

Before I begin, my presentation on my tenure as a contract public defender, I want to briefly discuss two other issues that are highly relevant to the issue of indigent defense in Nevada. They both have to do with that most precious commodity – money.

First, while I am no longer a contract public defender, I still accept appointments to represent indigent defendants in criminal cases. As a result, I am well acquainted with NRS 7.125, which is woefully inadequate in its compensation amounts. As you undoubtedly know, this statute sets the amount of compensation at \$100 an hour for non-capital cases and \$125 an hour for capital cases. This statute also has caps on total fees that Courts rightly ignore on a regular basis. The statutory amounts were set by the 2003 Legislature, raising the hourly fee from \$75 an hour.

According to the Bureau of Labor Statistics prices in general have risen approximately 30% in the last 15 years -- which actually is fairly low inflation. But when the fees paid for appointed counsel do not change, fewer and fewer attorneys will be willing to accept these appointments. By comparison, attorneys appointed in federal cases receive \$140 an hour in all but capital cases – and those pay \$188 an hour.

The second issue has to do with the compensation within the Office of the State Public Defender. THAT office, like their counterpart attorneys in other parts of state government such as the Office of the Attorney General, top off its deputies pay 30% to 40% LOWER than their counterparts in Clark, Washoe, and Elko Counties. When your pay structure is such that it is difficult to both recruit and retain good people, you are going to have a hard time NOT having a turnover that makes effective representation difficult.

Now to my tenure in Churchill County.

I was a contract public defender for Churchill County for five years, from November, 2012 through November, 2017. My tenure as a contract public defender should be of some interest to this commission. To put it simply, it is a matter of the Good, the Bad, and the Ugly.

First, a brief history.

Churchill County had been a part of the State Public Defender system until some point in the late 1980s to early 1990s. The County left the State Public Defender system because that office would send deputies out from Carson City. Fallon felt ill-used – and that it was not getting sufficient value for its tax money.

Churchill County's solution was to hire a local attorney, Paul Drakulich, to act as its Public Defender. Mr. Drakulich, in turn, contracted with another attorney

to provide conflict representation. This system was in place until 2012, with the same attorney acting as the primary public defender and several other attorneys acting as his contracted conflict counsel during that time. In 2012, Churchill County realized that this position was becoming untenable and its public defender system was teetering on the brink of collapse.

In the summer of 2012, Churchill County started looking at other models. The County Commission ultimately concluded that the best model would be to contract with three attorneys, as independent contractors, to provide indigent defense. The Commission decided that \$10,000 a month was an ideal amount to offer as compensation. At the time, Lyon County was paying its contract public defenders \$11,000 a month. As I was told, because Churchill County only had one justice court and everything was centrally located, lower compensation was appropriate since there was no need to travel between different courts or offices in other parts of the county.

I had left the Office of the Attorney General after 15 years there as a prosecutor at the end of June, so the timing could not have been more fortuitous. I recruited another former Senior Deputy Attorney General, Troy Jordan, and the two of us put in a joint bid for one of the three contract positions. Mr. Jordan and I were both experienced prosecutors. I had been practicing criminal law for 20 years at that time and Mr. Jordan had been practicing for about 8.

Mr. Jordan and I thought that sharing this contract, coupled with the appointed work each of us was accepting in other counties, particularly Washoe, would provide us with sufficient income.

15 or so other attorneys also applied, though a Fallon-based attorney told the County Commission that the amount being offered as compensation was inadequate and he refused to apply for that reason. We were assured that the criminal division of the district attorney's office was not part of the selection process.

In early November, the County Commission was presented with the recommendations of the selection committee as to whom to give the contracts. Mr. Drakulich, and another local attorney, Jacob Sommer, were awarded two of the three contracts. Mr. Jordan and I were offered the third. Ironically, the attorney Mr. Drakulich was paying as the conflict public defender, Sheri Emm-Smith, declined to apply for a share of the public defender contract.

However, a problem had arisen. Mr. Drakulich had been arrested for a D.U.I. and had checked himself into alcohol rehab. The County needed someone to fill in immediately. Mr. Jordan and I were approached and asked if we could start immediately and take over his caseload in his absence. In return, the county offered to pay each of us \$10,000 a month for November and December. We agreed.

With his permission, we temporarily moved into Mr. Drakulich's office and started. Less than a month later, we moved into our permanent offices. In both locations, we walked into an unholy mess, with cases languishing and multiple cases set for trial. Mr. Jordan and I agreed that the best approach was for each of us to be responsible for half of the caseload, while providing "cover" for the other half.

One of the cases set for trial involved a case of Open Murder. The case was not a "who did it" but a "why did he do it." While the trial judge was willing to reset the trial date, the trial was projected to last two weeks. There were thousands of pages of discovery, the preliminary hearing had lasted over a day. The defendant had been sent to Lake's Crossing twice.

Mr. Jordan and I realized that preparing for and participating in a trial of that complexity would take most of a month of the trial attorney's time. The contract we had just signed allowed for ancillary services but there was no provision for extra compensation for complex trials. There was no way for one of us to prepare for trial and do any other legal work. We approached the senior judge assigned the trial and proposed that one of us be appointed co-counsel at \$100 an hour with the other attorney handling the case as part of the contract and both us "splitting" the money from the "appointment." Remember, each of us was being paid \$5,000 a month.

For whatever reason, the senior judge asked for the input from the prosecutor handling the case. The prosecutor argued there was no need for second counsel and the judge denied our request.

Realizing that this case would be financially ruinous to one of us, Mr. Jordan and I literally played “rock-paper-scissors” at the District Court counter to decide which of us would be responsible. I lost.

Fortunately, the case settled with my client pleading guilty to second degree murder without a weapons enhancement. This was doubly fortunate because as I reviewed the preliminary hearing transcript I discovered an error that, had it been committed at trial, would have almost certainly led to reversal and re-trial.

Our local district judge, Tom Stockard, had been disqualified from the case. He later told me that he disagreed with the other judge’s decision and would have appointed one of us as co-counsel to prevent the case from being financially ruinous to one of us. Unfortunately, that was small solace when Mr. Jordan and I faced the possibility of financial ruin in the first year of our contract.

A year later, Mr. Jordan came to me and indicated that he didn’t think that our joint contract was working financially. Because the Washoe County Public Defender had made the decision to stop conflicting as much as his office had in the past with cases, there were fewer cases going to the Alternate Public Defender and

from there to the Bob Bell group. Mr. Jordan suggested that he resign his portion of the contract so that I could have the full contract and he could pursue a private practice based out of Reno. I agreed.

From December, 2013 until December, 2017, I personally handled approximately 1/3 of the public defender cases in Churchill County. During that time I took 5 cases to jury trial. I received an outright acquittal in four of those trials. My client was convicted in the fifth.

The cooperation from the Court, particularly Judge Stockard, was beyond reproach during my tenure.

In an early case, I was appointed to represent a client charged with dozens of counts of statutory sexual seduction involving a young woman who was 14 or 15 years old. The case had gone to preliminary hearing and the young woman had testified about a long-term ongoing sexual relationship involving most kinds of sexual activity – hence the stacking of the charges.

While meeting with this client at the jail, he informed me that he was, in fact, impotent. Along with his general denials, his lack of criminal record, and the lack of other physical evidence, I thought that impotence was a pretty good defense for statutory sexual seduction.

However, saying you are impotent and having persuasive evidence for a jury that you are impotent can be two very different things.

I asked a friend of mine, a highly respected internist in the Reno area, if he would examine my client and testify if necessary as an expert witness at trial.

Physicians are not cheap – and even when doing something of a favor for a friend the discounts are not huge. My doctor friend had his price – both to examine my client and to testify in court if needed – in the thousands of dollars.

I approached Judge Stockard *ex parte* and told him who I needed to hire, why I needed to hire him, and the cost for his expertise. Judge Stockard readily agreed and signed a sealed order authorizing payment for the doctor's asking price.

The doctor examined my client, examined and ordered blood work. The doctor's report came back with the opinion that my client had abnormally low levels of testosterone and was, in fact, impotent.

At 4:30 p.m. on the Friday 3 weeks before trial was set to commence, I noticed this physician as an expert witness and supplied both his CV and report containing his conclusions to the prosecution.

I heard later that the prosecutor was none too pleased with my notice. "Apoplectic" may be the best descriptor. He quickly discovered my expert was not

a “hired gun” and was very well-respected in his field. A week before trial, the prosecutor made an offer my client could not refuse.

As a result, my client, who been facing the scarlet letter of being a registered sex offender and many years in prison as a sexual predator, instead pleaded to two gross misdemeanor counts of Annoying a Minor, which does not require sex offender registration.

But his case was not the exception. In addition to the doctor I hired as an expert early on, I was never denied any other expert I sought either.

Any time I had a case set for trial, I would seek *ex parte* approval for an investigator. I was never refused.

I never felt like the County, the courts, or the district attorney ever tried to interfere with how I handled any of my cases. The District Attorney usually supplied discovery in a timely manner within a day of an appointment.

The Justice of the Peace, Mike Richards, appoints counsel on Monday, Tuesday, and Wednesday mornings and expects the public defenders to meet with their incarcerated clients BEFORE court that Thursday so that they can intelligently participate in a pre-trial with the District Attorney and discuss their custodial status. Additionally, Churchill County has a Pre-Trial Court Services program which evaluates risk to the community – and in many cases Judge

Richards will grant an OR based on the Court Service's recommendation at the same time he appoints counsel.

I had unfettered access to the jail to meet with clients at almost any time I wanted to meet with them, staffing and unrelated bookings permitting – morning, afternoon, or night.

Those are all good things that Churchill County should be commended for doing. However, in addition to the judge refusing Mr. Jordan and my request for the appointment of co-counsel there were other things that were also BAD about the experience.

The contract itself was for five years.

There was no increase in compensation for the entire term of the contract.

There was no additional compensation for lengthy jury trials.

On two occasions, the county did not pay the contract public defenders in a timely manner. The first one occurred as my wife and I were preparing to travel out of state on a vacation. That occurred because someone in the controller's office did not release the funds. The other time literally occurred on New Years, 2017. On both occasions, I felt a singular lack of appreciation or concern on the county's part due to their acts – and I would add that the New Years one was deliberate – with none of the contract public defenders being informed in advance.

The contract itself lacked symmetrical termination clauses. That is, if I wanted out of the contract, I was required to give 90 days notice. If the county wanted to terminate my contract, they were only required to give 60.

Termination of parental rights and post-conviction petitions were outside the scope of the contract. However, when Judge Stockard decided that mediations were a good way to resolve certain child dependency cases, these mediations, which could sometimes last half a day, WERE included.

The county took the position that extra work was expected – and it appeared very unappreciative when it was done even without additional compensation.

In April, 2014, Mr. Drakulich was suspended from practicing before the Nevada Supreme Court. The Churchill County Commission subsequently voted to terminate his Public Defender contract. For approximately 4 months, Mr. Sommer and I handled all the Public Defender cases in Churchill County. For the first two of those months, we did not receive an additional dime of compensation, even though our caseloads had increased by 50%.

When Mr. Sommer asked about him and me being paid for the extra work, we were informed by the County Comptroller that there was no money budgeted and there was nothing he was willing to do to ameliorate the issue. In fact, I do not remember receiving so much as a “thank you” for the extra work.

The County should have been on notice that there was a problem with their Public Defender system, both in its scope of responsibilities and in the compensation it provided.

When Mr. Drakulich was fired by the county, it put out an RFQ for his replacement. The response was underwhelming. The caliber and level of experience of the attorneys was such that Judge Stockard asked his Child Support Master, Charles Woodman, to apply. Mr. Woodman agreed if he could have another attorney, Peter Smith, handle the bulk of the contract with him supervising. Mr. Smith was inexperienced in criminal law at the time, but Mr. Woodman's tutelage made it work.

In 2016, Mr. Woodman decided to run for Reno Municipal Judge. He advised the county that if elected, he would have to take office almost immediately. Churchill County sought RFQs. They received four bids. One was from Mr. Smith. Another was from a family law practitioner with no criminal law experience. The third was from an attorney who had just taken the bar, and the final one had been an attorney for two years but had "skeletons" in his past such that his appointment would have been hugely embarrassing to Churchill County. Unfortunately for Mr. Woodman – a very good attorney who would have made an excellent judge – but fortunately for Churchill County, he lost. Churchill County did not have to act further on the RFQs.

In 2017, however, the County proved, at least to me, that it views Indigent Defense as the ugly stepchild for which it will provide the absolute minimum funding.

In the first part of 2017, Mr. Woodman, Mr. Sommer, and myself held informal discussions on the state of our contract. We became aware that Lyon County, which had been the original model for Churchill County, had agreed to major increases in the compensation level it would pay its contract public defender levels. We knew that Douglas County was paying its contract public defenders almost \$80,000 a year more than we were receiving. We naively thought that Churchill County would recognize that the amount it was paying was insufficient.

When the County held its budget hearings in February, 2017, all three public defenders appeared before the County Commission and expressed our concerns. We thought that we had impressed upon them the need to bolster the amount the county was paying for indigent services.

We heard nothing. We waited and heard nothing. Finally, in late August, 2017, the County Manager asked me if I would meet with her in her office to discuss the Public Defender Contract. I told her that I would.

I found it odd that she wanted to speak with just me and not all three contract public defenders together. Still, I went into the meeting expecting the

County Manager to hear my thoughts and engage in a discussion on what a fair amount of compensation would be as well as other portions of the contract Mr. Woodman, Mr. Sommer, and myself all thought needed changing.

I was mistaken.

Instead, the County Manager bad mouthed the county's fiscal health and offered to renew my contract for three years at the same amount the county had paid for the last five. No increase. Some minor tinkering at the edges, but basically, the same deal as before. Maybe, if the economy stayed positive, we MIGHT get a 2.5% increase in the next fiscal year. \$250 a month – after 6 years.

I was stunned. I had thought my loyalty in sticking with the contract. My experience in representing indigent defendants in Churchill County for the preceding five years, my trial record, everything, would be appreciated. Obviously it was not. Instead, I received the very real impression that County Manager Eleanor Lockwood viewed the Public Defenders, at best, as a budgetary inconvenience.

I listened politely but remained non-committal. I told her that we needed to discuss these issues further.

Over the next few days, I wrote Ms. Lockwood a 9 page letter. I told her that I was unwilling to re-sign for \$10,000 a month.

I used the data from the Administrative Office of the Courts to compare Churchill County's caseload versus other counties. I specifically focused on criminal cases filed in the district court, since a) all criminal defendants are entitled to representation in those proceedings, and b) public defenders handle a 95%+ of these criminal cases.

Using the AOC numbers, I noted that the three Churchill County Public Defenders had the HIGHEST caseload per attorney of any contract public defender county in Nevada and the LOWEST rate per case.

I also noted that according to the AOC, Churchill County's district court criminal case filing rate had risen 145% from 2013 to 2016.

Additionally, I noted that the District Attorney's budget had increased 8% during the five-year contract period.

Using data from Transparent Nevada, my letter further noted that her own pay had risen 19% during the contract period, the county's Comptroller's salary had risen 18%, and the Chief Criminal Deputy District Attorney's salary had risen 11% -- even as the Public Defender's salaries had remained flat during this same period.

I further noted that the amount of time I spent working on contract matters had risen from about 3/4 of my time in 2014 to 80% of my time in 2017. I also

noted that once overhead was taken into account, I was being paid significantly less than the most junior deputy district attorney – even though I had more actual experience practicing criminal law than ANY other attorney in the county.

The County Manager’s response was silence – other than to put out an RFQ for my position.

Over the next month and a half, only two attorneys responded to the RFQ – and one of them was the same ethically disqualified attorney who applied when Mr. Woodman was running for Reno Municipal Judge.

I had no further contact with her for over a month. In the interim, other than the RFQ – and receiving pushback from Mr. Sommer and Mr. Woodman, she placed an agenda item on the County Commission’s September 20 agenda where she proposed paying giving three attorneys a 5% increase (or \$500 a month) the first fiscal year and a 2 ½% increase the next two years, raising the public defender pay to \$11,000 a month over three years.

Unfortunately, on that date I was scheduled for cataract surgery, so I could not attend the meeting. Instead, I sent the Commission a four-page letter, endorsing a suggestion made by Mr. Woodman that the County conduct a study of public defender compensation over the next year and showing our good faith by re-signing for one year at the current contract rate.

At the September 20 meeting, the County Commission tabled Ms. Lockwood's proposal and suggested conducting a workshop to discuss public defender compensation.

I sent Ms. Lockwood a conciliatory e-mail. She responded with an unprofessional, angry email, impugning my professionalism while providing strong evidence that the criminal division of the District Attorney's Office had inserted itself into the negotiation process.

This workshop never happened. I do not know if she individually contacted the County Commissioners or not, but ultimately, Ms. Lockwood decided to reduce the number of contract public defenders from 3 to 2, while increasing the compensation of the remaining 2 from \$10,000 a month to \$14,000 a month.

I was left out in the cold.

In effect, she increased the workload of Mr. Sommer and Mr. Woodman by 50% while increasing their compensation by 40%

She did not negotiate with either Mr. Sommer or Mr. Woodman. Rather, she used coercion and intimidation – telling Mr. Sommer that he had less than two days to decide whether or not to accept and that if he did not accept she would seek an RFQ for his position. Mr. Woodman was given a similar ultimatum.

I made a final plea to the County Commission. I made two comparisons for them to consider. First, I looked at the per capita amount each county spent on indigent defense. Using that metric, Churchill County's indigent defense budget was second to last at \$14.47 per person. The state average was \$22.35.

I then compared the indigent defense budget as a percentage of the District Attorney's budget. Churchill County had the lowest percentage of any county in the state – at 16%. The average was 31%.

Despite these numbers, the County Commission adopted Ms. Lockwood's proposal.

On December 1, 2017, my tenure as a contract Public Defender came to an end. I would be dishonest if I did not say I was both hurt and angry at how I was treated by the County Manager. I would also be dishonest if I did not say I was deeply dismayed by the active meddling by the criminal division of the District Attorney's Office.

Overall, other than events surrounding the contract renewal, I would have to say it was a positive experience. My respect for Judge Stockard and Judge Richards remains high. They are both jurists who I believe deeply care about indigent defendants and those who represent them.

I just wish I could say the same about the Churchill County Commission and County Manager Eleanor Lockwood. Instead, I feel like that unwanted stepchild, part of a system that they wish they did not have to fund but which they know that they have to. Indigent defense deserves better than what I saw from them last year. For the sake of indigent defendants in Churchill County, I hope the County realizes the mistake it made just seven months ago.

Thank you for your time.