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FACT FINDING REPORT – Hourly Rate Disparity

Oregon Public Defense Services

INTRODUCTION

I was retained by the Department of Justice's Labor and Employment section to review concerns raised by the ACLU of Oregon about the Office of Public Defense Services (OPDS).

As part of this process, I interviewed a number of witnesses who are or have been contractors in the past with OPDS, most of whom asked for anonymity due to concerns about retaliation.

All witnesses were admonished to keep our conversation confidential and were admonished that they were protected from retaliation for speaking to me in good faith on the subjects we discussed. I informed all witnesses who gave me permission to move forward with their concerns and share their names so that I could ask OPDS for documents related to them that I could not keep the substance of our conversation confidential as I needed to make a report to the Public Defense Services Commission. No witness is identified in this report.

SCOPE/ALLEGATIONS

Female defense attorneys have concerns about pay equity; i.e., that there are systemic issues of OPDS paying women defense attorneys less pay than male defense attorneys even though the female defense attorneys are doing comparable work.[1, 2]

BACKGROUND

1. The Sixth Amendment Center Report

In 2019, the Sixth Amendment Center found that the manner OPDS was using to pay defense attorneys was unconstitutional (Exhibit 1). The model was a "case credit" model in which attorneys and firms were paid based on the number of cases they took on. According to the report:

> "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 is prohibited by national public defense standards."

This caused OPDS to review its model for paying for defense services through contracts. The issues raised in this matter are focused on OPDS pay practices for hourly indigent defense services. However, one comment in the report is relevant here:

> "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."

The report went on to detail a "stunning" lack of oversight.[3] This comment is relevant because the perceptions of pay disparity have been fueled by inconsistency and lack of oversite.

2. Basic process for hiring public defenders for criminal defendants

There are two main methods OPDS uses to contract with criminal defense counsel. The main method is for OPDS to contract with firms and consortia to provide defense services. OPDS contracts are issued pursuant to an RFP and public contracting process.

The second method is for OPDS to hire individual attorneys to represent defendants on an hourly rate basis where there is a conflict or a need for counsel not satisfied by existing contracts. The individual attorneys hired on a per case basis are paid an hourly rate and bill OPDS at the end of their case (unless they are granted the ability to bill on an interim basis). The allegations about hourly rate disparities based on gender arise out of assignment of cases to hourly attorneys.

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[1] The ACLU also raised issues of retaliation, which are dealt with in a separate report as they raise concerns about job performance of a state employee.

[2] These individuals are or have been contractors, not employees. As the concerns raised here relate to compensation or hourly rate disparities based on gender, I am informed by concepts related to employment law because they relate to public policy around basic fairness in compensation. However, these laws relate to employees not independent contractors.

[3] Since that time, OPDS has addressed the issues raised in the Sixth Amendment Report in an ongoing manner which is outside the scope of this report.

These hourly attorneys are typically retained by going to court where they are assigned cases or because OPDS reaches out to them and asks if they have capacity to take on cases. In addition, some individuals noted that they were not successful in getting a contract and suspected that personal animus or gender discrimination played a role in their lack of success.

I reviewed the contracts but could not identify whether males or females were more often signers on the contracts. OPDS does not track gender categories of the contractors it hires for criminal defense. According to the General Counsel, historically OPDS has funded the same contractors cycle after cycle. Prior to the Sixth Amendment Report, OPDS issued an RFP every two years requesting a plan and a budget. The General Counsel said there are often not many competing proposals.

3. OPDS Hourly Rate Policies

OPDS specifies particular hourly rates for attorneys not under contract based on the type of case in its policies. Unless an attorney requested an exception to these policy hourly rates, the attorney was paid the policy rate.

The following chart establishes the pay policies on hourly pay for attorneys beginning in 2003 and showing the changes/increases in the rate through 2020[4]:

Table 1: Pay Policies[5]							
Attorney role	12/1/03	8/10/07	2/18/14	4/1/17	9/1/19	1/1/20	7/1/20
Lead - Regular Case	$40.00	$45.00	$46.00	$46.00	$55.00		$75.00
Lead - Capital Case	$55.00	$60.00	$61.00	$61.00	$61.00	$105.00	$105.00
Co-Counsel - Regular Case	$40.00	$45.00					$75.00
Co-Counsel - Capital Case	$40.00	$45.00	$46.00	$46.00	$55.00		$75.00
Nonresident	$40.00	$45.00	$46.00	$46.00	$55.00		$75.00

4. Exceptions to OPDS Hourly Rate Policies

OPDS payment policies have always provided for exceptions to these hourly rates. Between 2003 and 2019, the policy language barely changed (Exhibit 2, page 5 and Exhibit 3, page 5). Generally, attorneys could request exceptions to the pay policy in "compelling circumstances" which included substantial financial hardship on counsel because of the anticipated length or complexity of the proceedings or if the increased hourly rate would result in an overall savings (e.g., because of the skill or experience of the attorney).

[4] The rates changed significantly in 2023.

[5] https://www.oregon.gov/opds/provider/pages/policies-procedures.aspx. Not all policies dating back to 2003 are available online; some were sent to me separately.

The payment policy specifies that hourly exception requests must be received by OPDS within 30 days of appointment to a case (Exhibit 3, page 9).

Generally, attorneys received exceptions to the hourly rate policy in two ways. One way was to be assigned a case in court, and then to make an exception request upon receiving the case. The second was when a case was unassigned, and OPDS contacted attorneys asking them to take the case on. An attorney could negotiate a higher rate during that contact.

The process was for the attorney to make a request of the analyst assigned to the county or region for an increased rate. The analyst would ask the General Counsel for an increase in the rate. The General Counsel said he would request input from the budget director about the rate and either grant the request or deny it.[6] After the hourly rate was raised in 2020 to $75 and $105, the General Counsel said OPDS would not grant exceptions unless the analyst was unable to find an attorney to take a case (see below at pages 9-12). In reviewing the exception letters granted since 2003, our firm discerned several informal ways of making these decisions (see, Exhibit 4).

5. The data this report relies on: OPDS' exception spreadsheet

OPDS tracked these exceptions to the hourly rate on a spreadsheet entitled "Exception Requests." This spreadsheet originated in 2003 and data continued to be entered as of 2022. OPDS staff entered the case name, defendant name, attorney name, and other data into the "Exception Requests" spreadsheet whenever an attorney was granted a policy hourly rate exception (in other words, when they were paid more than the policy rate). In addition, OPDS maintained much of the supporting documentation (letters and emails) requesting and granting these exception requests.

There were a number of problems with the data in the "Exception Requests" spreadsheet, including accuracy of the record keeping and failure to record all the data. These problems probably stemmed from changes in staffing over the years and the possibility that maintaining the spreadsheet was not always the highest priority.

I received a copy of the OPDS "Exception Requests" spreadsheet (described in the preceding paragraphs). I also received many of the exception letters (or emails) dating back to 2003 (many are no longer retained by OPDS). The spreadsheet had information the database of letters did not have, and the database of letters contained exception requests which were not tracked on the spreadsheet. Our firm added the missing information from the database of letters/emails into the spreadsheet. In addition, we received additional exception letters periodically after having been assured we'd received all of them, necessitating that they be added to the spreadsheet from time to time. We also found errors in the spreadsheet based on the information in the exception letters.[7]

Although I am confident that the Exception Request spreadsheet is currently reasonably accurate based on the information I received from OPDS, the fact that the database of exception letters is

[6] Prior to the current General Counsel, the exception request documentation indicates previous General Counsel simply made the judgement call themselves.

[7] I do not believe OPDS was attempting to prevent me from having access to the exception request documentation. Rather, I suspect the documentation is not all kept in the same place and that some staff members at OPDS know where some of it is kept, and other staff members have knowledge of the location of other caches of this information. Certainly, as the documentation was located, it was provided to me.

not apparently housed all in one place makes it possible there are more letters which have not been discovered by current OPDS staff.

The Exception Requests spreadsheet also contains entries which were denied rate increase requests, some of which were interim billing requests (i.e., not rate increase requests), some of which were lump sum payments, some of which were not categorized as to the type of case and other reasons for not using the information as part of the analysis.

Ultimately, I based my analysis on the data contained in Appendices A and B, which were derived from a spreadsheet based on the corrected Exception Requests spreadsheet. The number of exception requests by type of case analyzed was as follows:

Table 2: Number of cases analyzed		
Type of Case	Number of exception requests approved	% of total
MPV, JUV, OTHR, CONT, DUIS, FPV, JUDM, DWS	16	1%
CFEL, FEL, DVIO	134	10%
AFEL, BFEL, HC, JDEC, JDEP, JLAW, JPDC, JPDP, JUDF, PCR, PCRA	254	19%
AM11, BM11, JM11 (Measure 11 cases)	383	28%
MUR, CMUR	567	42%
Total	1354	

Finally, the exception spreadsheet did not track gender. Our firm added in gender by making a judgement based on the individual's name and sometimes by looking attorneys up on their firm websites and identifying gender based on the manner in which the individual attorney presented. Again, I am confident the assignation of gender is reasonably accurate but recognize there might be some mistakes. There was no way to track hourly pay rates by gender through OPDS' accounts payable system.

6. What the data shows

I created three spreadsheets based on the Exception Request spreadsheet. The first, called "Median and Gap Analysis" groups all the entries by pay policy period (see Table 3). Appendix A is based on this spreadsheet.

Table 3 shows a high level summary of the gender gap in hourly rate exceptions by time period where the policy rates were the same. Please see Appendix A for the data upon which this table is based. The gap in pay was calculated by subtracting the female median from the male median for all attorneys, lead attorneys and co-counsel for the indicated categories and time periods.

Table 3: Median & Gap Analysis						
	2003-8/9/07	8/10/07-2/17/14	2/18/14-8/31/19	9/1/19-12/31/19	9/1/19-6/30/20	7/1/20-2023
Capital Murder - All attorney gender pay gap females to males	$0.00 – no difference	-$5.00 per hour (female median was $5.00 per hour **higher** than male median)	$0.00 – no difference	Insufficient data	n/a	n/a
Capital Murder – Lead counsel gender pay gap	$0.00 – no difference	$12.50 per hour (female median $12.50 per hour **lower** than male median)	-$5.00 per hour - (female median was $5.00 per hour **higher** than male median)	Insufficient data	n/a	n/a
Capital Murder – Co Counsel gender pay gap	$0.00 – no difference	-$5.00 per hour (female median was $5.00 per hour **higher** than male median)	$4.00 - per hour (female median $4.00 per hour **lower** than male median)	Insufficient data	n/a	n/a
Non-capital murder – all attorney gender pay gap	$0.00 – no difference	$5.00 - per hour (female median $5.00 per hour **lower** than male median)	$0.00 – no difference	n/a	-$7.50 per hour - (female median was $7.50 per hour **higher** than male median)	$0.00 – no difference
Non-capital murder – lead counsel gender pay gap	$0.00 – no difference	$5.00 - per hour (female median $5.00 per hour **lower** than male median)	$5.00 - per hour (female median $5.00 per hour **lower** than male median)	n/a	-$15.00 per hour - (female median was $15.00 per hour **higher** than male median)	$0.00 – no difference

Table 3: Median & Gap Analysis						
	2003-8/9/07	8/10/07-2/17/14	2/18/14-8/31/19	9/1/19-12/31/19	9/1/19-6/30/20	7/1/20-2023
Non-capital murder – co counsel gender pay gap	$0.00 – no difference	$2.50 - per hour (female median $2.50 per hour **lower** than male median)	-$5.00 per hour (female median was $5.00 per hour **higher** than male median)	n/a	-$5.00 per hour - (female median was $5.00 per hour **higher** than male median)	$0.00 – no difference

Generally, it appears there were years where there was a pay gap in the favor of female attorneys and other years when there was not. However, the period between August 10, 2007 and February 17, 2014 showed a consistent pay gap of a lower hourly rate for females for non-capital murder.

I also analyzed the Exception Request data by year, adding more detail such as low rate/high rate for males and females (see Appendix B). Generally, there are inconsistencies but not to the disadvantage wholly of either males or females, again with the exception of the years in the 2007-2014 period for capital and non-capital murder cases. For Appendix B, I grouped all murder cases together because the rates were generally similar.

Because both analyses (Appendix A and B) showed females were disadvantaged in the 2007-2014 years in the Murder (or Capital Murder) case categories, I looked at the data more closely (see, Table 4).[8] Separating Capital Murder from Murder cases revealed that women were generally paid more than men were for capital murder cases during this period and men were generally paid more per hour than women for non-capital murder cases during the same period (See, Appendix A, page 4).[9]

There were 88 requests for a higher rate for non-capital murder cases during this period (August 2007 to February 2014). Table 4 details the requests, approvals and amounts requested during the period by gender:

Table 4: Non capital murder exception requests August 10, 2007 through Feb 17, 2014						
	to $50	to $55	to $60	to $65	to $85	Total
Total Requests	35	28	16	7	2	88
Males	20	20	12	5	2	59
Females	15	8	4	2	0	29
# approved in full	35	26	3	0	0	

[8] There are also discrepancies in other years for lower level criminal cases. See, e.g., Appendix B at page 24 (levels 3-5). However, those discrepancies are based on a much smaller sample size and even one different rate can skew the data set high or low.

[9] It is true there is a significant discrepancy in the median hourly rates paid to male and female lead counsel ($12.50). However, that discrepancy applies to 11 out of 95 attorneys for the category. The median for the majority of female co-counsel was $5.00 per hour higher than male co-counsel.

Table 4: Non capital murder exception requests August 10, 2007 through Feb 17, 2014						
# partially approved	0	3	13	7	2	
# partially approved - males		1	10	5	2	
# partially approved - females		2	3	2	0	
% males requesting higher rate	34% (20 out of 59 males)	34% (20 out of 59 males)	20% (12 out of 59 males)	8% (5 out of 59 males)	3% (2 out of 59 males)	
% females requesting higher rate	52% (15 out of 29 females)	28% (8 out of 29 females)	14% (4 out of 29 females)	7% (2 out of 29 females)	n/a	
% males partial approval	n/a	33%	77%	71%	100%	
% females partial approval	n/a	67%	23%	29%	n/a	

Based on this data, the majority of women (80% of all women in the period) requested increases at the lower end of the pay range ($50 and $55) as compared to 68% of men making requests at the lower end of the pay range. In other words, women tended to ask for less than men did, and were approved for less as a result. This tendency to ask for less money per hour than men did caused the overall approvals for women to be in the lower end of the range. This also suggests that the exception approvals tended to be driven by what the attorney asked for, not on objective criteria.

7. Inconsistencies

The Exception Request spreadsheet showed numerous inconsistencies in hourly rates paid to attorneys based on corrected data. Based on reading many of the exception letters, it appears that exception request approvals were driven by what the attorney asked the rate to be and whether there was money in the budget for it.

An example will illustrate this. On January 29, 2015, an attorney wrote to OPDS requesting to bill two cases at the rate of $50.00 per hour (Exhibit 5). At the time, the policy rate for that type of case was $46.00 per hour.

This attorney was approved at the rate of $50.00 per hour for both cases. In addition, in the exception request documentation is an email exchange between two OPDS staff explicitly recognizing that OPDS did not have any objective criteria for making these determinations.

The Accounts Payable Lead sent this attorney's request to her supervisor, the Budget and Finance Manager, after having checked that the two cases were indeed murder cases and highlighting that the attorney was "only asking for $50/hour." She then added a suggestion:

> "I think I may have come up with something that would save you time in even reviewing these, if you approve. Maybe you could give me some sort of a "criteria" of if and when it is OK for me to just generically approve them, if they are under a certain $ amount for certain case types and only have to send you the ones where they are asking for a higher rate, etc? [sic] Up to you but if you get too busy, this is just a thought. :)"

Her supervisor responded:

> "There isn't a real set criteria for these requests. It really is a case by case basis with multiple factors. I appreciate the offer, but the request [sic] need to continue to come to me for approval" (Exhibit 5).

Obviously, OPDS needed (and needs) to provide defense counsel for public defense while working with a finite budget. That constraint is the driving force behind the very low rates for defense counsel over the years. Even in this context, however, OPDS could have created a more objective set of criteria for granting approvals than what existed. See, e.g., Appendix B showing high rate and low rate for similar categories of cases. The inconsistency exists across the years and across the categories of cases.

The current General Counsel told me he became aware of the inconsistencies in the hourly rates paid to attorneys soon after he was hired in 2016. The General Counsel confirmed exception rates at the time were not determined pursuant to any formal structure. Even though there were pay policies, if an attorney asked for a deviation from the policy, the analyst would ask OPDS' General Counsel's office, which would determine if the request was reasonable. The General Counsel agreed there was a great deal of subjectivity in the rates.

I asked OPDS how many men and women were qualified to handle different types of cases (e.g., Murder, Capital Murder, etc.) during the different policy pay periods to ascertain if there were simply lower numbers of qualified women. OPDS could not provide data on who was qualified to take on particular cases in any given year. OPDS' practice is to qualify attorneys to handle different kinds of cases based on an application showing their experience. As an attorney gains experience and applies to handle more complex and serious cases, OPDS updates the attorney's file once they are approved for higher level cases. Because of this, it is not possible to know how many women or men were qualified to handle for murder or capital murder cases in any given year as the data set changes every time someone is upgraded. Thus, we do not know how many women or men were qualified to take on Measure 11 cases, Murder cases, and any other kind of case, in any single year. This prevents an analysis of whether female attorneys were asking for exceptions to the policy rates at much lower numbers than males.

In addition, the nature of the Exception Request spreadsheet excludes from consideration those who did not apply for exception requests. There are unknown numbers of men and women taking cases from OPDS during the entire time frame covered by this analysis who never asked for exceptions and were never tracked in the spreadsheet.

a. Pay policy Change July 1, 2020 – continued inconsistencies

In the summer of 2020, OPDS attempted to improve consistency in what it paid per hour to attorneys. On July 1, 2020, OPDS implemented a policy to pay $75 per hour for all criminal cases other than death penalty cases, for which it paid $105. Further, as of January, 2021, OPDS attempted to move most cases towards a contract model in response to the Sixth Amendment Report. However, there continued to be some level of subjectivity in the rates paid to attorneys for similar cases within the same time period (see, Appendix B). For example, the deviations in the hourly rates for murder and capital murder cases after 2020 ranged from $65 per hour (likely because the attorney was appointed prior to July 1, 2020) to $158 per hour (Appendix B, page 5).

One example brought to my attention was a female attorney (Witness 1) who took a BM11 case in March 2021 and shortly thereafter asked for an increase from $75.00 per hour to $125 or $100 per hour, citing reasons within the exception policy including that she was the fourth defense attorney appointed because of the client's difficulty. Witness 1's request was denied by the General Counsel, who told her that increases above $75.00 per hour were not allowed for this kind of case:

> "Our staff will reach out to people with specific rates when it has been cleared ahead of time, which occurs when we are having difficulty locating counsel for a particular client. At no point have we offered anything more than $105/hour. But once the assignment is made, we do not readily revisit the rate. The rates are posted on our website and in our payment policy. Attorneys are free to stay on the conflict list or ask to be removed" (Exhibit 6).

It is true that no attorney handling a BM11 case had been granted a rate above $105.00 at the time of this email in March 2021. However, the BM11 cases in the exception spreadsheet after July 1, 2020 (and after March 2021) show that many were granted hourly rate increases above $75.00:

Table 5: Approved Exception Requests after 7/1/20

Date	Exception letter #	County	Type of case	Gender of attorney	Role of attorney	Amount requested	Amount approved by OPDS
28-May-21	1402	MCR	BM11	M	Lead	$105.00	$105.00
19-Jul-21	1423	WSH	BM11	M	Lead	$105.00	$105.00
29-Jul-21	1426	MCR	BM11	M	Lead	$105.00	$105.00
09-Aug-21	1429	MCR	BM11	M	Lead	$105.00	$105.00
18-Aug-21	102102	DOU	BM11	M	Lead	$105.00	$105.00
24-Aug-21	1431	WSH	BM11	M	Lead	$105.00	$105.00
3-Sep-21	102085	DOU	BM11	M	Lead	$105.00	$105.00
21-Sep-21	1436	WSH	BM11	M	Lead	$105.00	$105.00
12-Oct-21	1444	MCR	BM11	M	Lead	$105.00	$105.00
02-Nov-21	1445	MCR	BM11	F	Lead	$105.00	$105.00
05-Jan-22	1455	LAN	BM11	F	Lead	$105.00	$105.00
05-Jan-22	1457	LAN	BM11	F	Lead	$105.00	$105.00
28-Jan-22	1469	WSH	BM11	F	Lead	$105.00	$105.00
02-Feb-22	1471	LAN	BM11	M	Lead	$105.00	$105.00
02-Feb-22	1474	LAN	BM11	M	Lead	$105.00	$105.00
09-Feb-22	1478	MCR	BM11	M	Lead	$105.00	$105.00
10-Feb-22	1479	LAN	BM11	M	Lead	$105.00	$105.00
16-Feb-22	1481	MAR	BM11	F	Lead	$105.00	$105.00
22-Feb-22	1482	PLK	BM11	F	Lead	$105.00	$105.00
21-Apr-22	1492	LIN	BM11	F	Lead	$105.00	$105.00
05-May-22	1502	COO	BM11	F	Lead	$105.00	$105.00
23-May-22	1507	MAR	BM11	M	Lead	$105.00	$105.00
02-Jun-22	1514	DOU	BM11	M	Lead	$105.00	$105.00
04-Aug-22	1535	WSH	BM11	M	Lead	$158.00	$158.00
25-Aug-22	1569	WSH	BM11	M	Lead	$158.00	$158.00

Table 5: Approved Exception Requests after 7/1/20							
Date	Exception letter #	County	Type of case	Gender of attorney	Role of attorney	Amount requested	Amount approved by OPDS
14-Sep-22	1621	WSH	BM11	M	Lead	$158.00	$158.00
21-Sep-22	1634	WSH	BM11	M	Lead	$158.00	$158.00
22-Sep-22	1648	MCR	BM11	F	Lead	$158.00	$158.00
22-Sep-22	1639	MCR	BM11	M	Co	$105.00	$105.00
23-Sep-22	1641	WSH	BM11	F	Lead	$158.00	$158.00

In addition, there were other exception letters for other types of cases (referenced by bolded number) where OPDS approved higher hourly rates for attorneys with almost exactly the same circumstances as Witness 1's situation:

- January 2021: **1395**[10] (attorney appointed by court at $75 rate for murder in the second degree, asked for $100 effective the date of appointment, granted); **1396** (PCR, attorney had already represented defendant, when asked for appointment at $105, granted)
- February 2021: **1397** (restitution/manslaughter; offer of $105 made to attorney upon attorney inquiry about hourly rate); **1400** (murder, attorney had been retained by parents who couldn't secure funding and attorney was appointed at $75 per hour, asked for and received $105).
- May 2021: **1401** (case was AM11, difficult defendant and judge appointed counsel at a higher rate. In the email exchange between the General Counsel and the judge, the General Counsel said, "The highest rate we have as an agency is $105/hour. We can authorize that rate on this case, without a court order, particularly given the charges, the client's behavior, and the churn in counsel."). I note this was exactly the justification for a higher rate Witness 1 used, which the General Counsel denied.
- June 2021: **1409 & 1410** (murder 2, counsel and co-counsel were already appointed, and both said they would withdraw if they did not receive the rate of $105 per hour which they were typically paid according to their request, both requests were granted).
- July 2021: **1417, 1418 and 1419** (analyst sent an email to undisclosed number of attorneys asking for representation for three defendants with an offer of $105 per hour – charges were numerous, most serious was murder); **1422** (child abuse, attorney asking for $105 rate after the fact, approved because victim had died, and it would likely turn into a murder case)
- August 2021: **1427** (four years into case, attorney asks for increase from $80 to $105, approved retroactively to January 2021); **1428** (Robbery 1, case offered to attorney at $105 after previous counsel withdrew); **1429** (attorney reappointed to represent defendant attorney had previously defended asked for and received $105 per hour rather than guideline rate of $75).
- September 2021: **1435** (judge asked attorney to take the case, attorney asked OPDS for higher rate before agreeing).
- October 2021: **1440** (M11/Robbery 1, offer to attorney to take case at $105 due to difficulty finding counsel); **1441** (rape, sodomy case, offer to attorney to take case at $105 due to difficulty finding counsel).
- November 2021: **1447** (attempted murder, after taking case, attorney confirms $105 rate).

[10] The bolded numbers denote hourly rate exception letters.

- December 2021: **1452 & 1453** (request to take cases by OPDS, when attorney said it would be difficult to devote time for less than $100 per hour, OPDS response was "The standard hourly rate is $75 and we have allowed an increase to $100 for the reasons you listed.").

There were several examples of recently appointed attorneys asking for and receiving a higher hourly rate. It is not just a matter of negotiating in a particular manner to be appointed at a higher hourly rate, although there were many more examples of that than those detailed above. Typically, when asked if they would take a case, the response from the attorney was something like, "I will take it if the rate is $___ per hour." I have not included those examples here because they at least loosely fit the justification the General Counsel made to Witness 1, that OPDS would offer a higher hourly rate when they couldn't otherwise assign counsel to cases.

The Witness 1 does not appear in Table 5 because she was not granted an increase. I note that Witness 1 accepted the case in court and then asked for a higher hourly rate and was denied. Many of the attorneys asking for pay policy exceptions detailed above did exactly that. There does not appear to be an objective basis for denying Witness 1's request.

Giving attorneys who decline cases more money per hour than those who take them immediately leads to a result in which some attorneys, because they do not refuse a case in court, are paid less than others for the same work, creating unfairness. This put Witness 1 in the position of either taking a lower hourly rate or threatening to resign if she did not receive a higher hourly rate.

Especially in the case of Witness 1, who only came to my attention because she provided me the email correspondence between herself and the General Counsel[11], denying her request appears arbitrary at the least, given the very same circumstances which were present in granting exceptions both before and after her request in 2021.

b. Other inconsistencies

OPDS policy provides that hourly rate exceptions must be received within 30 days of appointment to the case. This was a reason many attorneys were denied an increased rate. However, there were also multiple exceptions to this policy, only two of which are shown in Table 6 as examples:

Table 6: Approved Exception Requests outside of 30-day appointment window				
Date of appointment	Date of request for increase	Gender of attorney	Role of attorney	Amount approved
5/30/14 (Exhibit 7)	11/17/14	Female Female	Lead Co-counsel	$65 $55
12/15/09 2/25/10 (Exhibit 8)[12]	7/29/10 for both cases	Male (requesting increases for two cases). This attorney also has been denied for late requests	Lead	$50.00 both cases

[11] Had Witness 1 not provided me with those emails, I would never have known about this inconsistency. Obviously, there could be others.

[12] Exhibits 7 and 8 were not redacted as to name because neither of the letter writers made complaints and these letters are public records.

c. Access to the General Counsel

Another reason for the inconsistencies could be the fact that some attorneys, either through a relationship with the General Counsel (or past General Counsels) or because they thought to ask, received information which was not generally available to the public. Based on my review of the General Counsel's emails, there were times when he provided detailed information to attorneys who asked him questions about policies and rates which he acknowledged in at least one email was not publicly available.

The General Counsel told me he will respond directly to questions he receives from attorneys who contact him. Based on my review of the emails provided,[13] the General Counsel has an informal style of communication with many who contact him, supporting his statement that he will provide information to any who ask.

One example is the General Counsel's response to a male attorney asking about turnaround time to be paid after invoicing on December 3, 2020. The attorney expressed dismay when he was told he would not be paid by December 10, 2020. The General Counsel responded by going into detail about the history of the pay policies, forthcoming changes and also letting this attorney know that there could be more increases in the hourly rate for attorneys.[14]

The General Counsel told me this is the kind of thing he would say to anyone who asked him. However, if not everyone asks the General Counsel, not everyone will know that adjusting hourly rates is something OPDS does with regularity and something which anyone can ask for at any time.

I recognize that exceptions are and have been provided for in OPDS policy since at least the early 2000s; however, I also recognize that attorneys are busy and focused on their work. Most of those I spoke with had heard through word of mouth only that they could request a higher rate. I heard from almost all of the female attorneys who agreed to speak with me that they were not aware in the first place that exceptions could be requested.

Some, with relationships with OPDS staff, found out directly about requesting exceptions and others found out from other attorneys. This kind of subjectivity in information sharing can and often does lead to serious disparities in information a particular group has at its fingertips.

Without objective standards for providing hourly rate increases and without objective standards about who receives the information, it is more likely than not that people who have relationships with those who have the information are the ones who benefit.

SPECIFIC ISSUES RAISED BY WITNESSES

Several witnesses raised issues about pay disparity based on gender, citing specific cases. Because identifying those cases would reveal who raised the issues, I have de-identified the information. The

[13] My requests for the General Counsel's emails were received by OPDS, then reviewed by the OPDS HR manager, who then determined which of the General Counsel's emails could be provided to me and which were protected from my review by attorney client privilege. In other words, it is possible I only was able to review only a subset of these types of emails and there are others which I was not provided.

[14] I note that the General Counsel sent this email approximately three months before he denied Witness 1's request for an increase over the policy rate, described above at pages 9-12.

people who raised the issues are identified as "Witness" and the examples of people they believe were paid differently are identified as "Example."

1. **Hourly Rates**: Female attorneys believed that they were paid less than friends of the General Counsel or male attorneys generally.

    a. Witness 2 told me she was being paid $55 per hour during a time when former capital defenders received $105, regardless of the type of case. This individual gave me two examples of particular male attorneys whom she believed were being paid $105 for cases regardless of the type of crime.

Example 1 appeared only once on the exception spreadsheet.[15] In March 2021, he requested and received $100 per hour for an A Felony. Of the nine attorneys assigned A Felonies in 2021, one was female. All the rates were either $100/hour or $105/hour for those nine attorneys. Example 1 was not being paid a higher rate than others doing similar work in 2021. Witness 2 did not have a comparable case with Example 1 in the years 2020-2022 but was paid $100/hour for a murder case in 2020.

Example 2 had five cases in the exception spreadsheet where he was approved for an exception increase above the policy (he was denied a higher rate in one case). The rates he was approved for were:

Table 7: Example 2's Approved Exception Requests

Year	Rate
2012	$55.00
2013	$60.00
2013	$65.00
2015	$70.00
2015	$70.00

Example 2 was not paid $105 per hour based on these records but might have had a higher contract rate.

    b. Witness 2 believed Example 3, a male, was awarded contracts (and Witness 2 was not) despite not living in Oregon. I could not locate a contract for Example 3 or relating to Example 3 but recognize Example 3 might have been issued a contract under other than his name (e.g., a firm or consortium name).

    c. Witness 2 told me mitigation investigators were paid more than she was. At the time, Witness 2 said she was being paid $55.00 per hour and the mitigation investigator was paid $65.00 per hour.

[15] Example 1 might have had a contract at a higher rate instead of being assigned hourly cases and asking for exceptions.

According to the pay policies, mitigation investigators were paid $1.00 less per hour than attorneys for non-capital cases beginning in 2010. However, an investigator could be paid more than the hourly rate if they were a qualified interpreter. According to OPDS policies, a bilingual mitigation interpreter could be paid more than an attorney was being paid in a non-capital case.

d. Witness 2 represented a defendant in 2019 and a male attorney represented the co-defendant. Witness 2 believed the male attorney was paid more than Witness 2.

The male attorney did not appear on the exception spreadsheet for this matter, which means the male attorney did not ask for an exception to the policy rate or he was under contract. The female attorney who represented this defendant after Witness 2 withdrew was paid $105/hour.

e. Witness 2 and another female attorney represented a client who had been through five different lawyers. When this client physically assaulted the female attorney, she withdrew. Witness 2 believes the subsequent attorney, a male, was paid more.

This is correct. Witness 2 was paid $70.00 per hour and her female co-counsel was paid $70.00 per hour. The subsequent male attorney who took the case over was paid $75.00 per hour.

CONCLUSIONS

1. This case was significantly hindered by several factors, including ten months during which OPDS did not allow me to access information or witnesses. When the case did recommence, I needed time to both refamiliarize myself with the facts and the status of the case and to work the matter into my schedule. In addition:

    a. I could not directly review all information I wanted, specifically communications with the General Counsel with attorneys about hourly rates. I received some communications after the Human Resources Manager reviewed them and provided me with those emails which were not protected by attorney client privilege. This prevented me from following up on specific information from female attorneys who declined to be identified because I could not specifically identify these witnesses in document requests. My requests had to be non-specific, and the responses to my requests from OPDS did not result in particular email exchanges which had been identified for me by witnesses. I do not know if this is because they were deleted, never existed in the first place or because they were filtered out by OPDS staff.

    b. I made several record requests which were responded to, then it transpired that not all relevant data had been provided by OPDS staff upon the initial request, necessitating that the analysis be redone as supplemental information was provided by staff.

    c. As noted throughout this report, there are problems with the data. Although I am reasonably confident in the analysis I have provided, it assumes that the data is correct and complete.

2. Based on the data provided and recognizing the concerns, there has been considerable inconsistency in how attorneys are paid when they request exceptions to the policies.

a. Generally, there is inconsistency with respect to pay according to gender, with some years females being paid more and other years males being paid more based on the median data.

b. The inconsistency led to reasonable concern about whether females were being paid less than males.

Because some women were willing to come forward, I was provided with specific information that likely would have been impossible to find otherwise. Some of this information suggests that a particular attorney, not females generally, was subject to different treatment (e.g., Witness 1's request for an exception in March 2021 which was denied despite almost identical requests being granted for both females and males). With respect to the over-arching allegation that females were generally paid less than males for comparable work, I cannot substantiate that this was true for every category. Although there were significant inconsistencies, the pay policy time period with the most concern was the period between 2007-2014 for non-capital murder. In every other period, females were sometimes paid more, and sometimes paid less. The pay gaps in the period 2007-2014 are attributable to women generally asking for less than men did rather than direct action by OPDS. However, this points to three significant concerns:

i. First, OPDS did not use its Exception Spreadsheet as a guideline for paying all attorneys fairly and consistently. Of course, the systemic reason for these disparate rates are the very low hourly rates paid in the first place to attorneys.[16] Generally, because the exception spreadsheet shows a wide disparity in rates for similar cases within similar time periods, I conclude the database was not consulted in granting exceptions.

ii. Second, OPDS did not have objective criteria that it implemented consistently in determining whether to approve hourly rate exception requests. In reading the exception request letters, they were sent to the General Counsel who would approve, disapprove or partially approve an exception request. It appears the General Counsel used their own knowledge of criminal law and the rates paid to criminal defense attorneys in cases of varying complexity to make these judgements. These approvals were sent by email and the response would be "approved" or "approved at $55.00" or other words to that effect, meaning that it was the judgement of the General Counsel, without explanation as to the reasoning. In addition, the current General Counsel acknowledges there was considerable subjectivity in the approved exception rates. Furthermore, OPDS staff acknowledged there were no objective criteria for exception rates (see, e.g., Exhibit 5).[17]

iii. Third, the rate exception approvals were driven by what attorneys asked for, meaning that if an attorney asked for more, they might not receive all they

[16] In February 2023, OPDS raised hourly rates for attorneys ranging from $125 per hour to $200 per hour depending on the type of case.

[17] See, e.g., McReynolds, v. Merrill Lynch, 672 F.3d 482 (2012), a disparate impact employment case, where a teaming policy risked exacerbating discrimination due to its lack of objective criteria guiding team formation.

asked for, but they might receive more than they would have if they had asked for less. For example, an attorney who asked for $50.00 per hour during this period was likely to be approved. Many who asked for $55.00 per hour were approved. Those who asked for $65.00 might be approved for $55.00 or $60; those who asked for $85.00 received $65.00. However, the attorney's request set the rate range, not objective criteria set by OPDS. Because 80% of the women asking for rate increases during this time period asked for $55.00 or less (as compared to 66% of men), they received lower rates over all than males did.

3. The fact that, in most years, the number of women applying for exceptions to the pay policy was dwarfed by the number of men suggests that either there were significantly fewer women qualified by OPDS (or applying to be qualified) to take cases or that women were more likely to be unaware that they could apply for an exception to the pay policy. If the male General Counsels for OPDS shared insights more often with male attorneys than they did with female attorneys, this could account for that difference. Based on the current General Counsel's emails I was able to review, he appears to be friendly with and share information with both males and females. As of 2016, the number of women entering law school in the nation equaled the number of men for the first time.[18] Simple difference in numbers could also account for this discrepancy.[19]

[18] https://www.nytimes.com/2016/12/16/business/dealbook/women-majority-of-us-law-students-first-time.html

[19] As noted above, OPDS could not provide historical data on attorneys qualified for representation on particular crimes. OPDS updates their files when an attorney is further qualified, so the historical data is lost.