (THIP), which pays attorneys an enhanced hourly rate for taking on unrepresented cases. THIP has successfully brought in new attorneys who would otherwise not take OPDC cases and has been an essential part of the unrepresented response.

THIP was intended to be a temporary program until the unrepresented cases were eliminated. The long-term solution to this problem is to pay attorneys a competitive rate to incentivize them to take public defense cases. Through THIP, OPDC has seen a direct increase in the number of attorneys taking hourly

cases and the hourly rate. As the chart below shows, the number of attorneys taking hourly (THIP) cases has increased more than eightfold since enhanced rates were implemented. This is even after THIP was limited to only in-custody cases in October 2023.

Table 1: THIP Attorneys over time.



Before 2022, when the hourly rate was \$75 and \$105/hour, about 1% of OPDC-assigned cases were taken hourly. Today, hourly cases are taken at \$130 and \$145/hour or \$164 and \$200/hour for in-custody unrepresented cases under THIP. Hourly cases now account for nearly 10% of all OPDC-assigned cases.

THIP is set to expire on December 31, 2024. During the 2025 session, OPDC is requesting funding to stabilize hourly attorney rates for all attorneys at a two-tiered rate of \$205 and \$230/hour beginning July 2025. This creates a gap in the hourly program where THIP rates would end before the market rates³ took over. OPDC will request an extension of THIP through the end of the biennium at the same rate as the stabilized hourly rate proposed in the POP. This extension and increase will allow OPDC to:

- Bring in more hourly attorneys with an increased rate;
- Maintain the hourly attorneys we have now;
- Bridge the gap between the end of THIP in December 2024 and the new hourly rates anticipated in July 2025;
- Allow for a smooth transition from THIP to an hourly panel of attorneys come July 2025.

Table 2: Comparison of hourly rates under current and proposed rates.

Current Hourly Rate	Current THIP Rate	Proposed New THIP Rate	POP Stabilized Hourly Rate
\$130-\$145	\$164-\$200	\$205-\$230	\$205-\$230

THIP has been a successful program, allowing OPDC to establish the beginning of the hourly panel that SB 337 directs OPDC to establish by July 2025. Since its inception, 345 attorneys have taken 6,070 cases

³ Economic Study

representing 4,232 clients through THIP. Since narrowing to only in-custody unrepresented cases, THIP has taken 1,442 cases representing 947 clients directly off of the in-custody unrepresented list.

Cost:

Expected Outcome: Emergency Board Request. Continuing THIP will ensure that hourly attorneys continue to remove cases from the unrepresented in-custody list. We do not know how many of these attorneys would stop taking cases if the rate returned to the standard rate, but we can assume it would be significant as the standard rate is below the market-lag rate calculated by the economic study. If today’s THIP assignment rate is maintained, OPDC expects to remove 120 clients and 200 cases per month from the unrepresented in custody list.

Timeline: If funded, rates will be implemented from January 2025-June 2025.

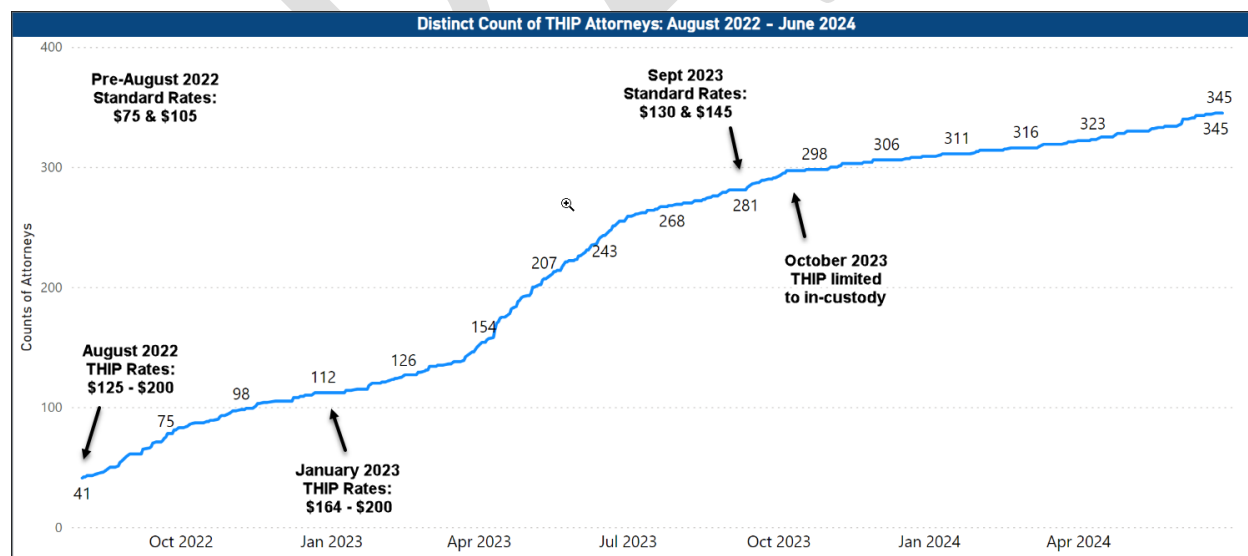
Barriers: Funding. This extension must come from a general fund ask to the Emergency Board.

Stabilize hourly attorney rate prior to July 2025

Action: In August 2022, OPDC began the Temporary Hourly Increase Program (THIP), which pays attorneys an enhanced hourly rate for taking on unrepresented cases. THIP has successfully brought in new attorneys who would otherwise not take OPDC cases and has been an essential part of the unrepresented response.

Through THIP, OPDC has seen a direct increase in the number of attorneys taking hourly cases and the hourly rate. As the chart below shows, the number of attorneys taking hourly (THIP) cases has increased more than eightfold since enhanced rates were implemented. This is even after THIP was limited to only in-custody cases in October 2023.

Table 1: THIP Attorneys over time.



Before 2022, when the hourly rate was \$75 and \$105/hour, about 1% of OPDC-assigned cases were taken hourly. Today, hourly cases are taken at \$130 and \$145/hour or \$164 and \$200/hour for in-custody unrepresented cases under THIP. Hourly cases now account for nearly 10% of all OPDC-assigned cases. Since its inception, 345 attorneys have taken 6,070 cases representing 4,232 clients through THIP. Since

narrowing to only in-custody unrepresented cases, THIP has taken 1,442 cases representing 947 clients directly off of the in-custody unrepresented list.

Despite its success, THIP was never intended to be a permanent program. The long-term solution to this problem is to pay attorneys a competitive rate to incentivize them to take public defense cases. THIP is set to expire on December 31, 2024. During the 2025 session, OPDC is requesting funding to [stabilize hourly attorney rates](#) for all attorneys at a two-tiered rate of \$205 and \$230/hour beginning July 2025.

Rather than requesting another short-term extension of THIP, which only focuses on in-custody cases, allowing the out-of-custody list to grow, OPDC is requesting that the Emergency Board fund the stabilization hourly rates for all attorneys at a two-tiered rate of \$205 and \$230/hour beginning January 1, 2025. This will:

- Bring in more hourly attorneys with an increased rate;
- Maintain the hourly attorneys we have now;
- Incentivize attorneys to take cases before they become unrepresented;
- Bridge the gap between the end of THIP in December 2024 and the new hourly rates anticipated in July 2025;
- Allow for a smooth transition from THIP to an hourly panel of attorneys come July 2025.

Table 2: Comparison of hourly rates under current and proposed rates.

Current Hourly Rate	Current THIP Rate	Proposed New Hourly Rate	POP Stabilized Hourly Rate
\$130 and \$145	\$164 and \$200	\$205 and \$230	\$205 and \$230

Cost:

Expected Outcome: September E-Board Request. Under THIP, OPDC removes 120 clients and 200 cases per month from the unrepresented in custody list. Stabilizing rates across the board would mean that attorneys would be willing to take cases from not only the in-custody list but on all unrepresented cases and, most importantly, on court-appointed cases preventing them from becoming unrepresented in the first place.

Timeline: 25-27 Biennium. If funded, new rates would begin in January 2025.

Barriers: Funding. This extension must come from a general fund ask to the Emergency Board.

Supports: Increasing attorney pay was one of the top recommendations from the Presiding Judges Crisis Reports⁴.

Establish a state trial office [serving the southwest](#)

Action: OPDC will request funding from the Emergency Board to establish a new state trial office serving Douglas county and the south coast. OPDC currently has an office in Medford, serving Jackson, Douglas, and Klamath counties. However, Jackson County is the primary county served by this office due to the size of the unrepresented list in that county and the geographic challenges for staff commuting from Medford to Klamath Falls and Roseburg.

⁴ CJC Crisis Report

In addition to geographic challenges, Douglas and Coos counties have unrepresented populations disproportionate to their size. This is primarily due to a lack of staffing, the difficulties of recruiting to rural areas, and the significant impact of conflict cases. OPDC anticipates that these staffing challenges will increase in the coming months, and setting up a southwest office would allow us to prepare for that influx in cases.

Cost:

Expected Outcome: September Emergency Board Request. A permanent office in the southwest will stabilize the defense bar in a high-risk area and eliminate the region's chronic staffing issues. The in-custody list in Douglas and Coos counties continues to grow as staffing impacts worsen. A southwest office would likely have to pick up cases currently handled by departing contract attorneys and take on the current and growing in-custody numbers. With such a volatile situation, it is hard to predict how quickly a southwest trial office of 6 attorneys could eliminate the region's in-custody list, it would likely take 3 to 6 months.

In addition to increasing capacity in Douglas and Coos counties, the southern and mid-valley offices would also be able to increase their capacity as they will no longer have to spend significant time driving to Douglas and Coos.

Timeline: October 2024-October 2025. Six months to establish the office and six months to eliminate the in-custody backlog.

Add additional assignment coordination staff within OPDC

Action: OPDC currently has two assignment coordinators and one administrative staff dedicated to finding attorneys for all unrepresented persons across the state. This is an overwhelming task, and all staff members are working at full capacity or currently being trained, even with the process improvements the agency has implemented.

OPDC is requesting funding to add two additional assignment coordinator positions. Each coordinator would be responsible for a different region of the state and would work with the region's judicial districts to find counsel for any unrepresented persons in the district.

Cost:

Expected Outcome: September E-Board Request. OPDC estimates a 50% increase in the monthly assignment of counsel with each additional assignment coordinator. With one staff member, OPDC assigned 140 cases in January; after an additional staff member was reassigned to this work in May, OPDC made 240 case assignments in June, a 71% increase in monthly case assignments. That increase reflects the new staffer, who is still in training, and the process improvements OPDC implemented in April-June.

Timeline: November 2024-December 2024. Full benefits will be seen by January 2025.

Add additional level 1 MAC

Action: With additional funding, OPDC could add additional attorneys to its current contracts in regions most impacted by the unrepresented crisis. These attorneys would take misdemeanor and C felony cases and provide added capacity in their jurisdiction to take court-appointed cases, preventing them from joining the unrepresented list.

OPDC has contractors who believe they can bring on new attorneys should they be given the funding, including provisional licensees under the Oregon State Bar Supervised Provisional Practice Exam (SPPE)⁵ program.

Cost:

Expected Outcome: September E-Board Request. Additional MAC increases the public defense capacity in a given jurisdiction. With six months of funding, every additional MAC would take up to 150 misdemeanors or 82 C felonies.

Timeline: If funded, additional attorneys could join contracts by January 1, 2025.

Continue effective existing programs

Temporary Hourly Increase Program (THIP)

THIP provides representation for an average of 6 clients on 10 cases daily. The program is limited to in-custody unrepresented persons. Continuing this program through December 2024 is a critical tool to secure representation for individuals most likely to be released pretrial pursuant to *Betschart* and those with the most liberty at stake by remaining unrepresented.

Strategically utilize state attorneys for the most serious cases

When an attorney cannot be appointed under OPDC contracts, OPDC works to appoint an hourly provider to the case. Should an hourly provider not be found, OPDC can appoint a state public defender to represent clients charged with person felonies or those potentially subject to pretrial release pursuant to *Betschart*. By holding the state employees back as a last resort, OPDC can strategically utilize state attorneys for the most serious cases.

OPDC will also utilize any unused capacity from the state attorneys authorized under HB 4002 not used on cases arising from HB 4002.

Ongoing communication, data collection, and sharing

OPDC works closely with OJD, state public defenders, and our contractors to track and report on the unrepresented persons crisis and to maximize existing resources. This data sharing has allowed OPDC to get the most up-to-date court data and prioritize cases more efficiently. OPDC also meets weekly with OJD and the Oregon District Attorney Association to review *Betschart* cases.

2025-2027 Biennium

Add additional accounts payable and preauthorized expenses staffing

Action: OPDC will request additional staff in the accounts payable and preauthorized expenses sections through a POP in 2025. With the increase in hourly providers comes more expense authorization and payments. This work requires additional staff to meet demand.

Cost:

Expected Outcome: Policy Option Package. Additional staff in these sections will ensure timely payments to hourly providers. Without timely payments, providers are hesitant to take OPDC cases.

Timeline: Additional staff can be hired and onboarded by September 2025.

⁵ Oregon State Bar SPPE Program

Stabilize the hourly attorney rate

Action: Part of the solution to this crisis is to stabilize public defender compensation at a rate competitive with the market. As previously discussed, OPDC has seen a direct correlation between the number of attorneys taking hourly cases and their pay rate (See Table 2 above).

OPDC must stabilize the hourly rate not to lose the progress made in building this hourly attorney panel through THIP. OPDC has a POP for 2025 to stabilize the hourly rate for all cases at a two-tiered rate of \$205 and \$230/hour. This will keep the attorneys taking hourly cases and bring in new attorneys while incentivizing attorneys to take cases before they become unrepresented.

Cost:

Expected Outcome: Policy Option Package. While we can't estimate the number of additional attorneys this rate increase will bring in, this hourly rate aligns with the economic study's market rate. OPDC believes this will make public defense hourly work more attractive to more attorneys.

Timeline: 25-27 Biennium. If funded, new rates would begin in July 2025.

Barriers: Funding. The main barrier to this is the cost of increasing rates.

Supports: Increasing attorney pay was one of the top recommendations from the Presiding Judges Crisis Reports.

Add additional state trial office attorneys and staff

Action: OPDC will request additional trial office attorneys and staff, including regional managers and Operations and Policy Analyst (OPA) positions, through a POP during the 2025 Legislative Session.

Cost:

Expected Outcome: Policy Option Package. Building the trial office towards SB 337 goals will significantly impact unrepresented cases around the state as new attorneys are brought on. Regional supervisors will also allow OPDC to build the trial division more sustainably and provide better management over regional representation problems. OPAs will help the trial division establish policy and procedures for a quickly expanding division.

Timeline: Additional staff can be hired and onboarded by September 2025.

Barriers: Availability of attorneys; while state trial positions have proven relatively easy to fill, the pool of attorneys will continue to shrink as the division grows.

Appendix and Reference Documents

Appendix

To Come

² Appendix A: OPDC Initiative to Date

³ Six Year Plan

⁵ Economic Study

⁶ [CJC Crisis Report](#)

⁷ Oregon State Bar SPPE Program

⁸ OPDC SPPE Policy

Reference Documents

Governor's letter to OPDC

[05.23.24_Governor's Letter to the OPDC.pdf](#)

OPDC response to Governor letter

[06.04.24 OPDC Response Letter to Gov Kotek.pdf](#)

OPDC Crisis Guidelines (Aug. 2023)

[276906 \(oregonlegislature.gov\)](#)

Public Safety Sub, Nov 2023

[Public Safety Joint 2023-2024 Interim - Oregon Legislative Information System \(oregonlegislature.gov\)](#)

DRAFT