

Requesting Nonroutine Expenses from the Office of Public Defense Services: The Easy Way and the Other Way¹

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General Counsel, Office of Public Defense Services
(Revised April 17, 2014)

Given the constitutional² and statutory³ right to the assistance of investigators, experts and other necessary support in public defense cases, why would the Office of Public Defense Services (OPDS) ever deny a request for preauthorization of nonroutine expenses (NRE)? Let us count (and discuss) the reasons.

1. **Form not signed.** This still accounts for many denials, in part because there was a brief time, after OPDS began receiving NREs electronically, when we did not make clear that we require a signature. But there should be no question now that we require a signature—either digital, electronic, typed or handwritten—that certifies that the attorney handling the case has personally reviewed and approved the submission. We are certainly aware that some requests are prepared and transmitted to us by legal assistants and other support staff, which is fine so long as the attorney assigned to the case has *personally* reviewed and approved the submission.

And whatever the reason for a denial, OPDS will provide a short statement explaining its action in the notice you receive. OPDS is always happy to discuss a denial in greater detail. If you want more information, please call our Preauthorization Desk (503-378-2478), and someone will direct you to the person who reviewed your request. You are always welcome to call me (503-378-2486) to discuss any nonroutine expense matter.

2. **OPDS can't read minds (or between the lines).** Entitlement to fees and expenses for a public defense case is contingent upon demonstrating that the expenditure is “necessary and reasonable...for investigation, preparation and presentation of the case for trial,

¹ This paper was originally presented at the OCDLA 2008 Annual Conference, and has been periodically updated for various seminars and other purposes.

² A federal due process right to “the raw materials integral to the building of an effective defense” was recognized in *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). A similar right likely exists under the Oregon constitutional right to counsel, Article I, section 11, but there has not been an argument that the analysis of a state constitutional claim differs from the analysis under the federal constitution. *See, State v. Rogers*, 313 Or 356 (1992) (recognizing, under *Ake*, “an indigent defendant’s constitutional right under the Fourteenth Amendment to the basic tools necessary for the preparation of an adequate defense,” but not separately analyzing a state constitutional claim because it wasn’t argued). The U.S. Supreme Court recently discussed the important role that expert testimony may play in a criminal case, and the need for attorneys to seek appropriate experts informed by a thorough understanding of the law and facts relevant to such requests. *Hinton v. Alabama*, 134 S.Ct. 1081 (2014).

³ ORS 135.055(3)(criminal cases); 419B.201 (juvenile dependency cases); 419C.206 (juvenile delinquency cases).

negotiation and sentencing.”⁴ This normally requires a detailed discussion of the facts of your case, including matters that may be protected by the attorney-client privilege. Such confidential communications are protected by statute, ORS 135.055(9), by the Public Defense Services Commission Payment Policies and Procedures (PPP),⁵ and by the Evidence Code, ORS 40.225(5). Oregon Rule of Professional Conduct 1.6 also permits disclosures “impliedly authorized in order to carry out the representation...”

OPDS receives many NREs that merely assert that the requested expenditure is reasonable and necessary. This is not sufficient.⁶ If time permits, rather than deny an insufficient NRE, we may call or email you to discuss the matter. It is generally not considered good form to respond by blaming the secretary or legal assistant to whom you assigned this task without any supervision or review. Providing an attorney reviews and approves an NRE submission (see Number 1 above), there is nothing wrong with delegating the job of requesting NREs, but considerable care is usually required to establish that an expenditure is necessary and reasonable, *i.e.*, that there is a reasonable probability that the expenditure will produce a benefit for the defense or, conversely, that there is a significant risk of error if the expenditure is denied.

3. You never call (or write). As indicated, if time permits we may call or email to discuss a request in order to determine whether a particular expert or other assistance is reasonable and necessary in a case. Often, of course, we can only leave a message asking that you call us back to discuss the matter. If counsel fails to return our call or reply to email within a reasonable time, we’ll deny the request.

4. Not selling PCR insurance. OPDS shares your commitment to providing adequate and effective assistance of counsel to each client, and we encourage counsel to seek preauthorization for expenditures that are necessary to meet that commitment. We are occasionally told—or figure out—that counsel is requesting an expenditure because he or she feels compelled to take some action that, while not necessary for the defense of the case, may guard against potential later claims against the attorney in post-conviction

⁴ ORS 135.055(3)(a). The statutory scheme requires that requests for NREs comply with the Public Defense Services Commission’s (PDSC) Payment Policies and Procedures, available online at www.oregon.gov/opds.

⁵ PDSC PPP Sec. 5.

⁶ A request for NRE is sufficient if it establishes, pursuant to ORS 135.055(3), that an expense is “necessary and reasonable.” The case law interpreting this statute formulates the required showing either in terms of demonstrating a benefit to the defense or establishing the detriment if a request is denied. Thus, in *State v. Hammond*, 42 Or App 137 (1979), the court stated that “[t]here must be some showing from which the court can infer the existence of a reasonable probability that the expenditure will produce a benefit for the defense,” and in *State v. Rogers, supra*, the court stated that “[w]here a defendant establishes the probable value of the assistance sought such that there is a significant risk of error in the proceedings if that assistance is denied, the defendant is entitled to that assistance at state expense.” See also, *State v. West*, 250 Or App 196 (2012). Either way, the term “necessary” can be understood in its plain language sense as “essential.” (Webster’s defines “necessary” as “**2**: that cannot be done without: that must be done or had: absolutely required: ESSENTIAL, INDISPENSIBLE[.]” *Webster’s Third New International Dictionary* 1511 (3rd Ed 1993).)

proceedings. Given that there is no limit to the imagination of some clients when it comes to post-conviction claims, this is not, without more, a sufficient explanation for a NRE request.

A corollary of this type of request is one that lawyers make simply to appease the difficult client. Such a request, of course, is an abdication of your professional obligations to the client and others. *See, Jones v. Barnes*, 463 U.S. 745, 103 S.Ct. 3308 (1983). You may wish or expect that we will deny these requests. But submitting them is inappropriate and creates unnecessary work for us.

4. You found the best. Even if an expert is necessary, the expense must still be reasonable. In fact, the PPP Sec. 3.1.1 states that “counsel must obtain services by the least expensive means available and within the guidelines amount whenever possible, unless OPDS approves a more expensive means as reasonable and necessary.” Elsewhere, counsel is directed to demonstrate that an amount in excess of the guidelines schedule is justified by “compelling circumstances.” PPP Sec. 3.2.3.1. Counsel is well served by knowing the guideline amounts (they’re part of the Policies and Procedures), and discussing them with your proposed provider. Without an explanation to OPDS about why a request exceeds the guidelines, we may deny the request or approve only the guideline amount.

5. Your expert is not from around here. By statute, OPDS may approve out-of-state experts “only if in-state expert witnesses are not available or are more expensive than out-of-state expert witnesses.” ORS 151.216(1)(f)(I). Thus, your request may be denied without such an explanation. PPP Sec. 3.2.3.1.

6. It happened yesterday. OPDS will be responsible for only those expenditures that are *pre*authorized. Occasionally, an emergency or other unavoidable circumstance will result in counsel or others incurring an expense on a case that was not preauthorized. In fact, the NRE forms provide for designating an “effective date” for the authorization that might precede the “signature date.” However, expenditures will be approved in such circumstances only with an explanation of “what exigent circumstances existed requiring counsel to incur the expense before requesting preauthorization or before the OPDS could act on the request.” PPP Sec. 3.2.3.3.

7. The judge wants it. We are told quite often that counsel is seeking authorization for an expenditure because the judge told counsel to provide the court with a psychological evaluation or some similar service. OPDS will usually not authorize such expenditures. If the court, or district attorney, or Department of Human Services wants an evaluation, they can pay for one⁷. OPDS will only authorize *ex parte* evaluations and services, where counsel requesting the expenditure has control over who will perform the service, what information is made available to the service provider, whether results will be disclosed to others, and whether a report is written.

⁷ The major exception to this is for “aid and assist” evaluations, when ordered “upon motion of the court or a financially eligible defendant. ORS 161.365(6).

8. **A better client.** Understandably, lawyers want to help their clients. Unfortunately, although often sought, OPDS cannot approve expenditures that improve your client's circumstances, whether that be medical treatment, counseling, legal representation in collateral matters, or acting lessons on how to testify (yes, this has been sought). Of course, counsel wouldn't think of asking OPDS to pay a client's fines and fees on probation, but they do ask—but we won't authorize—that we pay for the drug or alcohol evaluation that was also a condition of probation when the client is facing a “show cause” hearing for failing to get one himself.

9. **You're retain and...** You may receive approval of NREs, even though retained, if the court has entered an order finding your client financially eligible for appointed counsel. Without such an order, a request for NREs will be denied.

10. **You're peerless.** In 2003, the Oregon Legislature directed the Public Defense Services Commission to establish a peer review system for the approval of certain NREs. ORS 151.216(1)(g). Since that time, OPDS has required supervisor review for NREs coming from public defender offices. Unless we see evidence of such review on a request from a public defender office, we may deny the request for failure to obtain it.

11. **OPDS is wrong.** I know this is far-fetched, but it is possible that we either didn't understand your request, or that a judge may view the matter differently. Regardless of the reason for a denial of a NRE, you may wish to seek reconsideration, since many denied requests are approved once we receive additional information. Seeking reconsideration is also a prerequisite for judicial review of an NRE denial. In either case, reconsideration is easily accomplished by “submitting to the OPDS a letter requesting reconsideration and *including additional support* for counsel's request [emphasis added].” PPP Sec. 3.2.3.1.

If reconsideration is denied, then an appeal may be taken to the Presiding Judge (or his or her designee) for matters pending in the circuit court. These appeals are *de novo* reviews of your NRE request. Such appeals should be treated as confidential *ex parte* proceedings in which the prosecuting attorney is not served with pleadings or invited to attend, and the court is asked to seal the pleadings. This is clear from ORS 135.055(9), which bars disclosure of “court orders” to the prosecutor until a case concludes. These appeals should, however, be on the record and counsel should be prepared to make offers of proof, in order to preserve the record for appeal to the appellate courts in the event of an adverse ruling.

While not explicitly required by statute, OPDS expects to be notified of appeals from the denial of reconsideration, PPP Sec. 3.2.3.1, and to be given an opportunity to be heard. Certainly, as a party to the appeal, OPDS is entitled to service under UTCR 2.080. As a practical matter, unless OPDS is heard on a matter, it will not accord any precedential value to a trial court ruling on any particular matter.

NREs the Easy Way. As most attorneys who request NREs know from experience, the process is usually quite quick and painless. With a working knowledge of the PDSC

Payment Policies and Procedures, and some serious thought about what you need to represent your client well, it is not very difficult to craft a request for NREs that should be approved. It does require some work, though, and given the importance of investigative and other support in many cases, its work that needs to be done well. There are some things to remember in each case that may make the job easier:

1. **The Big Ten.** For a number of years, OPDS has circulated a list of questions that each NRE request should answer. This is a good guide for your narrative explanation. The list is attached.
2. **Good Form.** The form that you submit specifying what you want and how much it will cost should be completed fully, especially the sections concerning travel that might be required. Many attorneys detail this information in their narrative but omit it from the form. There are only four “NRE intake” people available to receive and prepare your requests for review, and they should not have to read the narrative to get the necessary details and complete your work. After all, the time they spend working on the intake of dozens of NRE requests every day is time away from paying the roughly 3500 fee statements they receive each month. **Use the current forms available on our website and submit them in accordance with the instructions there.**
3. **I swear.** It’s not necessary to submit an affidavit explaining the need for your request. We do need an explanation, but it should be in a letter or other statement accompanying the request form.
4. **Call sometime.** If you have a question about how to request an NRE, or want to discuss a possible request, give us a call. We like to hear from you.

NON-ROUTINE EXPENSE REQUESTS - TEN IMPORTANT QUESTIONS

1. Is the attorney court-appointed; if retained, has the court entered an order that the client is eligible for appointed counsel?
2. What are the charges/allegations?
3. Has there been a change in circumstances since completion of the affidavit of eligibility, of which the attorney is aware, that would make the client able to pay the cost of the requested service?
4. Has a previous request been made in the case for similar or related services? If so, why is the additional expense needed? What was completed under the previous authorization(s)?
5. What will the provider do? (E.g. interview 10 witnesses, examine scene of events.)
6. Why is the service needed and how will provider's service benefit the defense? (E.g. What circumstances make it reasonably probable that the expenditure will benefit the defense or create a significant risk of error in the proceedings if the expense is denied? If a polygraph is requested, what fact(s) will be the subject of the test, what circumstances create a reasonable probability that the client will pass the test, is the DA in the county usually willing to consider the results in plea negotiations, disposition, etc.?)
7. Are there co-defendants? Can counsel obtain items (copies of photos, tapes, other discovery) from co-defendants' counsel at a cost significantly below the cost to obtain these items from the original source? Are there other services that can be shared in co-defendant cases without prejudice to any of the defendants?
8. Will the provider work for the guideline rate? Attorney needs to have made this request of the provider or be aware that the provider has declined to work at that rate. If not, why can the attorney not use the services of another provider at, or closer to, the guideline rate? (Note: If the provider is out-of-state, the request must show either that there is no qualified provider in the state or that the out-of-state provider is less expensive.)
9. If the provider is requesting, for example, an unusual number of hours at the guideline rate, why are 20 hours, instead of 5 needed for this particular evaluation, investigation, etc.? (E.g. lengthy records to review, multiple conditions to be explored, multiple incidents to evaluate.)
10. Note whether expedited consideration is requested.

[SAMPLE "OKAY" NRE JUSTIFICATION LETTER]

Law Office of Your Name Here ❖ yournamehere@email.com
1234 Your Street ❖ Your City, OR 97210 ❖ 503-123-4567

October 25, 2013

Preauthorization Desk
Office of Public Defense Services
1175 Court Street NE
Salem, OR 97301

VIA Email Attachment

Re: State v. Client
Waco Circuit Court No. CR1300745

To Whom It May Concern:

My client, identified above, is charged by indictment with Count 1 Assault on a Public Safety Officer, a Class C felony; Count 2 Resist Arrest, a Class A misdemeanor; and Count 3 Criminal Trespass in the Second Degree, a Class A misdemeanor. I am requesting funds in an amount not to exceed \$1750 in this case for the services of a neuropsychologist, Dr. Shrink Name. I have requested no other nonroutine expense requests in this case.

Comment [PEL1]: The charges are identified.

My client is a twenty-one year old man, who is petite in stature and appears to be younger both physically and intellectually. He is charged with offenses arising from an incident at a restaurant where he acted bizarrely and refused to leave when requested to do so by restaurant management. According to police, they escorted my client out of the restaurant and told him not to reenter, at which time he went back into the restaurant. They say that when police tried to arrest him for trespass, he fought with them strenuously.

Comment [PEL2]: We ask that you identify prior requests for services. If similar services have been previously approved, you will need to explain why further funding is now required.

My client has told me that he is "slow," and that he dropped out of school at about the age of thirteen and also began using methamphetamine at about that age. I learned from my client's father that there is a history of mental illness in the family, but my client has never seen a mental health professional for evaluation or been treated for any disability. The father told me that my client was a heavy methamphetamine user in his early teens but that his behavioral and intellectual problems predate that use. The father told me that school authorities urged the family to place my client in

Comment [PEL3]: This background helps us understand how a mental state defense might apply in this case.

special education classes but they resisted because they refused to believe anything was wrong. The father also told me my client cannot read or write. He says my client laughs at inappropriate times (I have observed this as well) and claims to hear voices and speak to voices that are imaginary.

Comment [PEL4]: This is all confidential and protected case information, which an attorney is permitted to provide, that is necessary in order for OPDS to determine whether the requested evaluation is reasonably likely to yield helpful information.

My legal assistant has provided much of the above information to Dr. Shrink Name, a neuropsychologist with 25 years experience, who said that the cognitive deficits and early drug use by my client suggest organic brain damage is involved that is best evaluated by a neuropsychologist. He estimates that ten [10] hours of work will be required to evaluate my client, consult with me, and write a report if I determine one will be helpful. He charges \$175 per hour, which I am informed is the minimum hourly rate for a competent neuropsychological evaluation in this part of the state.

My client and his father have agreed to meet with Dr. Shrink Name if funds are allowed to retain his services. I believe it is reasonably likely that Dr. Name will identify and substantiate that my client has significant organic brain damage. This information will be used in determining whether we should pursue a mental state defense in this case, and may be used in support of a plan to seek an appropriate sentence if my client chooses to either engage in plea negotiations or is convicted following a trial.

Comment [PEL5]: We need to know how the requested expenditure is reasonably likely to make a difference in the case.

Sincerely,

Name Here
Attorney at Law

[SAMPLE "NOT OKAY" NRE JUSTIFICATION LETTER]

Law Office of Your Name Here ❖ yournamehere@email.com
1234 Your Street ❖ Your City, OR 97210 ❖ 503-123-4567

October 25, 2013

Preauthorization Desk
Office of Public Defense Services
1175 Court Street NE
Salem, OR 97301

VIA Email Attachment

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Waco Circuit Court No. CR1300745

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Due to the seriousness of the charges, I believe it is reasonable and necessary for my client to be evaluated by a neuropsychologist in order to provide constitutionally competent defense at trial and sentencing.

Sincerely,

Name Here
Attorney at Law