

THE RIGHT TO COUNSEL IN RURAL NEVADA

EVALUATION OF INDIGENT DEFENSE SERVICES

AUGUST 2018

The Right to Counsel in Rural Nevada: Evaluation of Indigent Defense Services
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The Sixth Amendment Center (6AC) is a non-partisan, non-profit organization providing technical assistance and evaluation services to policymakers and criminal justice stakeholders. Its services focus on the constitutional requirement to provide effective assistance of counsel at all critical stages of a case to the indigent accused facing a potential loss of liberty in a criminal or delinquency proceeding.

Prepared for

The Nevada Right to Counsel Commission (NRTCC) was established by legislative action on June 8, 2017 to conduct a study of issues relating to the provision of indigent defense services and to make recommendations to the legislature to improve the provision of those services ensuring effective assistance of counsel is provided as required by the United States Constitution and the Nevada Constitution.

Executive Summary

[*to be added*]

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Chapter I. Introduction

Nevada has 16 counties and the one independent city of Carson City that is the state's capitol – for purposes of this report we will refer to a total of 17 counties. Two of the counties are markedly urban. Clark County includes Las Vegas and has a county population of 2,204,079.¹ Washoe County includes Reno and has a county population of 460,587.² Together, these two urban counties constitute nearly 89% of Nevada's total population of 2,998,039,³ but they cover only 13% of the state's geography.⁴

The other 87% of Nevada's vast 109,781 square miles makes up the 15 counties⁵ that are home to only 11% of all Nevadans.⁶ These counties are not solely mining lands, deserts, ranching and farmland, and federal government preserves and facilities, though there is definitely much of that to be found. Some of these counties and towns within them are suburban neighbors or bedroom communities to more urban areas, while others host highly sought-out tourist locations and events. We refer to them collectively as "rural counties" because that is how they are described in criminal justice arenas within Nevada itself.

This report is concerned with the provision of the effective assistance of counsel to the poor who face possible loss of liberty in criminal or delinquency proceedings, as guaranteed under the Sixth Amendment to the United States Constitution, in the courts of these 15 rural counties. The sparse populations and large geographical areas in most of these counties present difficult barriers, rarely faced by the urban counties,⁷ to delivering effective assistance of counsel.

A. The right to counsel in Nevada

The Sixth Amendment to the United States Constitution states that in "all criminal prosecutions" the accused shall enjoy the right, among others, to "have the Assistance of Counsel for his

¹ U.S. Census Bureau, American FactFinder, 2017 Population Estimates (ID: PEPANNRES), https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2017_PEPANNRES&prodType=table.

² U.S. Census Bureau, American FactFinder, 2017 Population Estimates (ID: PEPANNRES), https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2017_PEPANNRES&prodType=table.

³ U.S. Census Bureau, American FactFinder, 2017 Population Estimates (ID: PEPANNRES), https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2017_PEPANNRES&prodType=table.

⁴ indexmundi, Nevada Land area in square miles, 2010 by County, <https://www.indexmundi.com/facts/united-states/quick-facts/nevada/land-area#chart>.

⁵ indexmundi, Nevada Land area in square miles, 2010 by County, <https://www.indexmundi.com/facts/united-states/quick-facts/nevada/land-area#chart>.

⁶ U.S. Census Bureau, American FactFinder, 2017 Population Estimates (ID: PEPANNRES), https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2017_PEPANNRES&prodType=table.

⁷ This evaluation did not include Clark and Washoe counties. We note, however, that the residents of these counties who live outside of the primary population centers (i.e., Las Vegas and Reno) may well experience the same impediments to receiving the right to counsel as do rural county residents, and urban sheriff's departments likely face many of the same struggles imposed by geography as do their rural counterparts. In Washoe County for example, it is roughly 170 miles as the crow flies from Reno, in the southern part of the county where the district court sits, to the county's northern border at the Oregon state line.

defence.”⁸ In 1963, the U.S. Supreme Court declared it an “obvious truth” that anyone who is accused of a crime and who cannot afford the cost of a lawyer “cannot be assured a fair trial unless counsel is provided for him.”⁹ Since *Gideon v. Wainwright*, the Sixth Amendment right to counsel means every person who is accused of a crime is entitled to have an attorney provided at government expense to defend him in all federal and state courts whenever that person is facing the potential loss of his liberty and is unable to afford his own attorney. Moreover, the appointed lawyer needs to be more than merely a warm body with a bar card.¹⁰ The attorney must also be effective,¹¹ subjecting the prosecution’s case to “the crucible of meaningful adversarial testing.”¹²

Early on, many thought *Gideon* applied only to felonies. The Supreme Court has since expressly clarified that the Sixth Amendment requires the appointment of counsel for the poor threatened with jail time in misdemeanors,¹³ misdemeanors with suspended sentences,¹⁴ direct appeals,¹⁵ and appeals challenging a sentence imposed following a guilty plea where the sentence was not agreed to in advance.¹⁶ Children in delinquency proceedings, no less than adults in criminal courts, are entitled to appointed counsel when facing the loss of liberty.¹⁷

A crime in Nevada is either a felony, a gross misdemeanor, or a misdemeanor.¹⁸ Felonies carry the possibility of incarceration in state prison or a sentence of death,¹⁹ and they are divided into categories, with the most serious being a category A felony down to the less serious category E felony.²⁰ Gross misdemeanors can be punished by more than six months up to less than a year in

⁸ U.S. CONST. amend. VI.

⁹ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

¹⁰ As the Court noted in *Strickland v. Washington*, 466 U.S. 668, 685 (1984), “[t]hat a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command.”

¹¹ *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (“It has long been recognized that the right to counsel is the right to the effective assistance of counsel.”). To be effective, an attorney must be reasonably competent, providing to the particular defendant in the particular case the assistance demanded of attorneys in criminal cases under prevailing professional norms, such as those “reflected in American Bar Association standards and the like.” *Strickland v.*

Washington, 466 U.S. 668, 688-89 (1984).

¹² *United States v. Cronin*, 466 U.S. 648, 656 (1984).

¹³ *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

¹⁴ *Alabama v. Shelton*, 505 U.S. 654 (2002).

¹⁵ *Douglas v. California*, 372 U.S. 353 (1963).

¹⁶ *Halbert v. Michigan*, 545 U.S. 605 (2005).

¹⁷ *In re Gault*, 387 U.S. 1 (1967). “[I]t would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase ‘due process.’ Under our Constitution, the condition of being a boy does not justify a kangaroo court.” *Id.* at 27-28. “A proceeding where the issue is whether the child will be found to be ‘delinquent’ and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child ‘requires the guiding hand of counsel at every step in the proceedings against him.’ . . . [T]he assistance of counsel is essential for purposes of waiver proceedings, [and] we hold now that it is equally essential for the determination of delinquency, carrying with it the awesome prospect of incarceration in a state institution until the juvenile reaches the age of 21.” *Id.* at 36.

¹⁸ NEV. REV. STAT. §§ 193.120, 193.170 (2017).

¹⁹ NEV. REV. STAT. § 193.120(2) (2017).

²⁰ NEV. REV. STAT. § 193.130 (2017).

a county jail.²¹ Misdemeanors can carry punishments of up to six months in the county jail, although some misdemeanors do not have loss of liberty as a possible sentence.²²

Nevada's constitution states that "in any trial, in any court whatever, the party accused shall be allowed to appear and defend in person, and with counsel, as in civil actions."²³ By statute, an indigent defendant accused of a felony or gross misdemeanor "is entitled to have counsel assigned to represent the defendant at every stage of the proceedings from the defendant's initial appearance before a magistrate or the court through appeal, unless the defendant waives such appointment."²⁴ An indigent defendant charged with any public offense, including a misdemeanor, may request appointed counsel, and the judge must appoint an attorney whenever "representation is required."²⁵ Similarly, all children in delinquency and in need of supervision matters are statutorily guaranteed the right to appointed counsel.²⁶

"States are free to provide greater protections in their criminal justice system than the Federal Constitution requires,"²⁷ but they cannot provide less. Though the federal Constitution does not require it,²⁸ Nevada laws allow appointed attorneys to continue representing indigent defendants in criminal and delinquency cases beyond direct appeal and into postconviction proceedings when the attorney considers the representation to be "in the interests of justice."²⁹ The U.S. Supreme Court has yet to expand *Gideon*'s promise to civil matters, but Nevada protects children alleged to have been abused or neglected by requiring that an attorney be appointed to represent them "at all stages of any proceedings" under the state's protective custody laws.³⁰ Nevada statutes also ensure the mandatory appointment of counsel, whenever a person does not have an attorney, for every person facing involuntary admission proceedings based on mental health³¹ or intellectual disability³² and those facing involuntary quarantine because of disease.³³

²¹ NEV. REV. STAT. §§ 193.140, 193.120(4) (2017).

²² NEV. REV. STAT. §§ 193.120(3), 193.150 (2017).

²³ NEV. CONST. art. 1, § 8 ¶ 1.

²⁴ NEV. REV. STAT. § 178.397 (2017).

²⁵ NEV. REV. STAT. § 171.188 (2017); *see also* NEV. REV. STAT. § 189.005 (2017) ("proceedings in justice courts are governed by" Nevada's criminal procedure statutes).

²⁶ NEV. REV. STAT. § 62D.030 (2017).

²⁷ *California v. Ramos*, 463 U.S. 992, 1014 (1983). *See, e.g., Oregon v. Hass*, 420 U.S. 714, 719 (1975); *Cooper v. California*, 386 U.S. 58, 62 (1967); *O'Connor v. Johnson*, 287 N.W.2d 400, 405 (Minn. 1979) ("The states may, as the United States Supreme Court has often recognized, afford their citizens greater protection than the safeguards guaranteed in the Federal Constitution. Indeed, the states are 'independently responsible for safeguarding the rights of their citizens.'"); *South Dakota v. Opperman*, 247 N.W.2d 673, 674 (S.D. 1976) ("There can be no doubt that this court has the power to provide an individual with greater protection under the state constitution than does the United States Supreme Court under the federal constitution.").

²⁸ *Murray v. Giarratano*, 492 U.S. 1, 10 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 555-57 (1987); *Ross v. Moffitt*, 417 U.S. 600, 610-12, 617-18 (1974).

²⁹ NEV. REV. STAT. §§ 180.060(3)(b), 260.050(3)(b) (2017).

³⁰ NEV. REV. STAT. § 432B.420(2) (2017).

³¹ NEV. REV. STAT. § 433A.270 (2017).

³² NEV. REV. STAT. § 435.126 (2017).

³³ NEV. REV. STAT. § 441A.660 (2017).

Additionally, judges are given discretion to appoint publicly funded counsel in a host of other circumstances.³⁴

This report is concerned only with the right to counsel that is mandated by the Sixth Amendment. Throughout the rural counties of Nevada though, the same systems and attorneys are used to provide all right to counsel services – both those that are required under the federal Constitution and those that, although not mandated by the Sixth Amendment, are required or allowed under Nevada law. This means that the indigent defense attorneys in rural counties are appointed to represent adults and children in a wide variety of case types and must be competent not only in criminal and delinquency law but also in a broad range of civil law areas. (See discussion of attorney qualifications, supervision, and training in Chapter III.)

B. Nevada courts structure & jurisdiction

The right to counsel is carried out in the courts. Nevada's constitution, statutes, and court rules establish the structure of its court system and the jurisdiction of its courts.³⁵

Appellate courts: There is one state Supreme Court with seven justices.³⁶ The Nevada Supreme Court has broad administrative authority over the court system, with the power to make rules regulating the operation of the judicial system and governance of attorneys,³⁷ which it does through its administrative docket.³⁸ It is the state's court of last resort and has jurisdiction over all appeals and discretionary review of cases arising out of the district courts.³⁹

There is also one Court of Appeals with three judges, first established in 2014 and opening its doors for business in January of 2015.⁴⁰ Since creation of the Court of Appeals, all appeals from the district courts continue to be filed in the Supreme Court, and by court rule, the Supreme Court assigns certain of those cases to the Court of Appeals.⁴¹ The Supreme Court hears all matters in death penalty cases,⁴² while most direct appeals and postconviction appeals in criminal cases are presumptively assigned to the Court of Appeals.⁴³

Trial Courts: The trial court system in Nevada is made up of three different types of courts: district courts, justice courts, and municipal courts. It is simplest to understand the organization of the courts in each county by beginning with the district courts, but it is simplest to understand the jurisdiction and how the courts operate by beginning with the municipal courts. For ease of understanding, we take both approaches.

³⁴ See, e.g., NEV. REV. STAT. § 62D.100 (2017) (parent/guardian of child alleged to be delinquent or in need of supervision); § 128.100(1) (2017) (child in termination of parental rights proceeding); § 128.100(3) (2017) (indigent parent in termination of parental rights proceeding).

³⁵ NEV. CONST. art. 6, §§ 1, 4, 19; NEV. REV. STAT. §§ 1.010, 2.120, 2A.160 (2017).

³⁶ NEV. CONST. art. 6, § 2; NEV. REV. STAT. § 2.010 (2017).

³⁷ NEV. CONST. art. 6 § 19; NEV. REV. STAT. § 2.120 (2017).

³⁸ See NEV. R. ADMIN. DOCKET, preamble.

³⁹ NEV. CONST. art. 6 § 4; NEV. REV. STAT. § 2.090 (2017).

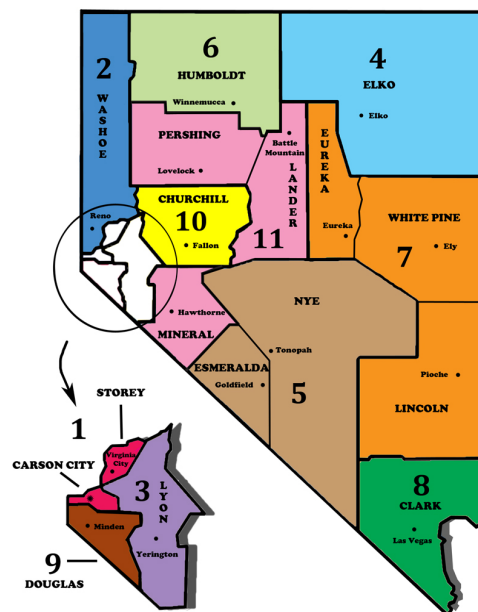
⁴⁰ NEV. CONST. art. 6, § 3A.

⁴¹ NEV. R. APP. PROC. 17.

⁴² NEV. R. APP. PROC. 17(a)(2).

⁴³ NEV. R. APP. PROC. 17(b)(1).

Nevada is statutorily divided into 11 judicial districts, with each judicial district covering either one, two, or three counties.⁴⁴ Each judicial district has one or more elected district court judges,⁴⁵ and all district court judges must have been a licensed attorney for at least 10 years prior to taking office.⁴⁶ Every district court judge has authority to act everywhere in the state,⁴⁷ but the judges elected to each district “direct and control the business” of their own district.⁴⁸ The legislature sets the salary of the district court judges, which is paid by the state.⁴⁹ Nevada has 82 district court judges, but only 15 of those judges are elected to the judicial districts covering the 15 rural counties.⁵⁰ (See table of “Courts & Judges in the Rural Counties” at page ____.)



Source: Supreme Court of Nevada, Administrative Office of the Courts

As a result, a district court judge is not always available in every county on any given day. For example, a single district court judge is elected to the 11th Judicial District, which encompasses Lander, Mineral, and Pershing counties.⁵¹ These three counties together cover over 15,279 square miles,⁵² and they circle around Churchill County in a different judicial district. To get from the county seat in Mineral to the county seat in Lander is a 239 mile drive. (See map of “11th Judicial District: Lander, Mineral, and Pershing Counties” at page ____.) Assuming the judge does not get tied up in a trial in one or another county, he handles criminal proceedings in: Pershing County on the 1st and 3rd Mondays of each month; Lander County on the 1st and 3rd Tuesdays of each month; and Mineral County on the 2nd and 4th Tuesdays of each month. A similar situation exists in the 5th Judicial District with two judges covering Esmeralda and Nye counties, and in the 7th Judicial District with two judges covering Eureka, Lincoln, and White Pine counties. While there are two judges in each of these districts, the geographical area of their responsibilities is even larger than in the 11th Judicial District. Esmeralda and Nye counties in the 5th Judicial District cover over 21,763 square miles.⁵³ (See map of “5th Judicial District: Esmeralda and Nye Counties” at page ____.) Eureka, Lincoln, and White Pine counties

⁴⁴ NEV. REV. STAT. § 3.010 (2017); see NEV. CONST. art. 6, § 5.

⁴⁵ NEV. REV. STAT. §§ 3.011 through 3.0197 (2017); see NEV. CONST. art. 6, § 5.

⁴⁶ NEV. REV. STAT. § 3.060 (2017).

⁴⁷ NEV. REV. STAT. § 3.220 (2017).

⁴⁸ NEV. REV. STAT. §§ 3.220, 3.020 (2017).

⁴⁹ NEV. REV. STAT. § 3.030 (2017).

⁵⁰ The 2nd Judicial District covers Washoe County and has 15 district court judges. NEV. REV. STAT. §§ 3.010, 3.012, 3.0125 (2017). The 8th Judicial District covers Clark County and has 52 district court judges. NEV. REV. STAT. §§ 3.010, 3.018, 3.0185 (2017).

⁵¹ NEV. REV. STAT. §§ 3.010, 3.0197 (2017).

⁵² indexmundi, Nevada Land area in square miles, 2010 by County, <https://www.indexmundi.com/facts/united-states/quick-facts/nevada/land-area#chart>.

⁵³ indexmundi, Nevada Land area in square miles, 2010 by County, <https://www.indexmundi.com/facts/united-states/quick-facts/nevada/land-area#chart>.

in the 7th Judicial District cover over 23,684 square miles.⁵⁴ (See map of “7th Judicial District: eureka, Lincoln, and White Pine Counties” at page ____.) Indigent defense attorneys and the people whom they represent, along with sheriff departments, prosecutors, and judges in other courts, must all frequently adjust and readjust their schedules to accommodate the availability and schedule of the district court.

The counties are required by statute to provide all costs of facilities, operations, and salaries of personnel for their district courts.⁵⁵ In a given judicial district, the district court must sit in the county seat of every county in the district, and the board of county commissioners in each county is allowed to also establish “additional locations within the county for the district court to hold court.”⁵⁶ Among the 15 rural counties, only Nye County incurs the cost of providing two district court locations. (See map of “5th Judicial District: Esmeralda and Nye Counties” at page ____.)

The vast distances to the district court from far-flung areas of the larger counties create serious difficulties for indigent defendants in getting to and from court. Indigent defendants often lack their own transportation and few counties have any form of public transportation. As one judge in Elko County explained, “it’s really, really hard for people to get there.” A Lyon County public defense attorney and law enforcement officials in Nye County reported that, when a defendant is arrested and then released on bail, many times they do not have any way to get back home from the jail or courthouse.

Each county is required by the state legislature to divide itself into “a convenient number of townships”⁵⁷ and then to have a justice court that holds court in each township.⁵⁸ Each justice court has at least one justice of the peace,⁵⁹ and in the rural counties there must be one justice of the peace for every 30,000 to 34,000 residents of each township,⁶⁰ unless the existing justices of the peace persuade the legislature that the caseload does not warrant it.⁶¹ Each justice of the peace has authority to act throughout the geographical boundaries of the township from which he is elected⁶² and throughout the county for criminal cases.⁶³ In the rural counties, they do not have to be a licensed attorney; in fact the only qualification is that they be a eligible to vote and have a high school diploma or its equivalent.⁶⁴ The salary of a justice of the peace is set and paid for by the county,⁶⁵ and the county is responsible for all costs of operating the justice court.⁶⁶ Justice

⁵⁴ indexmundi, Nevada Land area in square miles, 2010 by County, <https://www.indexmundi.com/facts/united-states/quick-facts/nevada/land-area#chart>.

⁵⁵ NEV. REV. STAT. §§ 3.100 (courtroom, attendants, fuel, lights, stationery, judge’s office), 3.250 (clerk of court), 3.260 (deputy clerks), 3.310 (bailiffs), 3.320 (court reporter), 3.370(4) (court reporter) (2017).

⁵⁶ NEV. REV. STAT. § 3.100 (2017).

⁵⁷ NEV. REV. STAT. § 257.010 (2017). A county must establish a separate township for each area of the county that contains an incorporated city. *Id.*

⁵⁸ NEV. REV. STAT. §§ 1.050, 4.020 (2017).

⁵⁹ NEV. REV. STAT. § 4.020(1) (2017).

⁶⁰ NEV. REV. STAT. § 4.020(1)(c)-(d) (2017).

⁶¹ NEV. REV. STAT. § 4.020(3) (2017). See NEV. CONST. art. 6, § 8, ¶ 1.

⁶² NEV. REV. STAT. §§ 4.020(2), 4.155 (2017).

⁶³ NEV. REV. STAT. § 4.370(4) 2017.

⁶⁴ NEV. REV. STAT. § 4.010 (2017); see NEV. CONST. art. 2, § 1. The high school diploma requirement is not applied to anyone who was already a justice of the peace on June 30, 2001. *Id.*

⁶⁵ NEV. REV. STAT. § 4.040 (2017).

⁶⁶

courts are required by the legislature to assess certain fees, a portion of which goes to the county to pay for certain costs of operating the justice court.⁶⁷

Altogether, the 15 rural counties operate 25 justice courts. Each of the rural counties has at least one justice of the peace presiding over a justice court. Elko has the largest number, with five justices of the peace dispersed across four justice courts. Of the total 28 justices of the peace, only six are licensed attorneys. (See table of “Courts & Judges in the Rural Counties” at page ____.)

Any Nevada community of more than 1,000 inhabitants can become an incorporated city.⁶⁸ Each incorporated city is required by the state legislature to have a municipal court located in the city.⁶⁹ Municipal courts are not required to be courts of record – it is up to each city counsel to determine whether by ordinance to designate its municipal court as a court of record or not.⁷⁰ A municipal judge has authority to act within the city limits from which he is elected.⁷¹ A municipal judge does not have to be a licensed attorney, again it is up to each city counsel by ordinance to establish the necessary qualifications; the only qualification mandated by statute is that they be eligible to vote within the city they serve.⁷² The salary of a municipal judge is set and paid for by the city,⁷³ and the city is responsible for all costs of operating the municipal court.

However, the justice of the peace over the area where the city is located may be designated “ex officio [as] the municipal judge of the city,” if the city counsel, the board of county commissioners, and the justice of the peace all agree.⁷⁴ In accord with this provision, six of the justice courts in the rural counties operate a court that serves as both the justice court for a township and as the municipal court for a city within that township. There are only four free-standing municipal courts in all of the 15 rural counties: Fallon Municipal Court within Churchill County; Fernley Municipal Court and Yerington Municipal Court within Lyon County; and Ely Municipal Court within White Pine County. (See table of “Courts & Judges in the Rural Counties” at page ____.)

⁶⁷ NEV. REV. STAT. §§ 4.060 through 4.140 (2017).

⁶⁸ NEV. REV. STAT. §§ 265.010, 266.016 through 266.029 (2017).

⁶⁹ NEV. REV. STAT. § 5.010 (2017); see NEV. CONST. art. 6, § 1; NEV. REV. STAT. § 1.010 (2017). According to the Nevada League of Cities & Municipalities, as of February 2017, there were 19 incorporated cities in the state: Boulder, Caliente, Carlin, Carson City, Elko, Ely, Fallon, Fernley, Henderson, Las Vegas, Lovelock, Mesquite, North Las Vegas, Reno, Sparks, Wells, West Wendover, Winnemucca, and Yerington. Nevada League of Cities & Municipalities, Municipal Directory (Jan. 2017, rev’d Feb. 2017), http://nvleague.com/sites/default/files/2017%20Directory%20Final_0.pdf.

⁷⁰ NEV. REV. STAT. §§ 1.020, 5.010 (2017). State law requires that a municipal court be a court of record of any case in which a jury trial is required, NEV. REV. STAT. § 1.020 (2017), but a jury trial is only required in Nevada for a crime that carries a sentence of greater than six months in jail (i.e., a gross misdemeanor or a felony) and municipal courts do not have jurisdiction over any such crimes.

⁷¹ NEV. REV. STAT. §§ 5.020, 5.050, 266.555 (2017)

⁷² NEV. REV. STAT. § 5.020 (2017); see NEV. CONST. art. 2, § 1.

⁷³ NEV. REV. STAT. § 5.030 (2017).

⁷⁴ NEV. REV. STAT. § 5.020(3) (2017).

COURTS & JUDGES IN THE RURAL COUNTIES						
DISTRICT COURTS			JUSTICE COURTS		# of Just/Muni Judges	# of non-atty Judges
Judicial District	# of Dist Judges	COUNTY	* combined Justice & Municipal Court	MUNICIPAL COURTS		
1 st	2	Carson City	Carson City Justice & Municipal *		2	1
		Storey	Virginia City Justice		1	1
3 rd	2	Lyon	Canal Justice		1	0
			Fernley Municipal		1	1
			Dayton Justice		1	1
			Walker River Justice		1	1
			Yerington Municipal		1	0
4 th	2	Elko	Carlin Justice & Municipal *		1	1
			Eastline Justice & West Wendover Municipal *		1	1
			Elko Justice & Municipal *		2	1
			Wells Justice & Municipal *		1	1
5 th	2	Esmeralda	Esmeralda Justice		1	1
		Beatty	Beatty Justice		1	1
		Nye	Pahrump Justice		2	2 [†]
			Tonopah Justice		1	1
6 th	1	Humboldt	Union Justice		1	1
7 th	2	Eureka	Eureka Justice		1	1
		Lincoln	Meadow Valley Justice & Caliente Municipal [‡] *		1	1
			Pahrnagat Valley Justice		1	1
		White Pine	Ely Justice		1	0
			Ely Municipal		1	0
9 th	2	Douglas	East Fork Justice		1	0
			Tahoe Justice		1	0
10 th	1	Churchill	New River Justice		1	1
			Fallon Municipal		1	1
11 th	1	Lander	Argenta Justice		1	1
			Austin Justice [†]		1	1
		Mineral	Hawthorne Justice		1	1
		Pershing	Lake Justice		1	1
TOTAL		15			32	24
[*] Since July 2015, Caliente Municipal Court transfers all of its criminal cases carrying the possibility of jail time to the Meadow Valley Justice Court. The Caliente Municipal Court continues to operate separately to hear non-jailable misdemeanors and civil matters. [†] From March 6, 2018 through the time of the GAC site visits in Lander County, the Austin Justice Court judgeship was vacant. All of its cases were being heard in the Argenta Justice Court. A judge has subsequently been appointed. [‡] At the time of the GAC site visits in Nye County, one of the two judgeships in the Pahrump Justice Court was vacant. The Beatty Justice Court judge, who is a non-lawyer, was travelling to Pahrump to hear cases.						

The presence of justice courts and municipal courts outside the county seats where district courts are located provides greater access by indigent defendants to these courts. But it also means that public defense attorneys, prosecutors, and sheriffs must cover multiple courtroom locations on any given day, and often there are not enough personnel to be in all of the courtrooms at the same time. Sheriffs struggle to transport in-custody defendants from jails to courts located far away within a county. For example, in Lincoln County it is a 1 ½ hour drive each way between the jail in Pioche to the Pahrnagat Valley Justice Court located in Alamo. The sheriff's office explained that to transport just three or four defendants will tie up one deputy for at least four hours at the absolute minimum, and he always sends two deputies to transport a defendant arrested on a serious offense such as homicide. The Nye County sheriff says a significant part of the budget goes toward transportation costs. Although Nye County has three jail facilities – one each in Beatty, Tonopah, and Pahrump – as a cost-saving measure the county commissioners

have rendered the facilities in Beatty and Tonopah unavailable to hold people overnight, so all in-custody defendants have to be transported from the jail in Pahrump to the justice courts located elsewhere. Meanwhile, the Tonopah Justice Court has problems calendaring cases, because four of the five public defense attorneys are unwilling to travel to Tonopah during weeks in which the district court judges are not holding court there, resulting in delayed proceedings for indigent defendants.

Jurisdiction and operation of the courts

Municipal courts. Each municipal court has jurisdiction over misdemeanors committed within the city, including both misdemeanor violations of city ordinances and misdemeanors established by state statutes.⁷⁵ From the alleged commission of an offense through its disposition at the trial court level, a misdemeanor occurring within the city limits will be presided over by the municipal court, with one exception. In 2017, the legislature provided that when a defendant is prosecuted for what would otherwise be a municipal court misdemeanor, but where the defendant is also prosecuted for a felony or gross misdemeanor arising out of the same act or transaction, the misdemeanor must be charged in the same criminal complaint as the felony or gross misdemeanor.⁷⁶

Justice courts. Each justice court has jurisdiction over all misdemeanors, whether established by county ordinance or state statute, alleged to have occurred within the boundaries of their county but outside of any incorporated city.⁷⁷ As explained above, many of the justice courts in the rural counties are designated “ex officio [as] the municipal judge” for a city located within that justice court’s geographical boundaries, and so they handle *all* misdemeanors. From the alleged commission of the offense through its disposition at the trial court level, a misdemeanor case will be presided over by the justice court. But that is not the end of the responsibilities placed on the justice courts (that are wholly paid for by the counties).

Justices of the peace also serve as magistrates over gross misdemeanors and felonies. For defendants arrested on these charges, the justice of the peace in a county conducts the initial appearance within 72 hours after the arrest.⁷⁸ They advise defendants of the charges upon which they have been arrested and of the rights to which they are entitled.⁷⁹ They determine who is entitled to public counsel and whether a person seeking a lawyer is indigent, then they appoint an attorney “as appropriate.”⁸⁰ They conduct the preliminary examination within 15 days of the arrest, hearing testimony from witnesses and argument from counsel, and decide whether there is probable cause to believe that an offense has been committed and that the defendant committed it, resulting in a defendant either being released from custody or bound over to the district court for trial.⁸¹ And they set conditions of bail.⁸²

⁷⁵ NEV. REV. STAT. §§ 5.050(2), 266.550, 266.555 (2017).

⁷⁶ NEV. REV. STAT. §§ 173.115(2) (2017); *see* NEV. REV. STAT. 5.050(2) (2017).

⁷⁷ NEV. REV. STAT. §§ 4.370(3)-(5), 269.165 (2017); *see* NEV. CONST. art. 6, § 8.

⁷⁸ NEV. REV. STAT. § 171.178 (2017).

⁷⁹ NEV. REV. STAT. § 171.186 (2017).

⁸⁰ NEV. REV. STAT. § 171.188 (2017).

⁸¹ NEV. REV. STAT. §§ 171.196, 171.206 (2017).

⁸² NEV. REV. STAT. §§ 171.206 (2017).

District courts. The jurisdiction of the district courts is defined by Nevada’s constitution as “original jurisdiction in all cases excluded by law from the original jurisdiction of justices’ courts.”⁸³ For criminal cases, this means the district courts have jurisdiction over gross misdemeanors and felonies.

The district courts have exclusive original jurisdiction over all juvenile delinquency proceedings⁸⁴ and child in need of supervision proceedings,⁸⁵ and they are referred to as juvenile courts when exercising this jurisdiction.⁸⁶ However, the district courts are allowed to appoint “any person to act as a master of the juvenile court if the person is qualified by previous experience, training and demonstrated interest in the welfare of children to act as a master of the juvenile court.”⁸⁷ In the 3rd Judicial District, the municipal court judges from Fernley Municipal Court and Yerington Municipal Court, along with the Dayton Justice Court judge, are all appointed as juvenile masters. In the 4th Judicial District, the Fallon Municipal Court judge is appointed as juvenile master. In the 5th Judicial District, the justice court judges from Beatty and Tonopah are the juvenile masters. In the 11th Judicial District: in Lander County, the Argenta Justice Court judge is the juvenile master; in Mineral County, the Hawthorne Justice Court judge is appointed as juvenile master.

The district courts “have final appellate jurisdiction” over the misdemeanor cases arising out of justice courts and municipal courts.⁸⁸

A word about non-lawyer judges

Like Nevada, thirty other states have some courts where judges do not have to be a lawyer.⁸⁹ Nine of these states, though, prevent the non-lawyer judges from taking a defendant’s liberty in a criminal proceeding.⁹⁰ Again like Nevada, the other 21 states, primarily for reasons of cost efficiency or to facilitate justice in more rural jurisdictions, have non-lawyer judges preside over misdemeanors or ordinances that carry jail time as a possible punishment. But even among those states, 14 of them give the defendant the right to have a trial *de novo* on appeal – basically a whole new trial – before a judge who is a lawyer.⁹¹ The United States Supreme Court held in 1976 that a criminal defendant who faces the possibility of incarceration can be tried by a non-

⁸³ NEV. CONST. art. 6 § 6.

⁸⁴ NEV. REV. STAT. § 62B.330 (2017).

⁸⁵ NEV. REV. STAT. § 62B.320 (2017).

⁸⁶ NEV. REV. STAT. § 62B.300 (2017).

⁸⁷ NEV. REV. STAT. § 62B.020 (2017).

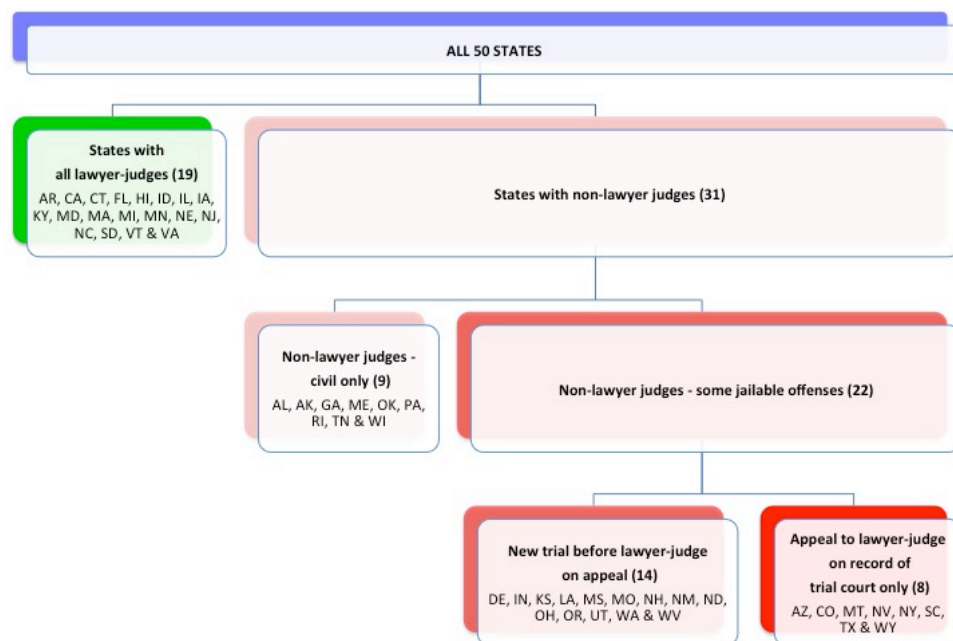
⁸⁸ NEV. CONST. art. 6 § 6.

⁸⁹ These states are: Alabama, Alaska, Arizona, Colorado, Delaware, Georgia, Indiana, Kansas, Louisiana, Maine, Mississippi, Missouri, Montana, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin, and Wyoming.

⁹⁰ Alabama, Alaska unless a defendant consents, Georgia unless a defendant waives his right to trial by jury, Maine, Oklahoma, Pennsylvania, Rhode Island, Tennessee, and Wisconsin unless a defendant consents.

⁹¹ Delaware, Indiana, Kansas, Louisiana, Mississippi, Missouri, New Hampshire, New Mexico, North Dakota, Ohio, Oregon, Utah, Washington, and West Virginia (unless in West Virginia the defendant had a jury trial).

lawyer judge, *so long as* the defendant has the right to a *de novo* trial before a judge who is a lawyer.⁹²



But the U.S. Supreme Court has never decided whether it is okay for a defendant to be tried by a non-lawyer judge where a state *does not* give the defendant a new trial on the appeal to a court whose judge is a lawyer. This is the situation in Nevada, along with seven other states.⁹³ A defendant can stand

trial in Nevada’s justice and municipal courts before a non-lawyer judge on a jailable misdemeanor, and if he is convicted and sentenced to jail, his only recourse is to appeal to the district court where the judge is always a lawyer. But that appeal is based solely on whatever record was made in the non-lawyer court; the defendant does not get a new trial.⁹⁴

So what does this all mean for the Sixth Amendment right to counsel? First, if the indigent accused is fortunate enough to receive a public defense attorney, that lawyer is trying to argue complex legal issues to a non-lawyer. Even judges who are lawyers often struggle to get the right answers to questions of law. Worse yet, though, is that an indigent defendant does not always receive a lawyer in a jailable misdemeanor case in Nevada even when it is required by the Constitution. (See discussion of providing counsel, initial appearances, and arraignments in Chapter IV.)

- Some judges incorrectly think they do not have to appoint counsel to represent an indigent defendant if they predict the defendant will receive a “suspended” jail sentence upon any conviction. These judges wrongly believe they can wait and appoint a lawyer to the defendant if and when the defendant fails to fulfill the terms imposed and is brought to answer before the court in either a contempt proceeding or a probation revocation.⁹⁵

⁹² North v. Russell, 427 U.S. 328 (1976).

⁹³ Arizona, Colorado, Montana, New York, South Carolina, Texas, and Wyoming.

⁹⁴ NEV. REV. STAT. § 5.010 (2017).

⁹⁵ In Alabama v. Shelton, 505 U.S. 654 (2002), the U.S. Supreme Court prohibited courts from ever sending an indigent defendant to jail following a suspended sentence unless the defendant had originally received or waived their right to an attorney.

- Some judges tell a poor person they can only get an appointed lawyer if they pay the government for part or all of the cost of that representation, without first determining whether the defendant has the financial ability to pay as the Constitution requires.⁹⁶
- Some judges fail to conduct an individualized inquiry to determine whether a defendant's choice to waive their right to counsel is an intelligent, knowing, and voluntary choice, as required by the Constitution.⁹⁷

In all of these circumstances, the defendant is forced to navigate their case before a non-lawyer judge without the aid of an attorney. If convicted, the defendant must assert their right of appeal to the district court on their own, but without a lawyer to advise them most defendants simply do not know how to get the district court to take a second look.

The problems of having non-lawyer judges in criminal proceedings also affect felony⁹⁸ and gross misdemeanor charges. In Nevada, the initial stages of these cases begin in the justice courts, where many of the judges are non-lawyers. They are responsible for presiding over initial appearances, and making decisions about bail, the appointment of counsel, and whether there is enough probable cause to bind the case over for prosecution in the district court.⁹⁹

It is not that non-lawyer judges are intentionally trying to undermine the Sixth and Fourteenth Amendments, nor are they consciously trying to put poor people in jail unduly. It is simply that it is difficult at best for non-lawyer judges to keep abreast of ever-evolving Sixth and Fourteenth Amendment law.

⁹⁶ *See, e.g.*, *Boddie v. Connecticut*, 401 U.S. 371 (1971).

⁹⁷ *Iowa v. Tovar*, 541 U.S. 77 (2004).

⁹⁸ Every state in the nation precludes non-lawyer judges from determining guilt and imposing prison sentences in felony cases.

⁹⁹ NEV. REV. STAT. §§ 171.178, 171.186, 171.188, 171.196, 171.206 (2017).

Prosecution:

Criminal justice has often been referred to anecdotally as a three-legged stool, relying on judges, prosecutors, and defense attorneys in equal measure. To properly understand the provision of the effective assistance of the right to counsel by defense attorneys and the systems within which they work in Nevada, it is essential to consider the role played by the prosecutors who are their counterparts.

1. District attorneys

Each county is responsible for funding the full cost of salaries, facilities, and operations of its district attorney's office.¹⁰⁰ The office of district attorney is part of county government, yet all district attorneys are under the supervisory powers of the Nevada Attorney General.¹⁰¹

Each county elects one district attorney.¹⁰² Other than in Esmeralda County, the district attorney is prohibited from engaging in the private practice of law (for compensation) while in office.¹⁰³ The salary of the district attorney is set by the state legislature, but it is paid by the county.¹⁰⁴ Compensation of a district attorney varies depending on the class assigned by the legislature to the county he serves.¹⁰⁵

Annual salary of rural county district attorney				
County	Class 3 Carson City Churchill Douglas Elko Humboldt Lyon Nye	Class 4 Lander Storey White Pine	Class 5 Eureka Lincoln Mineral Pershing	Class 6 Esmeralda
FY2015-2016	\$118,872	\$112,268	\$99,060	\$78,657
FY2016-2017	\$122,438	\$115,636	\$102,033	\$81,017
FY2017-2018	\$126,112	\$119,105	\$105,093	\$83,447
FY2018-2019	\$129,895	\$122,678	\$108,246	\$85,951
NEV. REV. STAT. § 245.043(2) (2017). Salaries are not to increase in any year the board of county commissioners determines that sufficient financial resources are not available to cover the increase. NEV. REV. STAT. § 245.043(5) (2017).				

¹⁰⁰ NEV. REV. STAT. §§ 245.043 (district attorney), 252.050 (office and branch offices), 252.070 (deputies and support staff) (2017).

¹⁰¹ NEV. REV. STAT. § 228.120 (2017).

¹⁰² NEV. REV. STAT. § 252.020 (2017).

¹⁰³ NEV. REV. STAT. § 245.0435 (2017); *see* NEV. REV. STAT. § 245.043(2) (2017).

¹⁰⁴ NEV. REV. STAT. § 245.043 (2017).

¹⁰⁵ NEV. REV. STAT. § 245.043 (2017).

The district attorney is allowed to appoint the number of deputy district attorneys and support staff that are authorized and paid for by the board of counsel commissioners.¹⁰⁶ In the 15 rural counties, deputy district attorneys are expressly allowed to maintain a private law practice.¹⁰⁷

State law requires the district attorney's office to be located at the county seat, and the board of county commissioners may by ordinance allow branch offices at other locations within the county.¹⁰⁸ The legislature also requires that the office be "open at least from 9 a.m. to 12 [p.]m. and 1 p.m. to 5 p.m. on all days except Saturdays, Sundays and nonjudicial days," except the board of county commissioners can "extend the days and hours" and approve deviations.¹⁰⁹ The board of county commissioners in each of the less populous counties of Esmeralda, Eureka, Lander, Lincoln, Mineral, Pershing, Storey, and White Pine are allowed to "reduce the days and hours during which the office of the district attorney must be kept open for the transaction of public business,"¹¹⁰ in effect creating a part-time district attorney's office.

The district attorney's role is as the public prosecutor throughout the county.¹¹¹ In that capacity, the district attorney's primary duty is to attend every criminal court session of the district courts in the county and those criminal court sessions of the county's justice courts "when required by justices of the peace."¹¹² The district attorneys in each of the 15 rural counties handle these court coverage requirements differently depending on the number of courts in their county and the number of deputy district attorneys they are allowed to appoint. (See table of "Prosecutors in the Rural Counties" at page ____.) Among the court duties is the requirement to "[p]rosecute . . . all actions for the recovery of debts, fines, penalties and forfeitures accruing to his or her county."¹¹³ (See discussion of recoupment of the costs of indigent defense services and other assessments imposed on indigent defendants in Chapter 4.)

When not prosecuting cases in the district court, the district attorney "shall . . . attend the meetings of the board of county commissioners."¹¹⁴ The legislature dictates further:

"Additional duties of the district attorney include, without limitation:

- (a) Reviewing all contracts under consideration by the board of county commissioners;
- (b) Drafting ordinances and amendments thereto;
- (c) Providing advice relating to the interpretation or application of county ordinances;
- (d) Providing advice relating to the impact of federal or state law on the county;
- (e) Drawing all legal papers on behalf of the board of county commissioners; and

¹⁰⁶ NEV. REV. STAT. § 252.070 (2017).

¹⁰⁷ NEV. REV. STAT. § 252.070(4) (2017).

¹⁰⁸ NEV. REV. STAT. § 252.050(1)-(2) (2017).

¹⁰⁹ NEV. REV. STAT. § 252.050(1),(4) (2017).

¹¹⁰ NEV. REV. STAT. § 252.050(5) (2017); see U.S. Census Bureau, American FactFinder, 2017 Population Estimates (ID: PEPANNRES), https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=PEP_2017_PEPANNRES&prodType=table.

¹¹¹ NEV. REV. STAT. § 252.080 (2017).

¹¹² NEV. REV. STAT. § 252.090 (2017).

¹¹³ NEV. REV. STAT. § 252.110 (2017).

¹¹⁴ NEV. REV. STAT. § 252.170(1) (2017).

- (f) At all times, giving his or her advice, including written legal opinions, when required, to the members of the board of county commissioners upon matters relating to their duties.”¹¹⁵

Finally, statutory law requires the district attorney to give legal advice to all “county, township or district officers” in the county on “any matter relating to the duties of their respective offices.”¹¹⁶

These state law mandates bring district attorneys directly into interference with the right to counsel. Each county’s board of county commissioners provides the right to counsel in the district courts and justice courts within the county through the ordinances it enacts and the contracts into which it enters, in its efforts to comply with the requirements of federal and state laws. It is these very federal and state laws, contracts, and ordinances, involving the qualifications, selection, compensation, and performance of indigent defense attorneys, about which the district attorney is required to advise the board of county commissioners. (*See* discussion of county indigent defense systems in Chapter III.) To protect the professional independence of defense counsel, all national standards recommend that prosecutors not be involved in the oversight of indigent defense services and providers,¹¹⁷ “to remove any implication that defenders are subject to the control of those who appear as their adversaries.”¹¹⁸

b. City attorneys

Each incorporated city with a population of 5,000 or more is required to have a city attorney, who may be either elected or appointed by the mayor as the city ordinance directs.¹¹⁹ The city’s governing body sets the compensation for and pays the city attorney.¹²⁰ The city attorney must be licensed to practice law¹²¹ and is the legal advisor to all officers of the city and carries out whatever other duties are required by the city’s governing body.¹²²

¹¹⁵ NEV. REV. STAT. § 252.170(2) (2017).

¹¹⁶ NEV. REV. STAT. § 252.160(1) (2017).

¹¹⁷ *See, e.g.*, ABA, STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES 5-1.3(b) (3d ed. 1992); NATIONAL STUDY COMMISSION ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES 5.10(f) (1976). *See also* NATIONAL RIGHT TO COUNSEL COMMITTEE, JUSTICE DENIED 175 (2009)

¹¹⁸ ABA, STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES 5-1.3(b) commentary at 19 (3d ed. 1992).

¹¹⁹ NEV. REV. STAT. § 266.405 (2017).

¹²⁰ NEV. REV. STAT. § 266.450 (2017).

¹²¹ NEV. REV. STAT. § 266.465 (2017).

¹²² NEV. REV. STAT. § 266.470 (2017).

PROSECUTORS IN THE RURAL COUNTIES					
DISTRICT COURTS		JUSTICE COURTS			
Judicial District	COUNTY	* combined Justice & Municipal Court	MUNICIPAL COURTS	# of Prosecutors	
1 st	Carson City	Carson City Justice & Municipal *		1 admin 7 crim 3 civil	
	Storey	Virginia City Justice		1 %	
3 rd	Lyon	Canal Justice		2 Canal 2 % Dayton 1 % Walker River	
			Fernley Municipal		2
		Dayton Justice			
		Walker River Justice			
			Yerington Municipal		1 K
4 th	Elko	Carlin Justice & Municipal *		7 crim 1 juv 2 civil	
		Eastline Justice & West Wendover Municipal *			
		Elko Justice & Municipal *			
		Wells Justice & Municipal *			
5 th	Esmeralda	Esmeralda Justice		1	
	Nye	Beatty Justice		4 Pahrump 1 Beatty/Tonopah & juv 1	
		Pahrump Justice			
		Tonopah Justice			
6 th	Humboldt	Union Justice		6	
7 th	Eureka	Eureka Justice		1	
	Lincoln	Meadow Valley Justice & Caliente Municipal ¹ *		2	
		Pahrangat Valley Justice			
	White Pine	Ely Justice		3 crim 1 juv 1 dom viol (for 7 th JDC)	
			Ely Municipal		?
9 th	Douglas	East Fork Justice		6 crim 1 juv 1 432B	
		Tahoe Justice			
10 th	Churchill	New River Justice		3 crim 1 juv 2 civil	
			Fallon Municipal		1
11 th	Lander	Argenta Justice		2	
		Austin Justice ²			
	Mineral	Hawthorne Justice		1 %	
	Pershing	Lake Justice		3	

Chapter II. State efforts to ensure effective assistance of counsel

For those who have been involved in the decades of Nevada's efforts to ensure the effective assistance of the right to counsel, this chapter may seem unnecessary. It is critical though, both for Nevada policymakers who are new to this topic and for others to bring a fresh understanding to the issues that confront the rural counties in providing the right to counsel.

The history recounted in this chapter provides a deep understanding of why rural actors and policymakers are wary of efforts to force rural counties to use the services of the State Public Defender, even if it were fully funded by the state. Simply put, the historical context shows that decisions by rural policymakers to move out of the state public defender system have not been based solely on a desire to provide services as inexpensively as possible. Five and a half decades of expanding right to counsel responsibilities under both federal and state law, in interaction with changes in Nevada's statutory law, have led county after county to strike out on their own in legitimate attempts to ensure adequate right to counsel services.

The Nevada Supreme Court has tried to fix systemic deficiencies in Nevada's right to counsel systems, but it is only one of the three branches of state government. The Court does not have the power of the purse and cannot, because of separation of powers concerns, tell the legislature how to spend taxpayer resources.

Nevada's legislature established the Nevada Right to Counsel Commission for the purpose of studying the provision of indigent defense services and making recommendations to the legislature. This report is a part of the commission's work. This chapter illuminates the deep-rooted, long-standing issues that Nevada faces in ensuring the effective assistance of the right to counsel and helps explain why the recommendations to follow are an honest attempt to address the concerns of rural actors.

A. Brief history of indigent defense services in Nevada

1. Nevada's early right to counsel history

In 1877, the Nevada Supreme Court observed in the case of *In re Wixom*: "If there was any law which expressly required the district judges to assign counsel to the defendant in a criminal action at any particular stage of the proceedings, a failure to do so would be a departure from the forms prescribed to them by law, and would be ground of reversal on certiorari in cases where the remedy is available. But in this state there is no such law."¹²³ Judges did, though, from time to time appoint an attorney to represent a defendant in a criminal case.

Private attorney appointments and compensation. The Nevada legislature, in 1875, provided for an attorney to be paid "such fee as the Court may fix, not to exceed fifty dollars" when appointed by a court in a criminal case.¹²⁴ The statute required that "[s]uch compensation shall be paid by the County Treasurer out of any moneys in the Treasure, not otherwise appropriated,

¹²³ *In re Wixom*, 12 Nev. 224 (Nev. 1877).

¹²⁴ 1875 Nev. Stat. 142, AB 122 (now codified at NEV. REV. STAT. § 7.125 (2017)).

upon the certification of the Judge of the Court, that such attorney has performed the services required.”¹²⁵ So began Nevada’s long-standing history of requiring counties to pay for the right to counsel.

In 1945, the legislature increased the possible compensation to an appointed attorney to not more than \$300 and, if an attorney had to travel to a county other than where his office was located, also authorized a \$5 per diem plus traveling expenses of 7 ½ cents per mile.¹²⁶ Again the funds were to be paid by the county treasurer.¹²⁷

In 1964, the Nevada Supreme Court held that the due process and equal protection clauses of the Fourteenth Amendment, as well as Nevada statutes, required that an indigent defendant be provided with a copy of a trial transcript at county expense, and that the court had inherent power to order the county to pay for it.¹²⁸

County public defender offices. In 1965, on the heels of the U.S. Supreme Court decision in *Gideon v. Wainwright*,¹²⁹ Nevada enacted its first county public defender law.¹³⁰ The board of county commissioners were authorized to pass an ordinance to create a public defender office for their county or to join with other counties to do so.¹³¹ If a county chose to create a public defender office, it was responsible for paying whatever salary it set for the public defender, assistants, and support staff it authorized, and also for provide all necessary facilities, equipment, and supplies.¹³² The public defender was responsible for representing a person charged with a felony or gross misdemeanor, at every stage of the proceedings including on appeal, once appointed by a district court judge.¹³³ The law provided, though, as it does today, that “[n]othing in this chapter shall be construed to interfere in any way with the manner in which the several counties and district courts deal with indigent defendants, if the provisions of this chapter are not applicable.”¹³⁴

In other words, if a county did not choose to establish a public defender office, the district courts could continue to appoint private attorneys at county expense. Private attorneys were to be paid not more than \$1,000 in a case punishable by death, not more than \$300 for district court services, and not more than \$200 for justice court services, along with traveling expenses and per diem for out of county appointments.¹³⁵

In 1969, the legislature relieved Clark and Washoe counties of the choice and required both of those counties to establish a public defender office at county expense.¹³⁶

¹²⁵ 1875 Nev. Stat. 142, AB 122 § 1.

¹²⁶ 1945 Nev. Stat. 104, AB 15 (now codified at NEV. REV. STAT. § 7.125 (2017)).

¹²⁷ 1945 Nev. Stat. 104, AB 15 § 1.

¹²⁸ *State v. Eighth Judicial District Court*, 396 P.2d 680 (Nev. 1964).

¹²⁹ 372 U.S. 335 (1963).

¹³⁰ 1965 Nev. Stat. 597, AB 199 (now codified at NEV. REV. STAT. §§ 260.010 et seq. (2017)).

¹³¹ 1965 Nev. Stat. 597, AB 199 §§ 2, 3.

¹³² 1965 Nev. Stat. 597-98, AB 199 § 5.

¹³³ 1965 Nev. Stat. 598, AB 199 § 6.

¹³⁴ 1965 Nev. Stat. 598, AB 199 § 9 (now codified at NEV. REV. STAT. §§ 260.080 (2017)).

¹³⁵ 1965 Nev. Stat. 598-99, AB 199 § 10 (now codified at NEV. REV. STAT. § 7.125 (2017)).

¹³⁶ 1969 Nev. Stat. 1475-76, AB 804 (amending NEV. REV. STAT. § 260.010(1)).

Also in 1969, the Nevada Supreme Court considered a situation where a district court had ordered the state treasurer to pay \$750 to court appointed counsel for preliminary fees and investigator expenses in a murder case.¹³⁷ The trial court had found that “the expenses were an unreasonable burden upon Washoe County and should be borne not by one county but by the citizens of the State of Nevada.”¹³⁸ The Court held that “an indigent defendant’s constitutional rights require reimbursement to his counsel for out-of-pocket expenses incidental to his defense, the trial courts have the inherent right to entertain motions seeking such allowances and to order payment of such reasonable amounts as they, in their discretion, deem proper and necessary. While the district court may not require payment by the state . . . , it may require payment by the various counties.”¹³⁹ The Court went on to say:

“No doubt the fixing of such a financial burden upon the several counties has and will cause serious problems in some cases. We are in great sympathy with the plight thus created for those public bodies. But because the rights recognized are of constitutional statute, there being inherent power of the courts to make such allowance and because of the legislative direction, the burden must fall upon the counties.

“. . . Society must assume the cost of providing a constitutionally adequate indigent defense system. The legislature has assigned that obligation to the counties.

“No doubt it would be wiser for the state to provide a uniform system for the handling of this type of problem. One serious criminal case could literally bankrupt one of our small, financially insecure counties. But until the legislature provides a different method of affixing financial responsibility than is now upon our statutes, we have no choice but to require the counties to provide and pay for this type of service in accordance with legislative mandate.”¹⁴⁰

2. The era of the State Public Defender

In the next legislative session of 1971, Nevada created the Office of State Public Defender¹⁴¹ and, for the first time in Nevada’s history, appropriated some state funds¹⁴² toward the provision of the Sixth Amendment right to counsel. The legislation created a seven-member commission to select the state public defender.¹⁴³ The state public defender was authorized to employ deputies and support staff and also to contract with private attorneys if needed.¹⁴⁴ The main office was located in Carson City, and the state public defender was allowed to establish branch offices,

¹³⁷ State v. Second Jud. Dist. Ct., 453 P.2d 421 (Nev. 1969).

¹³⁸ State v. Second Jud. Dist. Ct., 453 P.2d 421, 421-22 (Nev. 1969).

¹³⁹ State v. Second Jud. Dist. Ct., 453 P.2d 421, 423-24 (Nev. 1969).

¹⁴⁰ State v. Second Jud. Dist. Ct., 453 P.2d 421, 424 (Nev. 1969).

¹⁴¹ 1971 Nev. Stat. 1410-12, AB 720 §§ 1-11 (now codified at NEV. REV. STAT. §§ 180.010 et seq. (2017)).

¹⁴² 1971 Nev. Stat. 1413, AB 720 § 15.

¹⁴³ 1971 Nev. Stat. 1410-11, AB 720 § 3.

¹⁴⁴ 1971 Nev. Stat. 1411, AB 720 §§ 4, 6.

each to be supervised by a deputy state public defender.¹⁴⁵ The state public defender was to, upon appointment by a court, provide representation to indigent defendants charged with a gross misdemeanor or felony in any of the 15 rural counties that had not established a public defender office, and also to handle appeals and post-conviction proceedings out of all 17 counties.¹⁴⁶ To allow the commission to be appointed and select a state public defender, and for the state public defender to organize his office and report ready to assume duties, the legislature allocated \$40,000 for FY1972 and \$30,000 for FY 1973.¹⁴⁷

Just as the State Public Defender office was being established, in 1972 the United States Supreme Court issued its opinion in *Argersinger v. Hamlin*, requiring the appointment of counsel to indigent defendants facing the loss of liberty in misdemeanor cases.¹⁴⁸ The Nevada legislature did several things in 1973. First, in response to *Argersinger*, it authorized judges to appoint counsel to indigent defendants charged with misdemeanors,¹⁴⁹ authorized the state public defender office and the county public defender offices to represent defendants charged with misdemeanors,¹⁵⁰ and it mandated a series of reimbursements – cities were required to reimburse the state or county for providing representation in municipal courts; counties were to reimburse the state for providing representation in justice courts; and counties and cities were to reimburse private attorneys up to \$75 per case for providing representation in justice or municipal courts, respectively.¹⁵¹ Second, the state public defender was authorized to contract with county public defender offices if needed to provide services¹⁵² -- meaning the state would pay the county for providing representation in its own courts if the county had a public defender office; among the rural counties, only Douglas had established a public defender office.¹⁵³ Third, and of clearly the greatest concern to the rural counties, the legislature required all of the rural counties that did not have a public defender office (all but Douglas County at that time) to pay the state public defender for providing representation to indigent defendants in the cases arising out of those counties.¹⁵⁴

Even as the duties of the state public defender office expanded, the legislature continually diminished its independence. In 1977, the commission that had been established to select the state public defender was abolished, and the state public defender became a direct gubernatorial appointee.¹⁵⁵ The same year, the legislature authorized the state public defender office and county public defender offices to represent children in delinquency proceedings.¹⁵⁶ At the same time, it authorized the state public defender office to contract with counties to provide conflict

¹⁴⁵ 1971 Nev. Stat. 1411, AB 720 §§ 4, 5.

¹⁴⁶ 1971 Nev. Stat. 1411-12, AB 720 §§ 7, 10.

¹⁴⁷ 1971 Nev. Stat. 1413, AB 720 §§ 14-15.

¹⁴⁸ *Argersinger v. Hamlin*, 407 U.S. 25 (1972).

¹⁴⁹ 1973 Nev. Stat. 357, SB 266 § 1 (amending NEV. REV. STAT. § 171.188).

¹⁵⁰ 1973 Nev. Stat. 358, SB 266 §§ 2-4 (amending NEV. REV. STAT. §§ 180.060, 260.030, 260.050).

¹⁵¹ 1973 Nev. Stat. 357-58, SB 266 § 1 (amending NEV. REV. STAT. § 171.188(4)).

¹⁵² 1973 Nev. Stat. 706, AB 921 (amending NEV. REV. STAT. § 180.050(1)).

¹⁵³ *See* COUNTY OF DOUGLAS, NEVADA, Ord. 157 (Mar. 6, 1967) (creating a county public defender office, effective Mar. 16, 1967).

¹⁵⁴ 1973 Nev. Stat. 719, AB 912 (enacting NEV. REV. STAT. § 180.110 (SPD to bill by May 15 and counties to pay by July 20)).

¹⁵⁵ 1977 Nev. Stat. 1176, AB 278 § 4 (amending NEV. REV. STAT. § 180.010); 1977 Nev. Stat. 1264, AB 278, § 371(2) (repealing NEV. REV. STAT. § 180.020).

¹⁵⁶ 1977 Nev. Stat. 338-39, AB 36 §§ 4, 7 (amending NEV. REV. STAT. §§ 180.060(2), 260.050(2)).

services to those counties that had established a county public defender office¹⁵⁷ (none of the rural counties had a county public defender office at that time).¹⁵⁸

An evaluation of the State Public Defender Office conducted between December 1979 and August 1980 found that the state public defender at the time "inherited a disorganized and underfunded office" characterized by: a lack of investigators and social workers; inexperienced attorneys; high turnover; a lack of money for experts and other trial-related expenses; little supervision; no training; no brief bank; late entry into cases (especially juvenile delinquency cases); inadequate record-keeping; a lack of independence from the judiciary; a lack of qualified attorneys to take eligible cases; and insufficient funding.¹⁵⁹ As of June 1980,¹⁶⁰ the SPD operated a main office in Carson City and two regional offices.¹⁶¹ The Winnemucca Regional Office, staffed by one attorney and one part-time legal secretary, served Humboldt, Lander, and Pershing counties.¹⁶² The Ely Regional Office position was filled by a single contract attorney responsible for Eureka, Lincoln, and White Pine counties.¹⁶³ The main office in Carson City, with five attorneys and four legal secretaries, served Carson City, Churchill, Douglas, Esmeralda, Lyon, Mineral, Nye, and Storey counties.¹⁶⁴ In addition to representing indigent adults and children at the trial level, the SPD's seven attorneys also: handled all direct appeals statewide other than those arising out of Clark and Washoe Counties; handled all habeas corpus petitions and all post-conviction appeals statewide; handled all pardon board responsibilities statewide; and handled all parole board responsibilities other than for Washoe County.¹⁶⁵

In 1985, the legislature created a statutory right to counsel for parents and discretionary appointment of counsel for children in abused and neglect proceedings, and it authorized the state public defender office and county public defender offices to be appointed to represent them.¹⁶⁶

¹⁵⁷ Under this provision, during FY1996 and FY1997 Clark County contracted with the state public defender office to provide an attorney to represent indigent defendants in murder cases where the Clark County Public Defender Office had a conflict. Email from Phil Kohn, Clark County Public Defender Office, to David Carroll, Sixth Amendment Center (Aug. 14, 2018). The county was assessed a total cost of \$900,000 to be paid to the SPD for these services. 1995 Nev. Stat. 1414, SB 574 § 11. Email from Phil Kohn, Clark County Public Defender Office, to David Carroll, Sixth Amendment Center (Aug. 14, 2018).

Clark County then established the county's Special Public Defender's Office to handle conflict cases.

¹⁵⁸ 1977 Nev. Stat. 338-39, AB 36 §§ 4, 6 (enacting NEV. REV. STAT. §§ 180.060(5), 260.065).

¹⁵⁹ ABT ASSOCIATES, THE NEVADA STATE PUBLIC DEFENDER OFFICE: A PRELIMINARY ASSESSMENT at 4-5 (Aug. 1980).

¹⁶⁰ ABT ASSOCIATES, THE NEVADA STATE PUBLIC DEFENDER OFFICE: A PRELIMINARY ASSESSMENT at 1 (Aug. 1980).

¹⁶¹ ABT ASSOCIATES, THE NEVADA STATE PUBLIC DEFENDER OFFICE: A PRELIMINARY ASSESSMENT at 7 (Aug. 1980).

¹⁶² ABT ASSOCIATES, THE NEVADA STATE PUBLIC DEFENDER OFFICE: A PRELIMINARY ASSESSMENT at 7 (Aug. 1980).

¹⁶³ ABT ASSOCIATES, THE NEVADA STATE PUBLIC DEFENDER OFFICE: A PRELIMINARY ASSESSMENT at 9 (Aug. 1980).

¹⁶⁴ ABT ASSOCIATES, THE NEVADA STATE PUBLIC DEFENDER OFFICE: A PRELIMINARY ASSESSMENT at 7 (Aug. 1980).

¹⁶⁵ ABT ASSOCIATES, THE NEVADA STATE PUBLIC DEFENDER OFFICE: A PRELIMINARY ASSESSMENT at 3 (Aug. 1980).

¹⁶⁶ 1985 Nev. Stat. 1368, 1379, 1398-1400, AB 199 §§ 1, 44, 86, 89 (enacting NEV. REV. STAT. § 432B.420 and amending NEV. REV. STAT. §§ 180.060, 260.050).

The state public defender office lost all independence from the executive branch in 1993, when it became an office within the department of human resources and the state public defender was placed under the supervision of the governor and the director of the department of human resources.¹⁶⁷ Yet the duties of both the state public defender office and the county public defender offices continued to expand. In 1995, the legislature created a statutory right to counsel for all unrepresented children, without regard to indigency, who are alleged to be delinquent or in need of supervision.¹⁶⁸

In ensuing legislative sessions from 1973 to the present, the amount each rural county is required to pay to the state for the provision of right to counsel services has steadily increased. Looking toward FY1980, the state was funding only 20% of the costs of the state public defender office, while the rural counties that had not established their own county public defender office were collectively paying 80% of the total costs of state public defender office operations statewide.¹⁶⁹ This resulted in a slow exodus of the rural counties from purchasing right to counsel services from the state public defender.

- Elko County left the SPD system July 1, 1979.¹⁷⁰
- Lander County left the SPD system in 1990.¹⁷¹
- Churchill County passed its county public defender office ordinance in 1989,¹⁷² and left the SPD system sometime between April 1990 and July 1991.¹⁷³
- Lyon County left the SPD system July 1, 1990.¹⁷⁴
- Mineral County left the SPD system July 1, 1991.
- Douglas County left the SPD system July 1, 1993.¹⁷⁵
- Esmeralda County left the SPD July 1, 1993.
- Nye County left the SPD July 1, 1993.¹⁷⁶

¹⁶⁷ 1993 Nev. Stat. 1518, AB 782 § 129 (amending NEV. REV. STAT. § 180.010).

¹⁶⁸ 1995 Nev. Stat. 922, AB 319 § 2 (amending NEV. REV. STAT. § 62.085).

¹⁶⁹ Nevada Attorney General, Opinion No. 79-14A (July 5, 1979), http://ag.nv.gov/uploadedFiles/agnv.gov/Content/Publications/opinions/1979_AGO.pdf. “The Nevada State Public Defender represents indigent criminal defendants at all levels of the criminal process from the filing of the complaint to the appeal and post-conviction petitions after court appointment in all the counties except Clark and Washoe counties. That office received \$90,567 from the State General Fund for administration and operation of the Nevada State Public Defender system. The rest of the budget of \$364,244 comes from funds contributed on a proportionate basis from the counties where the Nevada State Public Defender represents indigent defendants in criminal matters. . . . NRS 171.188 and NRS 180.110 demonstrate an apparent legislative intent to require the various counties employing the services of the State Public Defender to pay for those services.” *Id.*

¹⁷⁰ COUNTY OF ELKO, NEVADA, ORD. 1979-M (June 28, 1979) (creating county public defender office, effective July 1, 1979).

¹⁷¹ COUNTY OF LANDER, NEVADA, ORD. 90-12 (1990).

¹⁷² COUNTY OF CHURCHILL, NEVADA, BILL 89-G (1989).

¹⁷³ Email from Jim Barbee, Churchill County Manager, to David Carroll, Director, Sixth Amendment Center (July 26, 2018) (“From our records it looks like the commission approved the first public defender contract on 4-5-90. So we have been doing this model for the past 28 years.”).

¹⁷⁴ COUNTY OF LYON, NEVADA, ORD. 340 (Apr. 19, 1990) (creating county public defender office, effective July 1, 1990).

¹⁷⁵ Departure date acknowledged in response to the Nevada Supreme Court Indigent Defense Commission survey by Michael McCormick, Assistant District Attorney on August 13, 2008. Stated reason for leaving the state public defender: “Douglas County could receive better representation through private attorneys under contract.”

¹⁷⁶ COUNTY OF NYE, NEVADA, ORD. 152 (1993).

- Humboldt County left the SPD July 1, 2007.¹⁷⁷
- Pershing County left the SPD July 1, 2007.
- Lincoln County left the SPD system July 1, 2011.¹⁷⁸
- Eureka County left the SPD July 1, 2015.¹⁷⁹
- White Pine County left the SPD July 1, 2015.¹⁸⁰

As the rural counties chose when to participate and when not to participate in the state public defender system, the state attempted to reign them in and stabilize its own budgeting process. In 1989, the legislature limited the rural counties to creating a county public defender office only commencing on July 1 in odd-numbered years and after giving written notice to the state public defender of its intention to do so on or before the preceding April 1.¹⁸¹ The goal was to lock the counties into paying for their portion of the state public defender services for the entire biennial.

The process changed again in 1991. The new policy is that each rural county pays 100% of the state public defender's cost in providing right to counsel services for cases arising out of that county. The state public defender provides a proposed cost projection to the county by December 1 of even-numbered years, and a county must give notice by March 1 of the following year if it intends to commence a county public defender office on July 1.¹⁸² Otherwise the county cannot create a county public defender office until the next odd-numbered year . . . *unless* the actual legislative assessment to the county exceeds the state public defender's estimate by more than ten percent, in which case the county must give notice by March 1 of the even-numbered year if it intends to commence a county public defender office on July 1.¹⁸³ If a county has not given notice by March 1 of its intention to commence a county public defender office, then the state public defender sends an estimate to the county on or before May 1, payable either in full within 30 days or in quarterly installments.¹⁸⁴ The location of various sections of the statutes were reorganized in 1995,¹⁸⁵ but the substance of the law did not change and remains the same today – the state simply began to refer to a rural county that has not created a county public defender office as a “participating county.”¹⁸⁶

3. Nevada Supreme Court actions to improve indigent defense services

a. ADKT 160

On December 30, 1992, the Nevada Supreme Court created “The Supreme Court of Nevada Task Force to Inquire into Racial and Economic Injustice” (“Racial and Economic Injustice Task

¹⁷⁷ COUNTY OF HUMBOLDT, NEVADA, ORD. 4-23-07 (2007).

¹⁷⁸ Email from State Public Defender Karin Kriezenbeck to David Carroll, 6AC Director (July 24, 2018).

¹⁷⁹ Email from State Public Defender Karin Kriezenbeck to David Carroll, 6AC Director (July 24, 2018).

¹⁸⁰ Email from State Public Defender Karin Kriezenbeck to David Carroll, 6AC Director (July 24, 2018).

¹⁸¹ 1989 Nev. Stat. 1646, AB 906 (amending NEV. REV. STAT. § 260.010).

¹⁸² 1991 Nev. Stat. 994, AB 114 (amending NEV. REV. STAT. § 260.010).

¹⁸³ 1991 Nev. Stat. 994, AB 114 (amending NEV. REV. STAT. § 260.010).

¹⁸⁴ 1991 Nev. Stat. 995, AB 114 (amending NEV. REV. STAT. § 180.110).

¹⁸⁵ 1995 Nev. Stat. 498-99, SB 436 (amending NEV. REV. STAT. §§ 180.080, 260.010).

¹⁸⁶ Nev. Rev. Stat. § 180.080(2) (2017).

Force”).¹⁸⁷ The Court mandated the task force to examine quality and access to justice, juvenile issues, jury issues, pre-arraignment issues, law enforcement matters, sentencing decisions, relationship to counsel, and death penalty cases.

After years of study and public hearings, the Racial and Economic Injustice Task Force issued its final report in June 1997.¹⁸⁸ The report identified numerous problems with indigent defense services throughout Nevada that contributed to racial and economic biases in both the quality and the delivery of justice,¹⁸⁹ including: “inadequate financial support of public defender offices to ensure proper attorney, investigatory and support staff; lack of early contact with indigent defendants (within 24-48 hours following arrest); insufficient training of indigent defense attorneys; poor interpreter services; and a need to guarantee effective assistance of counsel at all stages of the criminal justice process, including post-conviction.”¹⁹⁰ Among other things, the Racial and Economic Injustice Task Force recommended that the State of Nevada:¹⁹¹

- Increase financial support for the respective Public Defender's Offices in order to secure additional attorneys, investigators, and staff. Due to financial constraints, Public Defender's Offices are in dire need of additional staff and resources.
- Require the public defender's offices to initiate an ‘on call’ duty attorney to see any individual arrested or detained during the first 24 hours following arrest.
- Require the public defender’s office in each county to institute a formal training of incoming lawyers.
- Require that public defenders see their clients within 48 hours of arrest. Implement a policy that ensures clients are able to contact their attorneys by telephone.
- Ensure that indigent persons are entitled to effective assistance of counsel at all stages of the criminal justice process, including post-conviction proceedings especially for offenses punishable by death or life imprisonment.
- Require that any participation by judges in criminal negotiations be on the record including any ‘in chambers’ conversations between a judge and counsel.

On January 5, 1998, the Nevada Supreme Court created what came to be known as the Implementation Committee for the Elimination of Racial, Economic and Gender Bias in the

¹⁸⁷ Order Appointing Supreme Court of Nevada Task Force to Inquire into the Matter of Racial and Economic Injustice in the Administration of the Criminal and Civil Justice System, *In re* Task Force for the Study of Racial and Economic Bias in the Justice System, ADKT 160 (Nev., Dec. 30, 1992). All ADKT 160 documentation is available at <http://caseinfo.nvsupremecourt.us/public/caseView.do?csIID=24492>.

¹⁸⁸ Nevada Supreme Court Task Force for the Study of Racial and Economic Bias in the Justice System Final Report: Findings and Recommendations, *In re* Task Force for the Study of Racial and Economic Bias in the Justice System, ADKT 160 (Nev., filed June 18, 1997).

¹⁸⁹ Nevada Supreme Court Task Force for the Study of Racial and Economic Bias in the Justice System Final Report: Findings and Recommendations at 63-66, *In re* Task Force for the Study of Racial and Economic Bias in the Justice System, ADKT 160 (Nev., filed June 18, 1997).

¹⁹⁰ THE SPANGENBERG GROUP, INDIGENT DEFENSE SERVICES IN THE STATE OF NEVADA: FINDINGS AND RECOMMENDATIONS at 2 (Dec. 13, 2000).

¹⁹¹ Nevada Supreme Court Task Force for the Study of Racial and Economic Bias in the Justice System Final Report: Findings and Recommendations at 66-67, *In re* Task Force for the Study of Racial and Economic Bias in the Justice System, ADKT 160 (Nev., filed June 18, 1997).

Justice System (“Implementation Committee”).¹⁹² On the topic of access to counsel, the Implementation Committee secured the expert services of The Spangenberg Group (“TSG”).¹⁹³ TSG issued its report in December 2000.¹⁹⁴ The report found, among other things, that the indigent accused throughout the state were not afforded equal access to justice because:

- The State Public Defender system is in crisis;
- The independence of the defense function is jeopardized;
- The lack of state oversight and binding indigent defense standards;
- Excessive caseloads;
- Early case resolution programs; and
- A lack of comprehensive, reliable indigent defense data.¹⁹⁵

The Spangenberg Group recommended that the State of Nevada relieve more of the counties’ burden of funding and administering indigent defense services and establish a permanent indigent defense commission to oversee services and to promulgate standards.¹⁹⁶ Because the TSG report identified problems throughout the state, reform efforts first turned to fixing services in the most populous county, Clark County,¹⁹⁷ leaving the issues identified in the rural counties to continue on without relief.

b. ADKT 411

Due to its “concerns about the current processes for providing indigent defendants in criminal and juvenile delinquency cases with counsel and whether the attorneys appointed are providing quality and effective representation,” on April 26, 2007, the Nevada Supreme issued an order

¹⁹² Order Appointing Committee for Implementation of the Nevada Supreme Court Task Force for the Study of Racial and Economic Bias in the Justice System, *In re* Task Force for the Study of Racial and Economic Bias in the Justice System, ADKT 160 (Nev., Jan. 5, 1998).

¹⁹³ The Spangenberg Group is no longer in existence. The 6AC Director, David Carroll, was an employee of The Spangenberg Group at the time and conducted most of the site work and report drafting.

¹⁹⁴ THE SPANGENBERG GROUP, INDIGENT DEFENSE SERVICES IN THE STATE OF NEVADA: FINDINGS AND RECOMMENDATIONS (Dec. 13, 2000), *available at* http://www.nlada.net/sites/default/files/nv_tsgindigentdefensereport_dec2000.pdf.

¹⁹⁵ THE SPANGENBERG GROUP, INDIGENT DEFENSE SERVICES IN THE STATE OF NEVADA: FINDINGS AND RECOMMENDATIONS at 71-76 (Dec. 13, 2000).

¹⁹⁶ THE SPANGENBERG GROUP, INDIGENT DEFENSE SERVICES IN THE STATE OF NEVADA: FINDINGS AND RECOMMENDATIONS at 78-80 (Dec. 13, 2000).

¹⁹⁷ Clark County retained the National Legal Aid and Defender Association (“NLADA”) to conduct an in-depth study of the county’s public defender office. NLADA found that the “Clark County Public Defender Office (CCPDO) has a longstanding institutional culture that places a priority on attorney autonomy over the collective health of the organization. This has fostered organizational isolationism that limits accountability, support and professional development of staff, and inhibits interactions between attorneys in the office, between attorneys and support staff, between the organization and its client-base, and between the organization and the national indigent defense community. All of this has hindered the organization’s ability to change and evolve as circumstances dictate.” NLADA, AN EVALUATION OF THE CLARK COUNTY PUBLIC DEFENDER OFFICE at 13 (Mar. 2003), *available at*: http://www.nlada.net/sites/default/files/nv_evalofpdofficeclarkcountyjseri03-2003_report.pdf. 6AC Director, David Carroll, was Research Director for NLADA at the time of the report.

establishing the Indigent Defense Commission (“IDC”).¹⁹⁸ In November 2007, the IDC filed its report to the Court,¹⁹⁹ recommending:

- adoption of workload standards;²⁰⁰
- adoption of performance standards;²⁰¹
- ensuring independence of the defense function;²⁰²
- requiring that indigent defendants outside of Clark, Washoe, and Elko Counties be represented by the State Public Defender’s Office and that the SPD office be 100% funded by state general fund appropriation;²⁰³

¹⁹⁸ Order Establishing Study Committee on Representation of Indigent Defendants, *In re Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT 411 (Nev., Apr. 26, 2007). All ADKT 411 documentation is available at <http://caseinfo.nvsupremecourt.us/public/caseView.do?csIID=24756>.

¹⁹⁹ Final Report and Recommendations of Supreme Court Indigent Defense Commission, *In re Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT 411 (Nev., filed Nov. 20, 2007).

²⁰⁰ Final Report and Recommendations of Supreme Court Indigent Defense Commission at Exh. B pp. 7-8, *In re Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT 411 (Nev., filed Nov. 20, 2007) (“Although the American Bar Association has set the recommended caseload standard for attorneys handling felony cases at 150 per attorney, the Indigent Defense Commission recommends a felony/gross misdemeanor caseload standard 150 to 192 cases. In all categories, for public defenders, contract attorneys, or appointed counsel, caseloads should not exceed the following ranges: Capital cases 3-4; Charges carrying automatic life sentences 15; Non-life felonies/gross misdemeanors 150-192; Misdemeanors 400; Juvenile delinquency 200; Capital appeals 5; Non-capital felony appeals 25.”). A minority report from Washoe and Clark counties disagreed with the recommended caseload standards. Final Report and Recommendations of Supreme Court Indigent Defense Commission at Exh. C, *In re Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT 411 (Nev., filed Nov. 20, 2007). A second minority report by Eighth Judicial District Judge Stewart Bell and Justice of the Peace Kevin Higgins, Sparks Justice Court also opposed the caseload standards. Final Report and Recommendations of Supreme Court Indigent Defense Commission at Exh. D, *In re Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT 411 (Nev., filed Nov. 20, 2007).

²⁰¹ Final Report and Recommendations of Supreme Court Indigent Defense Commission at Exh. B p. 10, *In re Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT 411 (Nev., filed Nov. 20, 2007). The report included draft performance standards for: capital case representation, *id.* Exh. B pp. 25-37; appellate and post-conviction representation, *id.* Exh. B pp. 38-41; felony and misdemeanor trial cases, *id.* Exh. B pp. 42-54; and juvenile delinquency cases, *id.* Exh. B pp. 55-67.

²⁰² Final Report and Recommendations of Supreme Court Indigent Defense Commission at Exh. B pp. 10-11, *In re Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT 411 (Nev., filed Nov. 20, 2007) (Four separate recommendations: (i) “The selection of lawyers for specific cases should be made by the administrators of the indigent defense programs, not by judicial officials;” (ii) “The appointed counsel system should be administered in a manner that attracts participation from the largest possible cross-section of members of the bar and affords opportunities for inexperienced lawyers to become qualified for assigned cases, while at the same time insuring appointment of qualified counsel in every case;” (iii) “A board, agency, or commission should be created to oversee the appointment of counsel and the contract system without judicial interference;” and (iv) “The County, as the contracting authority, should appoint the board, agency, or commission to establish general policy for the indigent defense program, but not to interfere with the conduct of particular cases. The board, agency, or commission should consist of diverse members, but exclude judges and prosecutors to support and protect the independence of the defense services program.”).

²⁰³ Final Report and Recommendations of Supreme Court Indigent Defense Commission at Exh. B p. 11, *In re Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT 411 (Nev., filed Nov. 20, 2007).

- creating a permanent statewide indigent defense commission to oversee the provision of indigent defense representation in both primary and conflict cases;²⁰⁴ and
- instituting uniform data collection and reporting processes.²⁰⁵

On January 4, 2008, the Nevada Supreme Court issued the first of several administrative orders significantly altering the provision of indigent defense services throughout the state.²⁰⁶ The Order:

- established a standard for determining eligibility for public defense services;²⁰⁷
- required judicial districts and municipal courts to exclude judges from appointment of counsel, approval of case-related fees, and determination of a defendant's indigency, with plans to be filed with the Court by May 1, 2008;²⁰⁸
- adopted performance standards to be implemented effective April 1, 2008;²⁰⁹
- required a weighted caseload study in Clark and Washoe counties and by the State Public Defender office;²¹⁰
- required the Administrative Office of Courts to determine uniform data practices;²¹¹ and

²⁰⁴ Final Report and Recommendations of Supreme Court Indigent Defense Commission at Exh. B p. 12, *In re Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT 411 (Nev., filed Nov. 20, 2007).

²⁰⁵ Final Report and Recommendations of Supreme Court Indigent Defense Commission at Exh. B p. 12, *In re Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT 411 (Nev., filed Nov. 20, 2007).

²⁰⁶ Order, *In re Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT 411 (Nev., Jan. 4, 2008).

²⁰⁷ Order at 2-3, *In re Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT 411 (Nev., Jan. 4, 2008) (“effective immediately, the standard for determining indigency shall be: ‘A person will be deemed “indigent” who is unable, without substantial hardship to himself or his dependents, to obtain competent, qualified legal counsel on his or her own. “Substantial hardship” is presumptively determined to include all defendants who receive public assistance, such as Food Stamps, Temporary Assistance for Needy Families, Medicaid, Disability Insurance, reside in public housing, or earn less than 200 percent of the Federal Poverty Guideline. A defendant is presumed to have a substantial hardship if he or she is currently serving a sentence in a correctional institution or housed in a mental health facility. Defendants not falling below the presumptive threshold will be subjected to a more rigorous screening process to determine if their particular circumstances, including seriousness of charges being faced, monthly expenses, and local private counsel rates, would result in a substantial hardship were they to seek to retain private counsel.”).

²⁰⁸ Order at 3-4, *In re Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT 411 (Nev., Jan. 4, 2008) (each judicial district and municipal court to submit an administrative plan to the Nevada Supreme Court that “excludes the trial judge or justice of the peace hearing the case and provides for: (1) the appointment of trial counsel, appellate counsel in appeals not subject to the provisions of Nevada Rule of Appellate Procedure 3C, and counsel in post-conviction matters; (2) the approval of expert witness fees, investigation fees, and attorney fees; and (3) the determination of a defendant's indigency”).

²⁰⁹ Order at 4, *In re Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT 411 (Nev., Jan. 4, 2008) (the exact performance standards recommended by the IDC).

²¹⁰ Order at 7, *In re Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT 411 (Nev., Jan. 4, 2008).

²¹¹ Order at 7, *In re Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT 411 (Nev., Jan. 4, 2008).

- established a permanent statewide commission for the oversight of indigent defense²¹² (although this was mostly symbolic).

In response to extensive and wide-ranging concerns from county policymakers and criminal justice stakeholders, and after conducting a public hearing, on March 21, 2008, the Court revised portions of its January 2008 order.²¹³

- The Court stayed the implementation of the performance standards and referred them back to the IDC for review and revision if necessary. The IDC filed revised performance standards with the Court in June 2008, explaining the relationship of the standards to U.S. Supreme Court caselaw on ineffective assistance of counsel.²¹⁴ On October 16, 2008, the Court ordered the performance standards to be implemented on April 1, 2009.²¹⁵
- The Court extended the deadline for Clark and Washoe counties to complete their case weighting studies. The case weighting studies were published in July 2009.²¹⁶
- The Court stayed the May 1, 2008 deadline for the 15 rural counties to submit plans, and reconvened the Rural Subcommittee of the IDC to study the impact that the IDC recommendations would have on the rural counties.

The Rural Subcommittee submitted its final report to the Court on December 16, 2008.²¹⁷

- The report renewed the call for a permanent statewide indigent defense commission.²¹⁸

²¹² Order at 8, *In re Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT 411 (Nev., Jan. 4, 2008).

²¹³ Order, *In re Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT 411 (Nev., Mar. 21, 2008).

²¹⁴ Nevada Indigent Defense Standards of Performance, *In re Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT 411 (Nev., filed June 24, 2008).

²¹⁵ Order, *In re Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT 411 (Nev., Oct. 16, 2008).

²¹⁶ THE SPANGENBERG GROUP & THE CENTER FOR JUSTICE, LAW AND SOCIETY AT GEORGE MASON UNIVERSITY, ASSESSMENT OF WASHOE AND CLARK COUNTY, NEVADA PUBLIC DEFENDER OFFICES: FINAL REPORT at 57-58 (July 13, 2009) ("After completing the 2008 case weighting study in Clark and Washoe Counties, after reviewing previous studies conducted in Nevada, and after performing extensive site visits in Clark and Washoe counties, it is clear to TSG that public defenders in Clark and Washoe counties will be unable to comply with the requirements of ADKT-411."). The starkness of the indigent defense caseload crises in Clark and Washoe counties was made obvious by the TSG conclusion that both counties "require additional FTE attorney positions to reach the caseload standards established by comparable jurisdictions and the new performance standards promulgated under ADKT-411," and that Clark County requires between 31 and 90 additional attorneys (an increase of 32% to 82%) while Washoe County requires 19-28 new attorneys (an increase of 22% to 73%)."

²¹⁷ Nevada Supreme Court Indigent Defense Commission Rural Subcommittee Report and Recommendations, *In re Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT 411 (Nev., filed Dec. 16, 2008).

²¹⁸ Nevada Supreme Court Indigent Defense Commission Rural Subcommittee Report and Recommendations at 10, *In re Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT 411 (Nev., filed Dec. 16, 2008) ("That the State of Nevada create and totally fund an independent, statewide oversight board to oversee the delivery of indigent defense services in Nevada. The board should consist of members from all three branches of government at both the state and local level, the State Bar, and other interested persons. The board will provide a source of accountability for indigent defense services.").

- The report renewed the recommendation that the State Public Defender be fully and adequately funded by the state and removed from the supervision of the Department of Health and Human Services.²¹⁹
- Differing from the IDC recommendation for the State Public Defender Office to provide all representation in the rural counties, the Rural Subcommittee recommended that the state pay for all indigent defense services statewide, but with each county “free to choose its own indigent defense delivery system, provided that system conforms to performance standards, caseload standards, and is subject to the oversight of an independent board.”²²⁰
- Finally, the rural subcommittee recommended an amendment to the removal of judges from involvement in indigent defense services, which came to be known as the “Wagner Rule,” that would allow judges other than the judge presiding over a case to make decisions about requests for experts, investigators, and other trial-related expenses in rural communities.²²¹

The Nevada Supreme Court commissioned the Sixth Amendment Center to prepare a report on the history of the right to counsel in Nevada. That report, released in March of 2013, detailed Nevada’s first-in-the-nation status in requiring compensation of attorneys to represent the indigent in all cases and how the state retrenched on that commitment, particularly in the rural counties, beginning in the mid-1970’s.²²²

In October of 2014, the Rural Subcommittee made one final report to the Nevada Supreme Court.²²³ The report acknowledged “the unlikeliness of the Nevada Legislature fully funding a State Public Defender’s Office for the rural counties,” and suggested that the rural counties “should continue to use either the Nevada State Public Defender’s Office, establish a County Public Defender’s Office under NRS 260, or continue to use the contract counsel method” provided that the counties do not use “a totally flat fee contract.”²²⁴ Based in part on that

²¹⁹ Nevada Supreme Court Indigent Defense Commission Rural Subcommittee Report and Recommendations at 10, *In re Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT 411 (Nev., filed Dec. 16, 2008) (“The office of the Nevada State Public Defender must be adequately and totally funded by the State of Nevada. The history of the State Public Defender’s Office since its creation to present demonstrates that it has been and continues to be inadequately funded, all to the detriment of indigent persons requiring these services. Attorney salaries must be made competitive with like positions, attorney training must be improved, investigative services must be adequately funded, and the Office should not be administered under the direction of the Department of Health and Human Services.”)

²²⁰ Nevada Supreme Court Indigent Defense Commission Rural Subcommittee Report and Recommendations at 10, *In re Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT 411 (Nev., filed Dec. 16, 2008).

²²¹ Nevada Supreme Court Indigent Defense Commission Rural Subcommittee Report and Recommendations at 10, *In re Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT 411 (Nev., filed Dec. 16, 2008).

²²² SIXTH AMENDMENT CENTER, *RECLAIMING JUSTICE: UNDERSTANDING THE RIGHT TO COUNSEL IN NEVADA SO AS TO ENSURE EQUAL ACCESS TO JUSTICE IN THE FUTURE* (Mar. 22, 2013), *available at* <http://sixthamendment.org/reclaiming-justice/>.

²²³ Rural Subcommittee Report on the Status of Indigent Defense in the 15 Rural Counties and Recommendations to Improve Service to Indigent Defendants, *In re Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT 411 (Nev., filed Oct. 24, 2014).

²²⁴ Rural Subcommittee Report on the Status of Indigent Defense in the 15 Rural Counties and Recommendations to Improve Service to Indigent Defendants at 5, *In re Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT 411 (Nev., filed Oct. 24, 2014).

recommendation, on July 23, 2015, the Nevada Supreme Court ordered that “[i]f counties use the contract counsel method, they shall not use a totally flat fee contract, but execute contracts that allow for a modification of fees for extraordinary cases, and allow for investigative fees and expert witness fees.”²²⁵

In his 2017 State of the Judiciary address, Chief Justice Michael Cherry decried the growing justice gap in right to counsel services between urban and rural jurisdictions in Nevada.²²⁶ Announcing that rural counties simply cannot shoulder the state’s Sixth Amendment obligations any longer, the Chief Justice challenged the legislature to create a statewide indigent defense commission. “In our urban counties, a defendant can count on a public defender to provide prompt representation. However in the rural parts of our state, indigent defendants may sit in jail for an extended period of time waiting to speak to an attorney while witnesses’ memories fade and investigative leads go cold.” He continued, “even after that defendant is appointed an attorney [in a rural court], he or she may be one of several hundred clients all vying at the same time for the attention of that single attorney.”²²⁷

Noting that the rural counties’ “financial burden increases as the U.S. Supreme Court continually clarifies and expands the obligations an attorney owes the indigent accused” and the systems in which they operate, Justice Cherry urged the legislature to engage in comprehensive reform: “We must do better at providing representation to rural defendants. . . . Rural persons are just as deserving of representation as their urban neighbors. I encourage you to provide equal justice to rural individuals too. The time has come for an independent Indigent Defense Commission.”²²⁸

B. This evaluation

Nevada’s Advisory Commission on the Administration of Justice (“ACAJ”) is required to submit a report to the legislature in advance of each regular session, recommending “changes pertaining to the administration of justice.”²²⁹ At its November 1, 2016 meeting, the ACAJ voted its support of legislation to:²³⁰

- Create a 13-member commission with statewide authority over all indigent defense services in criminal, delinquency, child in need of services, and abuse and neglect cases, including the authority to promulgate standards.
- Create the Office of Indigent Legal Services to carry out the day-to-day operations of the commission (replacing the existing Office of State Public Defender).
- Authorize the commission to create a specialized appellate representation unit of the Office of Indigent Legal Services and allow counties to cede administration and funding of appellate services to the state.

²²⁵ Order, *In re Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT 411 (Nev., July 23, 2015).

²²⁶ Chief Justice Michael Cherry, 2017 State of Judiciary Message (Mar. 8, 2017), *available at* https://nvcourts.gov/Supreme/Court_Information/State_of_the_Judiciary/2017_State_of_the_Judiciary_Message/

²²⁷ Chief Justice Michael Cherry, 2017 State of Judiciary Message (Mar. 8, 2017).

²²⁸ Chief Justice Michael Cherry, 2017 State of Judiciary Message (Mar. 8, 2017).

²²⁹ NEV. REV. STAT. § 176.0125(12) (2017).

²³⁰ ADVISORY COMMISSION ON THE ADMINISTRATION OF JUSTICE, FINAL REPORT at 141-142 and App. J (Feb. 2017), *available at* <https://www.leg.state.nv.us/App/InterimCommittee/REL/Document/9887>.

- Require counties with populations greater than 100,000 to continue to fund and administer trial level indigent representation through public defender offices, and require compliance with commission standards.
- Offer counties with populations of 100,000 or less the choice between: continued autonomy over administration of trial level services with responsibility for fully funding those services; or capping costs at the current level and ceding administration of trial level services to the commission.

The proposed legislation would help the State of Nevada meet its Fourteenth Amendment duty to provide Sixth Amendment effective assistance of counsel to the indigent at all critical stages of a case. Flexibility in service delivery systems, including through regional plans, would eliminate redundancy and maximize efficient use of limited taxpayer resources. Uniform data collection would arm state policymakers with the information to ensure that limited taxpayer resources are used to maximum efficiency. The initial state financial impact for improving services would be minimized, as counties would continue to contribute the amounts they were already spending during the initial years of implementation.

The proposed legislative approach would give rural counties a choice of either capping their indigent representation costs at an average of the past three years (excluding extraordinary cases) in perpetuity and ceding administration of trial level services to the state, or retaining full local autonomy over indigent representation services. If local governments are happy with their trial level systems, do not want to receive state funding for those services, and their services meet statewide standards, the recommendation would have zero impact on those trial level systems. All counties would be immediately relieved of responsibility for funding and administering appellate services.

The ACAJ recommendations were proposed to the legislature as SB377 during the 2017 regular session.²³¹ Some actors felt that local indigent defense systems should be more thoroughly studied. As a compromise, the bill was amended to create the Nevada Right to Counsel Commission to study public defense services in rural Nevada. The legislature passed the amended bill, and it was signed by Nevada Governor Brian Sandoval on June 8, 2017.²³²

The Nevada Right to Counsel Commission (“NRTCC”) is required to study and make recommendations for a statewide system for the provision of legal representation to indigent persons in counties with populations of 100,000 or less. The NRTCC contracted the Sixth Amendment Center²³³ to conduct the research. Originally, the NRTCC selected five counties to be studied in depth as representative of the rural counties. Some members of the NRTCC felt this

²³¹ SB 377, 79th Nev. Leg. (2017) (as introduced; available at <https://www.leg.state.nv.us/Session/79th2017/Bills/SB/SB377.pdf>).

²³² 2017 Nev. Stat. 2939-43, SB 377 (codified at NEV. REV. STAT. §§ 180.002 -180.004 and 180.200 – 180.210 (2017)).

²³³ The 6AC is a Massachusetts non-profit, tax-exempt organization seeking to ensure that no person accused of crime goes to jail without first having the aid of a lawyer with the time, ability, and resources to present an effective defense as required under the United States Constitution. We do so in part by measuring public defense systems against Sixth Amendment case law and established standards of justice, and we assist state and local policymakers in their work to establish and implement public defense systems that meet constitutional requirements while promoting public safety and fiscal responsibility.

would overlook the least populated counties. The 6AC agreed to study all of the rural counties in as much depth as possible within the time constraints imposed by the legislature on the NRTCC.

Methodology

The Sixth Amendment Center independently and objectively evaluates indigent defense systems using Sixth Amendment case law and national standards for right to counsel services as the uniform baseline measure for providing attorneys to indigent people, along with the requirements of local and federal laws.

The 6AC's assessment of indigent defense services in Nevada's 15 rural counties has been carried out through three basic components:

- *Data collection*: Basic information about how a jurisdiction provides right to counsel services exists in a variety of forms, from statistical information to policies and procedures. 6AC obtained and analyzed relevant hard copy and electronic information, including copies of indigent defense contracts, policies, and procedures.
- *Court observations*: Right to counsel services in each jurisdiction involve interactions among at least three critical processes: (i) the process an individual defendant experiences as their case advances from arrest through disposition; (ii) the process the defense attorney experiences while representing each individual at the various stages of a case; and (iii) the substantive laws and procedural rules that govern the justice system in which indigent representation is provided. Throughout the rural counties, 6AC conducted courtroom observations to clarify these processes.
- *Interviews*: No individual component of the criminal justice system operates in a vacuum. Rather, the policy decisions of one component necessarily affect another. Because of this, 6AC conducted interviews with a broad cross-section of stakeholder groups before, during, and after site visits to the various counties. In addition to speaking with indigent defense attorneys, 6AC interviewed trial court judges, county officials, prosecutors, court clerks, and law enforcement.

Two principal U.S. Supreme Court cases, decided on the same day, describe the tests used to determine the constitutional effectiveness of right to counsel services. *United States v. Cronin*²³⁴ and *Strickland v. Washington*²³⁵ together describe a continuum of representation. *Strickland* is used after a criminal case is final to determine retrospectively whether the lawyer provided effective assistance of counsel; it sets out the two-pronged test of whether the appointed lawyer's actions were unreasonable and prejudiced the outcome of the case. *Cronin* explains that, if certain systemic factors are present (or necessary factors are absent) at the outset of the case, then a court should presume that ineffective assistance of counsel will occur.

²³⁴ 466 U.S. 648 (1984).

²³⁵ 466 U.S. 668 (1984).

**Understanding *Cronic* through the American Bar Association's
Ten Principles of a Public Defense Delivery System**

Adopted by the ABA House of Delegates in 2002, the ABA *Ten Principles*^a are self-described as constituting “the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney.” The *Ten Principles* include the markers of a *Cronic* analysis: independence of the defense function (Principle 1); effective representation by counsel at all critical stages (Principles 3 and 7); sufficiency of time and resources (Principles 4, 5, and 8); and qualifications, supervision, and training of attorneys (Principles 6, 9, and 10).

a. ABA, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002), available at https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf.

Hallmarks of a structurally sound indigent defense system under *Cronic* include the early appointment of qualified and trained attorneys with sufficient time to provide effective representation under independent supervision. The absence of any of these factors can show that a system is presumptively providing ineffective assistance of counsel. This report evaluates the indigent defense systems of Nevada’s 15 rural counties against these criteria.

Chapter III. Rural county & city indigent defense systems

Nationally, there are only two models for the delivery of indigent defense services. Jurisdictions may: a) employ government staff attorneys; and/or, b) compensate private attorneys to provide representation.

a) Government employees are either full-time or part-time employees. Full-time government attorneys are generally barred from carrying private cases²³⁶ but in return receive benefits consistent with other government attorneys (e.g., health insurance, retirement, malpractice insurance, etc.) and are generally housed in government office space. Part-time government-staff attorneys are employed for a specific number of hours per week, month or year, and may or may not receive government benefits or office space. Part-time government staff attorneys are allowed to take private cases during their non-public hours.

b) Private attorneys can be paid one of two ways: i) under contract; or, ii) at hourly rates.

i) Contracts: Public defense contracts can be constructed in multiple ways, including:

- A set fee per case event (e.g., a lawyer earns one fee for completing an initial hearing, and a separate fee for other proceedings such as an “arraignment,” “preliminary hearing,” “trial,” or, “direct appeal,” etc.);
- A set fee per defendant (e.g., a lawyer earns a set fee to represent a single defendant against all charges regardless of the point in the case that the charges are disposed);
- A set fee per “case;” (This is similar to the above example except that a lawyer earns a set fee to represent a single defendant against charges presented on a single prosecution charging instrument regardless of the point in that the “case” is disposed); or,
- A set flat fee per week, month or year regardless of number of case events, defendants or cases represented.

Under each of these four models, contract fees may or may not include the cost of trial-level expenses (e.g., experts or investigators).

ii) Hourly Rates: Separate hourly rates may be set by case type (e.g., one rate for felony representation, and different rates for misdemeanor, delinquency, direct appeal, etc.) These hourly rates may or may not differ depending on whether the lawyer is working in-court or out-of-court. Hourly rates may or may not be set to include overhead operating costs of administering a law office (e.g., office rent; malpractice insurance; etc.) in addition to a reasonable fee to compensate the lawyer. Total compensation earned under any of these hourly rate models may or may not be capped at a determined limit (regardless of

²³⁶ Excluding the occasion case for a relative or friend.

hours worked). And, these potential compensation caps may or may not be waivable upon judicial review.

Nevada's statutes allow the board of county commissioners in each rural county to determine the manner in which it provides representation to indigent defendants and the amount of funding it provides to do so.

- a) **Government employee systems:** A Nevada county's board of county commissioners "may," if they so choose, create a county "office of public defender."²³⁷ All that is required is for the commissioners to pass an ordinance saying they have done so. The commissioners set and pay the compensation of the attorney designated as the public defender and also for all deputy public defenders and support staff that the commissioners authorize.²³⁸ State law requires the commissioners to "provide" the overhead (such as offices, furniture, equipment, and supplies), but then permits the commissioners to "provide for an allowance in place of facilities."²³⁹

A rural county that has created a county public defender office may in fact have an office provided and fully furnished and equipped at government expense, staffed by full-time government employees who receive a salary and benefits. This is the type of county public defender office established by the boards of county commissioners in Elko, Humboldt, and Pershing counties.

Alternatively, in every rural county where the board of county commissioners has not created a county public defender office, each year the county pays to the state public defender the amounts "authorized by the Legislature for use of the State Public Defender's services that year."²⁴⁰ The legislature identifies these counties as a "participating county."²⁴¹ In exchange, the state public defender office provides primary representation to indigent defendants in cases arising out of the county's justice courts and district courts. This is the type of indigent defense system used in only Carson City and Storey County today. (See discussion of the movements of all 15 rural counties in and out of the state public defender system in Chapter II.)

- b) **Private attorney systems:**

- i.) Contracts: A rural county that has created a county public defender office may, though, have in place a contract with one or more private attorneys to handle all of the indigent defense cases in the justice and district courts of the county, in exchange for which the attorney is paid a fixed annual fee and out of which the attorney must provide all overhead necessary to serve as an attorney. With some variations, this is the type of county public defender office established by the boards of county commissioners in Churchill, Douglas, Esmeralda, Eureka,

²³⁷ NEV. REV. STAT. § 260.010(2) (2017).

²³⁸ NEV. REV. STAT. § 260.040(1)-(3) (2017).

²³⁹ NEV. REV. STAT. § 260.040(5) (2007).

²⁴⁰ NEV. REV. STAT. § 180.110 (2017).

²⁴¹ NEV. REV. STAT. § 180.080(2) (2017).

Lander, Lincoln, Lyon, Mineral, Nye, and White Pine counties. On July 23, 2015, the Nevada Supreme Court ordered that “[i]f counties use the contract counsel method, they shall not use a totally flat fee contract, but execute contracts that allow for a modification of fees for extraordinary cases, and allow for investigative fees and expert witness fees.”²⁴²

- ii.) Hourly Rates: Judges in all counties are authorized by state law to appoint a private attorney, on a case by case basis, to represent an indigent defendant when the public defender (either the state public defender or a county public defender) “is disqualified from furnishing the representation.”²⁴³ This type of disqualification most often occurs because the public defender has a conflict of interest with the particular defendant and includes cases where multiple defendants are charged together in a single case such that the public defender is ethically allowed to represent only one of the defendants. No matter the type of public defender office a county has chosen, there will always be at least a few cases that require a private attorney to be appointed. Other than in a postconviction petition for habeas corpus (a proceeding for which the Sixth Amendment does not require appointment of counsel), the county is responsible for paying for the appointed private attorney in the case, even in the counties that use the state public defender office to provide primary representation.²⁴⁴

Those counties with county government employee systems as their primary delivery system will be discussed first before moving on to those counties using the state government employee system (“State Public Defender”). In each of these two categories, the conflict system will also be explained regardless of whether the conflict system uses government employees, contract private attorneys and/or private attorneys paid hourly. In explaining the county government employee systems, those counties with the smallest populations will be explained first as systems generally become more complex the greater number of people being served. The two jurisdictions that use the State Public Defender (Carson City and Storey County) will be explained together.

Similarly, the private attorney systems will be explained from least populated counties to the most populated counties, for ease of readership. Finally, municipal indigent defense systems will be explained in a stand-alone section at the end of the chapter.

County Government Employee Systems

Pershing County: The provision of indigent defense services in Pershing County are guided by Title II, Chapter 2.80 of the Pershing County Code.²⁴⁵ The public defender serves at the pleasure of the County Board of Commissioners. He is to represent all persons appointed counsel by a magistrate, all persons in drug court, all persons subject to 432B or Termination of Parental

²⁴² Order, *In re Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT 411 (Nev., July 23, 2015).

²⁴³ NEV. REV. STAT. § 7.115 (2017).

²⁴⁴ NEV. REV. STAT. § 7.155 (2017).

²⁴⁵ §§ 2.80.010 *et seq.*

Rights proceedings; and all persons alleged to be mentally ill by a court of competent jurisdiction. He is required to “counsel and defend” clients at all critical stages of proceedings, including on appeal.²⁴⁶ The attorney can maintain a private law practice outside the hours he serves as public defender (Monday – Friday, 8:00am – 5:00pm).

All overhead expenses are paid by the county, as are case-related expenses, subject to the county’s budgeting procedures. Steve Cochran is the Pershing County public defender. Cochran has been public defender for ten years and is paid \$107,566 annually, plus a benefits package of \$31,159.²⁴⁷ The office also has a government employed legal secretary (salary: \$40,789; benefits: \$17,403).

The public defender office is located in the basement of the Pershing County Courthouse. There is no directory visible inside the courthouse lobby, and the public defender office is difficult to find. There are no signs in the basement showing the way and one might walk past a library, the justice courtroom, and Justice of the Peace’s office before reaching the public defender’s office.²⁴⁸ Walking into the office, a defendant enters into a small vestibule. Immediately ahead is a desk of the public defender’s legal secretary. Her office connects to a small conference room. To the left and through a door and small hallway with a copy machine is the office of public defender Cochran. The office is grey cinder block with low ceilings and fluorescent lighting; one window lets in some natural light, and the defender keeps his desk and file space orderly.

Initial conflicts arising in the District and Justice Courts are assigned to a conflict public defender, who is under contract with the county for that purpose. The conflict defender is paid \$50,000 for FY2018. Kyle Swanson has been the conflict public defender since at least 2004.

When the district and justice courts have to go outside of this conflict defender for conflict representation, they maintain a joint list of qualified attorneys (generally from the Reno/Carson City area). These attorneys are compensated at the statutory rate established by NRS 7.125 (i.e., \$100/hour) There is not a strict rotational appointment policy as the courts call attorneys to find availability.

Conflict attorneys: Steven Evenson, Patrick McGinnis, John Malone, Rendal Miller, David Neidert, John Oakes, Todd Plimpton

²⁴⁶ §§ 2.80.050 – 2.80.060

²⁴⁷ The defender says his compensation is “adequate.” He has never asked for a raise in ten years.

²⁴⁸ The hallway is a giant circle surrounding the commission meeting chambers (which used to be the justice court room); a defendant could also go the other way for a slightly shorter walk.

PERSHING	FY2013	FY2014	FY2015	FY2016	FY2017	5 YR Total
PD Expenditure ²⁴⁹	\$154,182.00	\$161,903.00	\$171,299.00	\$188,051.00	\$183,939.00	\$859,374.00
PD						
Recoupment ²⁵⁰	\$1,165.00	\$1,987.00	\$2,367.00	\$1,497.00	\$1,555.00	\$8,571.00
% Recouped	0.76%	1.23%	1.38%	0.80%	0.85%	1.00%
ANALYSIS						
% +/- (FY13-FY17)	19.30%					
2018 (Budget)	\$214,018.00					
% +/- (FY17-FY18)	16.35%					

Humboldt County: The Humboldt County board of commissioners has established two separate county public defender offices: one to provide primary representation, and one to provide conflict representation.

In 2007, Humboldt County created the Office of the Public Defender. Originally, the office was a regional office that also provide representation in Pershing County. Humboldt County and Pershing County separated their indigent defense services in 2010.

Humboldt County Code, Chapter 2.44 provides the statutory framework for the office.²⁵¹ “The office of public defender shall be filled by appointment by Humboldt County board of commissioners after receiving recommendations from the Humboldt County public defender committee (“HCPDC”). HCPDC shall be comprised of one county commissioner, one district court judge, the county administrator and one private attorney and shall be appointed by Humboldt County board of commissioners.”²⁵² “The Humboldt County public defender shall serve at the pleasure of the Humboldt County board of commissioners.”²⁵³

The only qualification to be appointed public defender is that the person be licensed to practice in the state and become a resident of Humboldt County “as soon as practicable after appointment.”²⁵⁴ There are no further qualifications made by the HCPDC or the county. Although the county code allows for the hiring of assistant public defenders and staff, the office currently operates with a single attorney and one legal secretary.

²⁴⁹ CAFR and budget, in Expenditures under "Judicial > Public Defender" line item

²⁵⁰ CAFR and budget, in Revenues under "Charges for Services > Judicial > Public defender fees" line item

²⁵¹ Available at:

<http://www.codepublishing.com/NV/HumboldtCounty/html/HumboldtCounty02/HumboldtCounty0244.html#2.44.0>

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²⁵² HCC 2.44.010(b).

²⁵³ HCC 2.44.010(c).

²⁵⁴ HCC 2.44.030(A)1-2.

The public defender is full-time and may not have a private caseload.²⁵⁵ All overhead costs are part of the public defender budget.²⁵⁶ Public defender staff receive the same benefits as other county employees, including medical insurance and retirement.

“The public defender may, before appointment as counsel for that person, interview an indigent person when he has been arrested and confined for a public offense or for questioning on suspicion of having committed a public offense. This does not create a right to the public defender before appointment by the magistrate.”²⁵⁷ “Upon appointment, the public defender or other appointed counsel shall represent the person at every critical stage of the proceedings from initial appointment by the court.”²⁵⁸

The public defender is appointed to cases at the justice court level and continues vertical representation for those cases bound over to the district court. The public defender is required to handle the following case types:

1. All criminal matters in which the magistrate deems that the appointment of counsel for the defendant is warranted;
2. All juvenile matters in which the magistrate deems that the appointment of counsel for the child is warranted;
3. All guardianships involving the public guardian in which the magistrate deems that the appointment of counsel for the proposed adult ward is warranted; and,
4. All child protection proceedings in which the magistrate deems that the appointment of counsel, for the parent or person responsible for the child’s welfare and alleged to have abused or neglected a child, is warranted.²⁵⁹

Under HCC 2.44.080, the public defender is required to keep detailed statistics and submit an annual report to the county commission by February of each year for the previous calendar year.

There has only been one public defender since the creation of the office, Matthew Stermitz. He is compensated at an annual salary of \$122, 420 (in addition to medical and retirement benefits). There is one legal secretary, Maureen Macdonald.²⁶⁰ She earns \$53,090 plus benefits.

²⁵⁵ “The public defender and deputies shall not engage in the private practice of law while employed in the office of public defender.” HCC 2.44.030(E).

²⁵⁶ “Humboldt County board of commissioners shall provide necessary and appropriate office space, furniture, equipment, and supplies to conduct the business of the office of the public defender. The public defender shall maintain a budget for approved office expenses. Humboldt County board of commissioners shall appropriate funds to operate and maintain the office of the public defender in accordance with Humboldt County established budgetary process.” HCC 2.44.030(F-G).

²⁵⁷ HCC 2.44.050(A).

²⁵⁸ HCC 2.44.050(E).

²⁵⁹ HCC 2.44.050(A) 1-4.

²⁶⁰ She is the sister of the District Attorney. Maureen Macdonald was the legal secretary for the state public defender office in Lander County when the decision to open a county public defender office in 2007 was made. Her employment pre-dates the election of her brother as District Attorney. Three people, including Maureen Macdonald applied for the position. A temporary public defender committee was formed to oversee the creation of the office. The committee consisted of former District Court Judge Wagner and the former county manager at the time [who is Maureen’s father and the former District Attorney]. Her brother became the district attorney in approximately 2012.

In April 2017, Humboldt County created the Office of the Alternate Defender. Humboldt County Code, Chapter 2.44.110 provides the statutory framework for the office. Many of the same requirements of the public defender apply to the alternate defender as well. For example, the alternate defender must be a licensed attorney and resident of the county. However, there is no alternate public defender committee that makes decisions on hiring. The alternate defender is a direct appointee of, and serves at the pleasure of, the county commission.

The alternate public defender is not a true conflict office. With the creation of the alternate public defender, that office became the primary representation in the following cases: juvenile proceedings, abuse/neglect proceedings, parole revocation proceedings and diversion and opportunity court participants.”²⁶¹ The public defender provides representation in these types of cases only if the alternate public defender has a conflict. The alternate public defender provides conflict representation in criminal cases for which the public defender cannot provide services.

Like the public defender, the alternate public defender’s overhead costs are provided by the county. There has only been one alternate public defender since the office opened, Maureen McQuillan. She is employed full-time and is not allowed to carry private cases. She is paid an annual salary of \$85,850, plus benefits. There is no other staff in the Office of the Alternate Public Defender. The office budget for the current fiscal year (FY2018) is \$129,700.

The offices of the public defender and alternate public defender are located in the same basement of the Humboldt County Courthouse. Although the county recently added the public defender office to the court directory in the lobby of the building, the public defender office is difficult to find. There are no signs in the basement showing the way and one must walk past storage lockers and utility rooms before reaching the office.

A defendant that eventually makes it to the office is greeted by a plain door with a “public defender” sign attached. Walking through that door a defendant enters into a small vestibule. To the immediate right is a singular office dedicated to the alternate defender. To the left is the office of the public defender’s legal secretary. Her office connects to a conference room and the office of the public defender. The look of the office is depressing as it is grey cinder block with low ceilings and fluorescent lighting. Only the legal secretary’s office has windows.²⁶²

In cases where both the public defender and alternate public defender have conflicts, the courts alternately appoint local attorneys Rendall Miller and Dolan Law (consisting of attorneys Robert Dolan and Massey Mayo). Conflict attorneys bill the court for services at the statutory rate of \$100 per hour, plus travel. Judge Norcutt stated that the Union Township Justice Court still maintains a list of attorneys throughout Northern Nevada who are willing to serve as court

Email to 6AC Executive Director, David Carroll, from Humboldt County Public Defender, Matt Stermitz, June 12, 2018 at 11:41 AM.”

²⁶¹ HCC 2.44.120(C).

²⁶² The alternate public defender does not share the legal secretary with the public defender and prefers to just shut her office door to create an ethical screen between the two offices.

appointed attorneys, if all the above-mentioned attorneys have conflicts. That said, the Court has not had to refer any such cases in the last year since hiring the Alternate Public Defender.

HUMBOLDT	FY2013	FY2014	FY2015	FY2016	FY2017	5 YR Total
PD Expenditures ²⁶³	\$206,019.00	\$214,582.00	\$225,559.00	\$243,762.00	\$278,558.00	\$1,168,480.00
PD Recoupment ²⁶⁴	\$9,821.00	\$13,270.00	\$13,172.00	\$10,251.00	\$8,413.00	\$54,927.00
% Recouped	4.77%	6.18%	5.84%	4.21%	3.02%	4.70%
ANALYSIS						
% +/- (FY13-FY17)	35.21%					
2018 (Budget)	\$393,740.00					
% +/- (FY17-FY18)	41.35%					

Elko County: Elko County Code, Chapter 10 provides the (very limited) statutory framework for the office. The County Commission determines the staffing and compensation for the office.²⁶⁵ The office currently has seven attorneys, including the public defender and deputy chief public defender. There are five full-time “caseworkers,” positions that include some combination of filing and administrative support. During school months, the office has three part-time social work interns (undergraduate students).²⁶⁶

Attorney Title	Name	Salary
Chief	Kriston Hill	\$110,000.00
Chief Deputy	Roger Stewart	\$104,009.91
Deputy 1	Stephanie Foster	\$88,837.26
Deputy 2	Ben Gaumond	\$89,279.70
Deputy 3	Bryan Green	\$88,926.52
Deputy 4	Phil Leamon	\$76,006.97
Deputy 5	Matt Pennell	\$77,406.32

The District Attorney is paid \$129,895, per N.R.S. 245.043. The public defender is paid \$110,000, at the discretion of the Assistant County Manager/CFO.²⁶⁷ Deputy defenders’ salaries are the same as assistant district attorneys (Compensation Schedule for both public defenders and assistant district attorneys: \$71,644 - \$107,464), and there is complete parity between the Chief Deputy Public Defender and the Chief Criminal Deputy District Attorney at \$104,009.91.

²⁶³ CAFR and budget, in Expenditures under "Judicial > Public Defender" line item, and for 2018 also "Judicial > Alt Public Defender" line item

²⁶⁴ CAFR and budget, in Revenues under "Judicial > Public defender fees" line item

²⁶⁵ County Code § 1-10-3.

²⁶⁶ Some attorneys contend that this program may create more work for the attorneys, who regularly have to train up the interns, who then attain competency in their roles right around the time their internships end.

²⁶⁷ Per Email from Kriston Hill, Elko County Public Defender, to Bob Boruchowitz (May 16, 2018).

However, the salaries were frozen for two years, and compensation for at least one of the defenders has not kept pace with his experience.²⁶⁸

The only qualification to be appointed public defender is that the person be licensed to practice in the state²⁶⁹ There have been no further qualifications made by the county. The public defender is technically a part-time position, and so may have a private caseload “insofar as such practice does not create an unreasonable time conflict with his duties.”²⁷⁰ Deputy public defenders are not permitted to have private caseloads. All overhead costs are part of the public defender budget. Public defender staff receive the same benefits as other county employees, including medical insurance and retirement.²⁷¹ The public defenders and assistant district attorneys are both members of the Elko County Public Attorney’s Association, which has a collective bargaining agreement with the County. The agreement contains provisions mutually relating to benefits, salary, leave, and termination.

The public defender is appointed to cases at the justice court level and continues vertical representation for those cases bound over to the district court. The public defender also provides representation to defendants who would be appointed counsel in municipal court for each of the four population centers.²⁷² The public defender handles the following case types: adult criminal, juvenile, family (432B). None of the public defenders are capital case qualified, so all capital cases must be assigned to outside counsel.

The office employs four support staff called “caseworkers.” The attorneys consider the caseworkers instrumental to their success. Caseworkers maintain contact with clients and witnesses,²⁷³ and file and prepare paperwork and certain documents. The caseworkers also gather discovery for the attorneys in all cases except those involving child pornography or other highly sensitive material (subject basically to the district attorney’s discretion). Every day, the office receives a jail list; the caseworkers block out time on attorneys’ calendars to meet clients in jail. The caseworkers have no set rotation for answering the phone or helping at the window; they just pick up the phone as they are available.

Unlike all other counties involved in this study, the public defender office in Elko has a dedicated budget for investigators and expert witnesses. The budget is \$80,000 per year, but the office never approaches using that. Attorneys submit requests to the chief defender to expend investigator funds in a case. Nearly all the defenders use a local private investigator named Mike

²⁶⁸ Matt has three more years of experience than Phillip Leamon, and earns about the same amount of money. He reports that he was owed should at least eight adjustments to his salary in the past four years, between regular raises and cost-of-living adjustments; he received just three increases.

²⁶⁹ ECC 1-10-2

²⁷⁰ In practice, the defender is full-time.

²⁷¹ County pays 100% of premium for attorneys; public defenders pay premiums for family members. One caseworker, Sharon, told us that she pays a total of \$1,150 in premiums per month for four people (herself, husband, and two children).

²⁷² It appears that only the city of Elko has formalized this agreement in writing.

²⁷³ The caseworkers take particular care to accommodate kids’ schedules and not keep them out of school. They often set up phone appointments for people in Wendover, but really always try to have juveniles come into the office. They filter calls from the prison, and cannot accept collect calls in the office.

Kolsch.²⁷⁴ Defenders reports using the investigator regularly in serious felony cases, but none of the defenders report using him on more than about five cases each year; the defender reports being hired by the office for about 8-10 cases per month.

The public defender office is located in a separate building across the street from the Elko County Courthouse. It is a former library and county administration building. The office is clean and appears to be a professional law office. Guests must be buzzed back through a security door. Each defender has their own private office; half on the main floor, and half in the basement. Four of the caseworkers work at their own desks in the main office area. One of the caseworkers – the longest-tenured and office manager – has her own small office set in a hallway between the main office area and a conference room. There is a positive atmosphere in the office, and by all accounts, people seem to really enjoy working there.

Funding for the Elko County public defender office is by far the most complex of any of the rural county government employee systems. It comes from a combination of Elko County, the City of Carlin, the City of Elko, the City of Wells, and the City of West Wendover. The county bills each of the cities \$75 for each misdemeanor case that arose under city ordinance and for which an indigent defense attorney was provided by the county, pursuant to state law.²⁷⁵ The amounts shown as “PD Expenditure” in the tables below for each of the cities reflect the sums that the city paid to the county for this purpose. The combined total that the four cities reimbursed to Elko County is shown in the county table as “County Reimb from Cities.”

After deducting the amounts that the four cities reimbursement to the county, the county’s actual annual expenditure is shown in the county table as “PD Expenditure (Net of reimb).” This sum does not include funds expended by the county

Each of the five courts (district and four justice/municipal courts) impose assessments on indigent defendants requiring them to partially reimburse the county and/or city for the attorney appointed to represent them. As assessments are actually collected in individual cases, they are then credited to the appropriate governmental body based on whether the defendant was prosecuted for a city ordinance misdemeanor (credited to the appropriate city) or for a crime under state law (credited to the county). Elko County provided information about the annual amounts it recoups from these assessments, as shown in the county table “PD Recoupment (county). Though similar information was requested from all four of the cities, only the City of Wells provided it.

²⁷⁴ Mike is a former Sheriff’s deputy, tribal police chief, and trainer for law-enforcement. He has been a private investigator since 2010, and has worked with the office since 2013. He spends about 70% of his time working for the Elko public defenders. He mostly works on felony cases, but occasionally is called in for juvenile and misdemeanor cases as well.

²⁷⁵ Nev. Rev. Stat. § 171.188 (2017).

ELKO COUNTY	FY2013	FY2014	FY2015	FY2016	FY2017	5 YR Total
PD Expenditure (Gross) ²⁷⁶	\$1,031,638.00	\$1,164,408.00	\$1,374,100.00	\$1,353,813.00	\$1,367,600.00	\$6,291,559.00
County Reimb from Cities ²⁷⁷	\$8,025.00	\$6,000.00	\$7,275.00	\$7,650.00	\$9,675.00	\$38,625.00
PD Expenditure (Net of reimb)	\$1,023,613.00	\$1,158,408.00	\$1,366,825.00	\$1,346,163.00	\$1,357,925.00	\$6,252,934.00
PD Recoupment (county) ²⁷⁸	\$27,659.00	\$27,939.00	\$14,187.00	\$15,042.00	\$6,701.00	\$91,528.00
% Recouped	2.70%	2.41%	1.04%	1.12%	0.49%	1.46%
ANALYSIS						
% +/- (FY13-FY17)	32.57%					
2018 (Budget - Gross)	\$1,438,145.00					
2018 (County Reimb)	\$11,550.00					
2018 (Budget - Net of reimb)	\$1,426,595.00					
% +/- (FY17-FY18)	5.16%					

CARLIN	FY2013	FY2014	FY2015	FY2016	FY2017	5 YR Total
PD Expenditure ²⁷⁹	\$150.00	\$375.00	\$450.00	\$225.00	\$0.00	\$1,200.00
ANALYSIS						
% +/- (FY13-FY17)	-100.00%					
2018 (Actual)	\$225.00					
% +/- (FY17-FY18)						

WEST WENDOVER	FY2013	FY2014	FY2015	FY2016	FY2017	5 YR Total
PD Expenditure ²⁸⁰	\$2,250.00	\$1,350.00	\$2,175.00	\$2,175.00	\$3,525.00	\$11,475.00
ANALYSIS						
% +/- (FY13-FY17)	56.67%					
2018 (Actual)	\$3,900.00					
% +/- (FY17-FY18)	10.64%					

CITY OF ELKO	FY2013	FY2014	FY2015	FY2016	FY2017	5 YR Total
PD Expenditure ²⁸¹	\$5,100.00	\$4,125.00	\$4,275.00	\$5,175.00	\$6,150.00	\$24,825.00
ANALYSIS						
% +/- (FY13-FY17)	20.59%					
2018 (Actual)	\$7,200.00					
% +/- (FY17-FY18)	17.07%					

²⁷⁶ CAFR and budget, under Expenditures in "Judicial > Public Defender" line item.

²⁷⁷ email from county PD; cities reimburse the county at \$75/case per NRS 171.188

²⁷⁸ CAFR and budget, under Revenues in "Charges for Services > Judicial > Public defender fees"

²⁷⁹ paid to county; already deducted from county expenditures. email from Teri Feasel (June 21, 2018) and letter from PD Kriston Hill (Apr 27, 2018);

²⁸⁰ paid to county; already deducted from county expenditures. email from Teresa Naranjo (July 10, 2018) and letter from PD Kriston Hill (Apr 27, 2018).

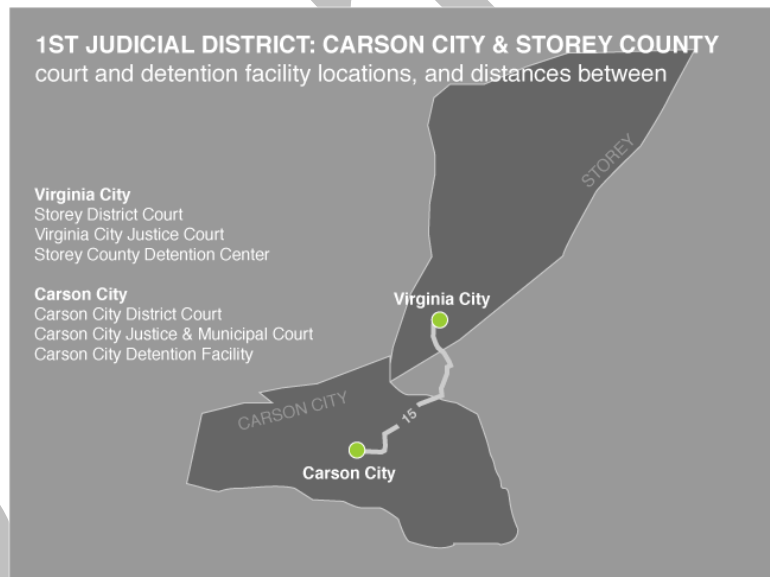
²⁸¹ paid to county; already deducted from county expenditures

WELLS	FY2013	FY2014	FY2015	FY2016	FY2017	5 YR Total
PD Expenditure ²⁸²	\$525.00	\$150.00	\$375.00	\$75.00	\$0.00	\$1,125.00
PD Recoupment (muni only) ²⁸³	\$250.00	\$600.00	\$280.00	\$150.00	\$0.00	\$1,280.00
% Recouped	47.62%	400.00%	74.67%	200.00%		113.78%
ANALYSIS						
% +/- (FY13-FY17)	-10.71%					
2018 (Actual)	\$225.00					
% +/- (FY17-FY18)	-78.92%					

County Government Employee System (State Public Defender)

Carson City and Storey County are the two counties making up the 1st Judicial District. They are also the only two counties that pay the state public defender office to provide primary representation in their justice and district courts.

The state public defender office is located in Carson City within the Department of Health and Human Services. As of March 2017, it employed the state public defender, seven deputy state public defenders, two investigators, and four administrative staff.²⁸⁴ All SPD attorneys and staff are employees of the State of Nevada. The two SPD appellate attorneys share responsibility for handling direct appeals out of Carson City and Storey (as well as post-conviction responsibilities in all of Nevada's 17 counties).



The state public defender assigns four attorneys to cover the Carson City courts. They are aided by the Chief Deputy who covers the Storey County courts part-time. The Chief Public Defender occasionally takes cases when needed.

For conflict cases, Carson City contracts with three private attorneys to handle every conflict case to which they are appointed during the term of the three-year contract. In exchange, the attorney is paid a fixed annual rate of \$120,000 (increasing by 2% in each subsequent year of the contract).²⁸⁵ The contract attorneys are responsible for assuming all costs of doing business and

²⁸² paid to county; already deducted from county expenditures

²⁸³ email from Judge Patricia Calton (July 3, 2018)

²⁸⁴ Email from State Public Defender Karin Kreizenbeck to 6AC Executive Director David Carroll (Apr. 3, 2018) (providing Public Defenders Office organizational chart (Mar. 2017)).

²⁸⁵ Agreements for Public Defender Services July 1, 2017 Through June 30, 2020, between the Carson City, a political subdivision of the State of Nevada, and John E. Malone; Carson City, NV and Robert S. Walker; Carson City, NV and Noel S. Waters.; (June 6, 2017); Section 5, p. 3. (on file with Sixth Amendment Center).

must carry significant insurance plans: general liability (\$2,000,000); business automobile liability (\$1,000,000); professional liability insurance (\$2,000,000); and worker's compensation (\$1,000,000).²⁸⁶ The contract may be terminated without cause.²⁸⁷

Three contract attorneys provide the bulk of conflict representation: John E. Malone; Robert S. Walker; and, Noel S. Waters. Each contract is for a three year term (current is July 1, 2017 through June 30, 2020). Each contractor is compensated at \$120,000 in the first year with a 2% increase in each subsequent year.²⁸⁸ The contract may be terminated without cause.²⁸⁹ The contract attorneys are responsible for assuming all costs of doing business and must carry significant insurance plans: general liability (\$2,000,000); business automobile liability (\$1,000,000); professional liability insurance (\$2,000,000); and, worker's compensation (\$1,000,000).²⁹⁰

If additional conflict attorneys are needed beyond these three contracts, the Carson City courts keep a list of available attorneys and pays them at the statutory rate.²⁹¹ Richard Davies, Kirk Brennen, Justin Oakes, John Oakes, Daniel Spence, Kay Ellen Armstrong, Derek Lopez, Maria Pence, Karla Butko, Troy Jordan, Kaitlyn Miller, Anne Laughlin, Joel Locke, Alison Joffe, Lauren Berkich, Theresa Ristenpart, and, Cotter Conway.

There are very few conflict cases in Storey County. When the need arises, the court keeps a list of the following attorneys willing to take cases at the statutory rate²⁹² (\$100/hour):²⁹³ Robert B. Walker; John Kadlic; Anne Laughlin; Daniel Spence; Justin Oakes; Mary Lou Wilson; and, Laurie Trotter.

Funding for all indigent defense services in the courts located within Carson City comes from Carson City. For each biennial, the legislature authorizes the amount that the SPD may collect from Carson City for the indigent defense representation that the SPD provides.²⁹⁴ Carson City

²⁸⁶ Agreements for Public Defender Services July 1, 2017 Through June 30, 2020, between the Carson City, a political subdivision of the State of Nevada, and John E. Malone; Carson City, NV and Robert S. Walker; Carson City, NV and Noel S. Waters.; (June 6, 2017); Section 13, pp. 7-10. (on file with Sixth Amendment Center).

²⁸⁷ Agreements for Public Defender Services July 1, 2017 Through June 30, 2020, between the Carson City, a political subdivision of the State of Nevada, and John E. Malone; Carson City, NV and Robert S. Walker; Carson City, NV and Noel S. Waters.; (June 6, 2017); Section 7.1.2, p. 3. (on file with Sixth Amendment Center).

²⁸⁸ Agreements for Public Defender Services July 1, 2017 Through June 30, 2020, between the Carson City, a political subdivision of the State of Nevada, and John E. Malone; Carson City, NV and Robert S. Walker; Carson City, NV and Noel S. Waters.; (June 6, 2017); Section 5, p. 3. (on file with Sixth Amendment Center).

²⁸⁹ Agreements for Public Defender Services July 1, 2017 Through June 30, 2020, between the Carson City, a political subdivision of the State of Nevada, and John E. Malone; Carson City, NV and Robert S. Walker; Carson City, NV and Noel S. Waters.; (June 6, 2017); Section 7.1.2, p. 3. (on file with Sixth Amendment Center).

²⁹⁰ Agreements for Public Defender Services July 1, 2017 Through June 30, 2020, between the Carson City, a political subdivision of the State of Nevada, and John E. Malone; Carson City, NV and Robert S. Walker; Carson City, NV and Noel S. Waters.; (June 6, 2017); Section 13, pp. 7-10. (on file with Sixth Amendment Center).

²⁹¹ Email from Maxine Cortes, Court Administrator, First Judicial District Court and Carson City Justice/Municipal Court, to 6AC Director, David Carroll, on March 19, 2018 at 2:01 PM (on file at the Sixth Amendment Center).

²⁹² NRS 7.125

²⁹³ Email from Virginia Township Court Judge, Eileen Herrington, to 6AC Director, David Carroll, on April 2, 2018 at 5:37 PM (on file at the Sixth Amendment Center).

²⁹⁴ Nev. Rev. Stat. § 180.080 (2017). 2017 Nev. Stat. 2667, SB 545 § 9; 2015 Nev. Stat. 2868, AB 490 § 9; 2013 Nev. Stat. 2682, SB 521 § 10; 2011 Nev. Stat. 2189-90, SB 503 § 10.

also funds the compensation for the three conflict contract attorneys and for case by case appointments of private attorneys who are paid hourly. These combined sums are reflected in the table below as “PD Expenditure.”

Though requested, Carson City did not provide information about its total annual receipts from assessments imposed on indigent defendants to partially reimburse them for the attorney appointed to represent them. There is no line item in the annual financial documents from which the information can be obtained. The State Public Defender reports that the county assesses defendants \$250 for a gross misdemeanor and \$500 for a felony.

CARSON CITY	FY2013	FY2014	FY2015	FY2016	FY2017	5 YR Total
PD Expenditure ²⁹⁵	\$1,366,126.00	\$1,517,055.00	\$1,478,073.00	\$1,558,341.00	\$1,546,150.00	\$7,465,745.00
ANALYSIS						
% +/- (FY13-FY17)	13.18%					
2018 (Budget)	\$1,559,609.00					
% +/- (FY17-FY18)	0.87%					

Funding for all indigent defense services in the courts located within Storey County comes from the county. For each biennial, the legislature authorizes the amount that the SPD may collect from Storey County for the indigent defense representation that the SPD provides.²⁹⁶ Storey County also funds the compensation of attorneys who are appointed on a case by case basis and paid hourly in any case where the SPD has a conflict. Though requested, Storey County did not provide information about its total annual expenditures for indigent defense services and there is no line item in the county’s annual financial documents from which the information can be obtained. As a result, the amounts shown in the table below as “PD Expenditure” are only the amount that Storey County pays to the SPD each year.

STOREY	FY2013	FY2014	FY2015	FY2016	FY2017	5 YR Total
PD Expenditure ²⁹⁷	\$56,434.00	\$46,875.00	\$46,313.00	\$39,217.00	\$39,466.00	\$228,305.00
PD Recoupment ²⁹⁸	\$1,165.00	\$1,987.00	\$2,367.00	\$1,497.00	\$1,555.00	\$8,571.00
% Recouped	2.06%	4.24%	5.11%	3.82%	3.94%	3.75%
ANALYSIS						
% +/- (FY13-FY17)	-30.07%					
2018 (Budget)	\$76,888.00					
% +/- (FY17-FY18)	94.82%					

²⁹⁵ CAFR and budget, in Expenditures under "General Government > Other > Public Defender" line item; email from Karin Kreizenbeck (Apr 17, 2018), attaching "State Public Defender charges to Carson City and Storey County" by statute.

²⁹⁶ Nev. Rev. Stat. § 180.080 (2017).

²⁹⁷ 2017 Nev. Stat. 2667, SB 545 § 9; 2015 Nev. Stat. 2868, AB 490 § 9; 2013 Nev. Stat. 2682, SB 521 § 10; 2011 Nev. Stat. 2189-90, SB 503 § 10.

²⁹⁸ Where did we get this? CAFR and budget - no line item; Karen Kreizenbeck says: county assesses defs \$250 for gross misd and \$500 for felony.

Private Attorney Systems

Esmeralda County: Esmeralda County contracts with one attorney to represent all indigent defendants in the justice court and the district court, Chris Arabia.²⁹⁹ The attorney provides representation in all criminal and juvenile cases, including any and all necessary appeals and/or parole/probation revocation proceedings. The attorney is compensated at \$52,000 annually, paid monthly at \$4,333.33.³⁰⁰ This includes representation in one capital case (if any). However, any additional capital cases will be compensated at \$125/hour.

All overhead expenses are the responsibility of the attorneys, including rent, utilities, accepting calls from the jail at no charge, professional liability and worker's compensation insurance, and case related travel (including mileage). Although the "[c]ontractor shall not be obliged to provide the services of a conflict attorney,"³⁰¹ he "may assign other attorneys to take his place on an as-needed basis while maintaining overall responsibility for performance under this contract."³⁰² "Either party may cancel this Agreement by written notice to the other party received at least SIXTY (60) days prior to the termination date."³⁰³

When the District and Justice Courts have to go outside of the contract defender for conflict representation, each court maintains a separate list of qualified attorneys. That said, the district court has "never" had to go outside the public defender for a conflict.³⁰⁴ These attorneys would be compensated at the statutory rate established by NRS 7.125 (i.e., \$100/hour): Andrew Fritz, David Neely, Nathan Gent, Carl Joerger, Steve Evenson, and, John Malone.

Esmeralda County did not provide budget and expenditure information.

Eureka County: Eureka County contracts with one attorney, Kelley Brown, to represent all indigent defendants in the justice court and the district court. The contract itself contains no description of the work to be conducted; it incorporates by reference a proposal that the defense attorney submitted to the county, detailing the scope of services.³⁰⁵ The attorney agrees to provide representation in all criminal and juvenile cases, including any and all necessary appeals and/or parole/probation revocation proceedings.³⁰⁶ Capital cases are not contemplated within the

²⁹⁹ Arabia used to be a public defender in Nye County. At the time of this site report, Arabia is running for DA in Nye County.

³⁰⁰ Contract for Services of Independent Contractor between Esmeralda County & Law Offices of Chris Arabia, PC (July 1, 2018 through June 30, 2019). ¶ 2.

³⁰¹ Contract for Services of Independent Contractor between Esmeralda County & Law Offices of Chris Arabia, PC (July 1, 2018 through June 30, 2019). ¶ 1.

³⁰² "Contractor may assign other attorneys to take his place on an as-needed basis while maintaining overall responsibility for performance under this contract." ¶ 5.

³⁰³ Contract for Services of Independent Contractor between Esmeralda County & Law Offices of Chris Arabia, PC (July 1, 2018 through June 30, 2019). ¶ 4.

³⁰⁴ Phone conversations with County Clerk Cindy Elgan and David Carroll, May 14, 2018.

³⁰⁵ "Kelly Brown PLLC contract (July 2015 thru June 2017) (03-05-15)" at pdf pp. 12-22, in Eureka County folder (applying to Eureka County to provide public defense services for FY2015 and FY2016)

³⁰⁶ From "Kelly Brown PLLC contract (July 2015 thru June 2017) (03-05-15)" at pdf p. 13, in Eureka County folder (applying to Eureka County to provide public defense services for FY2015 and FY2016): "I, Kelly C. Brown, PLLC, propose to provide indigent defense services for misdemeanor, gross misdemeanor and felony cases as well as juvenile cases under Chapter 432B and Chapter 62 of the Nevada Revised Statutes. I will also handle Civil

contract; presumably, the county would have to appoint an attorney pursuant to the statutory compensation rates, but Eureka County has not had a capital case since the current public defender took over.

The defender is paid \$40,000 annually, in quarterly installments, on a 2-year contract.³⁰⁷ All overhead expenses are the responsibility of the attorney, including rent, utilities, accepting calls from the jail at no charge, professional liability and worker's compensation insurance, and case related travel (including mileage).³⁰⁸ He is to serve as a principal provider of indigent defense services in justice court and to continue representing any cases from that justice court that are bound over to the district court. The contract further requires the attorney to provide representation in direct appeals, and revocation of probation or parole. The defender also represents juveniles in delinquency cases, and is to assist in meritorious habeas corpus petitions.³⁰⁹

The defender operates his own independent law office, located in Ely (about 1.5 hours from Eureka, over two hours from Crescent Valley). He has no secretary, paralegal, or investigator on staff. The office is spacious and moderately well-adorned. It is located across from a vacant lot near the White Pine County Courthouse, and the attorney's name is prominently displayed on the door. Brown has over 20 years of legal experience, including as an assistant district attorney and a supervisor at the state public defender office. Eureka County (and cannot be appointed to them in other counties within the 7th District);³¹⁰ the justice court appoints another attorney and does not even notify Kelly about the case.

Conflicts arising in the District and Justice Courts are appointed to other lawyers, typically from Ely or Elko. The courts call attorneys to find availability. There is not a strict rotational appointment policy. These attorneys are compensated at the statutory rate established by NRS 7.125 (i.e., \$100/hour): Jane Eberhardy, Shain Manuele, and Richard Sears. If none of those three attorneys were available, then they would appoint from David Lockie, Sherburne Mcfarlan, and Michael Shurtz.

Commitment and Competency Hearings. I will handle cases in justice court, district court and the Nevada Supreme Court.”

³⁰⁷ Contract for Services of Independent Contractor between Eureka County, Nevada and Kelly C. Brown, PLLC (July 1, 2015 through June 30, 2017); Letter from Kelly Brown to Board of Eureka County Commissioners (Jan. 30, 2017) (exercising renewal of contract for July 1, 2017 through June 30, 2019 under same terms). ¶ 6.

³⁰⁸ From “Kelly Brown PLLC contract (July 2015 thru June 2017) (03-05-15)” at pdf p. 13, in Eureka County folder (applying to Eureka County to provide public defense services for FY2015 and FY2016): “I have a local office at 1139 East Aultman Street in Ely, Nevada. I maintain both legal malpractice insurance and general liability insurance. I have no office staff. I communicate with my clients directly. I will pay for my own local travel expenses, continuing education, bar dues and all other regular business costs.”

³⁰⁹ As determined by the defender himself.

³¹⁰ From “Kelly Brown PLLC contract (July 2015 thru June 2017) (03-05-15)” at pdf p. 14, in Eureka County folder (applying to Eureka County to provide public defense services for FY2015 and FY2016): “I will not be available to take domestic violence cases as my wife, Melissa Brown, is the Tri-County Special prosecutor for Domestic Violence. I understand that Eureka County had five domestic violence cases last year that required defense counsel. Because Eureka County will have to hire conflict counsel for these cases, I have reduced my proposed fee by an amount that should more than cover the possible additional cost of conflict counsel.”

The public defender's wife is a special prosecutor who prosecutes all domestic violence cases in the 7th judicial district. Accordingly, Kelly Brown has a conflict on all domestic violence cases in

Though requested, Eureka County did not provide information about its total annual expenditures for indigent defense services and there is no line item in the county's annual financial documents from which the information can be obtained.

Mineral County: Until January 2016, Mineral County contracted with only one attorney (Wayne Pederson, current Lyon County contract defender) to provide indigent defense representation. Most of the Mineral County cases were handled by his then-associate LeAnn Schumann, and conflict cases were assigned to other private attorneys on a case-by-case basis at the statutory rate of \$100 per hour.

When Pederson terminated the contract (because of the increased compensation for the Lyon County contract), John Oakes offered to take conflicts in-house with another attorney Patrick McGinnis. That is, when a conflict arose Oakes would pay McGinnis to cover the case. In the subsequent contract, McGinnis no longer plays that role but rather Justin Oakes, John Oakes' son. The law firm of John Oakes and the law firm of Justin Oakes are independent business entities.

When asked, the Mineral County district attorney said he has no idea how John Oakes pays Justin Oakes. However, John Oakes stated that he has never had a conflict of interest and therefore the monetary relation of how to pay Justin Oakes (or previously McGinnis) has never come up. He assumes that he would just pay the statutory hourly rate since that is what Justin Oakes gets when he is appointed by courts in other counties. But, of course, that makes no sense to have the contract arranged thusly when the Court could just decide to appoint Justin in all conflict cases at the statutory rate – except that by making conflicts inclusive in the contract the county never has to pay more than the contract amount. This, obviously, is the exact type of contract the NV Supreme Court banned because (at least theoretically) John Oakes may not have called conflicts in cases he should have because he knew it would mean he had to send money to someone else.

Oakes is paid \$105,000 annually, paid monthly at \$8,750,³¹¹ plus, "the statutory hourly rate for any portion of a non-capital jury trial longer than three regular working days."³¹² "Contractor shall guarantee the County that said attorney will remain current with all conditions and training

³¹¹ Contract for Services of Independent Contractor County Public Defender (July 1, 2016 through June 30, 2018) (between Mineral County Board of County Commissioners and John E. Oakes, Esq. and Patrick McGinnis, Esq.); replaced by Contract for Services of Independent Contractor County Public Defender (July 1, 2018 through June 30, 2019) (between Mineral County Board of County Commissioners and John E. Oakes, Esq. and Justin E. Oakes, Esq.). ¶ 4.

³¹² Contract for Services of Independent Contractor County Public Defender (July 1, 2016 through June 30, 2018) (between Mineral County Board of County Commissioners and John E. Oakes, Esq. and Patrick McGinnis, Esq.); replaced by Contract for Services of Independent Contractor County Public Defender (July 1, 2018 through June 30, 2019) (between Mineral County Board of County Commissioners and John E. Oakes, Esq. and Justin E. Oakes, Esq.). ¶ 5.

required by law to attain and maintain capital case qualification solely at Contractor's expense."³¹³

If the two contract attorneys both have a conflict, the District and Justice Courts maintain a single list of attorneys who they contact when needed on a case-by-case basis. These attorneys are compensated at the statutory rate established by NRS 7.125 (i.e., \$100/hour): Richard Davies, and, Carl Hylin.

MINERAL	FY2013	FY2014	FY2015	FY2016	FY2017	5 YR Total
PD Expenditure ³¹⁴	\$73,697.58	\$66,860.84	\$65,000.04	\$65,600.04	\$81,421.92	\$352,580.42
PD Recoupment ³¹⁵	\$2,883.00	\$1,570.00	\$2,283.00	\$1,873.00	\$3,472.00	\$12,081.00
% Recouped	3.91%	2.35%	3.51%	2.86%	4.26%	3.43%
ANALYSIS						
% +/- (FY13-FY17)	10.48%					
2018 (Actual)	\$79,999.92					
% +/- (FY17-FY18)	-1.75%					

Lincoln County: In 2011, Lincoln County awarded a contract for public defense services to Dylan Frehner.³¹⁶ The county still contracts with one attorney to represent all indigent defendants in the justice court and the district court. The attorney agrees to provide representation in all criminal and juvenile cases, including any and all necessary appeals and/or parole/probation revocation proceedings. Capital cases are reimbursed separately under the contract, at \$125 per hour, but Lincoln County has not had a capital case since the current public defender took over.

All overhead expenses are the responsibility of the attorney, including rent, utilities, accepting calls from the jail at no charge, professional liability and worker's compensation insurance, and case related travel (including mileage). The attorney is contractually required to track and report the number of cases assigned to him annually. The county has never requested to see Dylan's hourly reports, or the reports he submits to the Nevada Administrative Office of Courts.³¹⁷

³¹³ Contract for Services of Independent Contractor County Public Defender (July 1, 2016 through June 30, 2018) (between Mineral County Board of County Commissioners and John E. Oakes, Esq. and Patrick McGinnis, Esq.); replaced by Contract for Services of Independent Contractor County Public Defender (July 1, 2018 through June 30, 2019) (between Mineral County Board of County Commissioners and John E. Oakes, Esq. and Justin E. Oakes, Esq.). ¶ 7.

³¹⁴ email from Christine Hoferer (May 14, 2018), attaching public defense expenditures by the county; CAFR and budget - no line item

³¹⁵ CAFR and budget, in Revenues under "Miscellaneous > Other > Public Defender reimbursements" line item

³¹⁶ Dylan reports that, when he first got the contract, Lincoln County had just finished a year in which it paid the state defender office \$115,000, plus an additional \$65,000-\$90,000 to private attorneys for conflict representation.

³¹⁷ When he was public defender in White Pine, that county would request his hours, and seek reimbursement if his annual hours fell below the contracted amount.

The attorney serves at the pleasure of the County Board of Commissioners and may only be terminated for cause. The County is authorized to create a panel of up to three persons to oversee the administration of the contract and defender's performance.³¹⁸ Indigent defense work may not be sub-contracted out to other attorneys although the contractor is specifically allowed to employ assistant attorneys to help cover the court appointed representation.

The defender is paid \$125,000 annually, in quarterly installments, on a 2-year contract.³¹⁹ In exchange, he is to serve as a principal provider of indigent defense services in justice court and to continue representing any cases from that justice court that are bound over to the district court. The contract further requires the attorney to provide representation in direct appeals, and revocation of probation or parole. The defender also represents juveniles in delinquency cases, and is to assist in meritorious habeas corpus petitions.³²⁰

The defender operates his own independent law office, located in Pioche. His current staff includes two assistants, one of whom is part-time and the other is full-time. The full-time assistant has a paralegal degree she obtained while working with Frehner. Frehner's office is located in the old school building, a few blocks up the road from the courthouse. It does not have a professional look; furniture is old and worn, as is the building itself. The grass outside is overgrown, and the fence is broken down. No permanent signs indicate that the building contains a law office.

This year the defender, for the first time, billed Lincoln County because his hours exceeded the amount contemplated under the contract. By May, he had billed 350 hours over the 1,250 hours negotiated in the contract, and submitted an invoice to the county. He planned to submit another invoice for his hours in June. The hours were so high because the public defender tried a murder case.³²¹

Initial conflicts arising in the District and Justice Courts are assigned to the conflict attorney, Shain Manuele, who is under contract with the county for that limited purpose. The conflict contract is valued at \$20,000 per year, and the conflict defender reports receiving only seven total cases in his first nine months under the contract.

In the rare instance that the conflict attorney could not take the case, it would be appointed to other lawyers, typically from Ely or Elko.³²² The courts call attorneys to find availability. There is not a strict rotational appointment policy. These attorneys are compensated at the statutory

³¹⁸ Dylan reports that this panel has not been created. He perceives the district judges to be the primary decision-makers when it comes to contract oversight

³¹⁹ The contract contemplates 1,250 hours of legal work per year, at a rate of \$100 per hour. If the defender spends less time than that on the contract, he is required to reimburse the county; if he spends more than that time, he can seek reimbursement for hours over 1,250.

³²⁰ As determined by the defender himself.

³²¹ In years past, when he has fallen within 100 hours of the contract (higher or lower), he has never billed the county nor had the county seek reimbursement from him. Only if the difference in hours approaches 20% of the total contract will Dylan seek to renegotiate payment.

³²² The public defender's wife is a special prosecutor who prosecutes all domestic violence cases in the 7th judicial district. Accordingly, Kelly has a conflict on all domestic violence cases in Lincoln County (and cannot be appointed to them in other counties within the 7th District); the justice court appoints another attorney and does not even notify Kelly about the case.

rate established by NRS 7.125 (i.e., \$100/hour): Matthew Carling, Richard Sears (White Pine contract defender), Gregory Barlow

Though requested, Lincoln County did not provide information about its total annual expenditures for indigent defense services and there is no line item in the county's annual financial documents from which the information can be obtained.

Lander County: Lander County contracts with a single attorney to provide primary indigent defense services. The contract is for a two-year term, renewable for another two years. The contract can be terminated without cause by either party.

The contract is for \$89,760 paid in four quarterly installments. Out of that, the attorney must pay for all overhead expenses as the contract explicitly states that the county will not pay for any office space, furniture, equipment and supplies, and secretarial assistance.³²³ The attorney is contractually-required to have a toll-free telephone line paid for by the attorney and carry \$1,000,000 liability insurance policy.

The contract explicitly states that if the contract defender is unable to perform the duties for any reason (vacation, medical, etc.), the contract attorney has the responsibility to provide another attorney and pay for those services. The one exception to this is if two courts schedule simultaneous hearings in two different locations.

The contract is held by Todd Plimpton. He is the sole attorney at the law firm of Belanger and Plimpton located in Lovelock, Nevada (Pershing County). He does maintain an office in Battle Mountain at 142 South Reese Street. Although he is a single practitioner, he employs two legal secretaries (one in Pershing and one in Lander), and office administrator, and a former client who he exonerated does legal research for him.

When Attorney Plimpton has a conflict of interest, the District and Justice Courts maintains a single list of qualified attorneys. These attorneys are compensated at the statutory rate established by NRS 7.125 (i.e., \$100/hour): Dave Lockie; Sherborn MacFarlan; Kyle Swanson; Steve Evenson; Debra Amens; and, Michael Shurtz.

LANDER	FY2013	FY2014	FY2015	FY2016	FY2017	5 YR Total
PD Expenditure ³²⁴	\$96,246.00	\$85,616.00	\$87,043.00	\$111,170.00	\$91,106.00	\$471,181.00
ANALYSIS						
% +/- (FY13-FY17)	-5.34%					
2018 (Budget)	\$128,500.00					
% +/- (FY17-FY18)	41.04%					

³²³ Public Defender Agreement (Jan. 5, 2015 through Dec. 31, 2016) (between Lander County Board of County Commissioners and Belanger & Plimpton). ¶ 6.

³²⁴ CAFR and budget, in Expenditures under "Judicial > Public defender"

Though requested, Lander County did not provide information about its total annual receipts from these assessments imposed on indigent defendants to partially reimburse the county for the attorney appointed to represent them. There is no line item in the county's annual financial documents from which the information can be obtained.

White Pine County: White Pine County contracts with three attorneys to represent all indigent defendants in the justice court and the district court. All contracts are identical in terms of compensation and requirements. Attorneys agree to provide representation in all criminal and juvenile cases, including any and all necessary appeals and/or parole/probation revocation proceedings. Capital cases, by contract, require two attorneys (see section on attorney qualifications, below).

All overhead expenses are the responsibility of the attorneys, including rent, utilities, accepting calls from the jail at no charge, professional liability and worker's compensation insurance, and case related travel (including mileage). Attorneys serve at pleasure of the County Board of Commissioners and may only be terminated for cause. Indigent defense work may not be sub-contracted out to other attorneys although the contractors are specifically allowed to employ assistant attorneys to help cover the court appointed representation.

Each of the primary defenders is paid \$145,000 annually, in quarterly installments, on a 2-year contract.³²⁵ In exchange, they each serve as a principal provider of 1/3 of indigent defense services in justice court and to continue representing any cases from that justice court that are bound over to the district court. The contracts further require attorneys to provide representation in direct appeals, and revocation of probation or parole. The defenders represent juveniles in delinquency cases. The contractors are: Richard Sears; Jane Eberhardy; and, Shain Manuele.

The defenders each technically operate their own independent law practices, all three of which are housed in an office building located less than a quarter mile from the courthouse. The office has one general receptionist that answers the phone and directs calls; each attorney also has an assistant for help with filing. The offices are spacious and well-adorned. If one did not see the sign outside indicating the three separate law offices, one could be forgiven for assuming they all worked together as one firm. In fact, the phone number for all three attorneys goes to a central number, which answers as the "Ely independent conflicts office of Sears, Eberhardy, and Manuele." Sears, who has by far the most experience in criminal law, handles most of the high-level felony cases. He also distributes cases among the three attorneys; according to the contracts, the cases are to be distributed randomly.

Initial conflicts arising in the District and Justice Courts are shared amongst the three primary attorneys, but the attorneys receive no additional compensation for taking each other's conflicts. However, they do receive additional compensation when called upon to take a conflict case in a neighboring county in the seventh district (or elsewhere).

³²⁵ The contract contemplate 1,450 hours of legal work per year, at a rate of \$100 per hour. If the defenders spend less time than that on the contract, they are required to reimburse the county; if they spend more than that time, they can seek reimbursement for hours over 1,450.

When the District and Justice Courts have to go outside of the three contract defenders for conflict representation, each court maintains a separate list of qualified attorneys (generally from the Ely and Elko areas). The courts call attorneys to find availability. There is not a strict rotational appointment policy. These attorneys are compensated at the statutory rate established by NRS 7.125 (i.e., \$100/hour): Kelly Brown, Kevin Briggs; David Lockie, Sherb MacFarland, Michael Shurtz, and, Julie Cavanaugh-Bill.

Though requested, White Pine County did not provide information about its total annual expenditures for indigent defense services and there is no line item in the county's annual financial documents from which the information can be obtained.

WHITE PINE	FY2013	FY2014	FY2015	FY2016	FY2017	5 YR Total
PD Recoupment ³²⁶	\$2,015.00	(\$1,656.00)	\$7,969.00	\$7,503.00	\$5,284.00	\$21,115.00

Sidebar: Why a “Cookie-Cutter” Approach to Contracting Does Not Make Sense

As noted throughout this report, the State of Nevada has limited oversight of indigent defense services in the state's 15 rural counties. The absence of state oversight has left most counties to create contracts with no state guidance. Lincoln and White Pine counties should be applauded for seeking national assistance in drafting their public defense contracts. Specifically, the contracts in both counties rely on the National Legal Aid and Defender Association (NLADA), *Model Contract for Public Defense Services*. However, the *Model Contract* was created to assist governments implement NLADA's *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services* which were specifically designed for governments wishing to competitively bid for public defense “programs,” and not for contracts with individual attorneys. As the commentary to the *Model Contract* makes explicit: “It [the model contract] is not intended as a one-size-fits-all approach, but as a template capable of infinite variation to accommodate differences among jurisdictions in procedures, laws, legal practice, and the types of cases desired to be contracted out.” Both Lincoln and White Pine counties appear to have used the *Model Contract* with only a limited few variations causing some odd results related to:

Adequate Support Staff: Both counties' indigent defense contracts appropriately state that “[a]dequate support staff is critical to an attorney's ability to render competent assistance of counsel at the caseload levels [set by the contract.]” The contracts then bind the attorneys to the following support staff ratios: a) One full time Investigator for every 450 Felony Cases; One full time Investigator for every 600 Juvenile Cases; One full time Investigator for every 1200 Misdemeanor Cases.” Yet, in 2017, Lincoln County only had a caseload of 65 felony cases, eight gross misdemeanor cases, 29 misdemeanors and four other cases (family/juvenile).³²⁷ Since the number of cases triggering the need to hire a full time investigator will likely never be met in Lincoln County, this requirement could

³²⁶ CAFR and budget, in Revenues under “Charges for Services > Public Defender Fees” line item

³²⁷ 2017 figures reflect July 1, 2017 – May 31, 2018

lead one to assume investigations are never required in the county when in fact the commentary to the Model Contract requires that “every case be investigated.” Specifically, a “defense attorney should not enter a guilty plea without, at a minimum, contacting the main witness(es) in the case,” and a “guilty plea should never be entered on the basis of a police report alone.”

Policy Board: Lincoln and White Pine contracts suggest that the contract public defender *may* establish a three-person board to conduct oversight. However, the *Model Contract* requires such boards and insists that the oversight board be composed primarily of lawyers and specifically disqualifies judges from being members. However, how can a county with very few lawyers establish such a board? It is near impossible. So the two counties do not require board members to be lawyers and allow judges to serve. But that is precisely the type of interference an independent board is designed to prevent.

Training: Noting that “ongoing professional training is a necessity in order for an attorney to keep abreast of changes and developments in the law and assure continued rendering of competent assistance of counsel,” the Lincoln and White Pine contracts require that the indigent defense firm “shall provide sufficient training, whether in-house or through a qualified provider of CLE, to keep all of its attorneys who perform work under this Contract abreast of developments in relevant law, procedure, and court rules.” Again this requirement makes no sense when the contract is with an individual attorney as an individual cannot provide in-house training to himself.

Churchill County: Churchill County contracts with two attorneys to represent all indigent defendants in the three justice courts and the district court. Both contracts are identical in terms of compensation and requirements. Attorneys agree to provide representation in all criminal and juvenile cases, including any and all necessary appeals and/or parole/probation revocation proceedings. Capital cases are outside the scope of the contracts in Churchill County; the county would have to appoint an attorney pursuant to the statutory compensation rates.

All overhead expenses are the responsibility of the attorneys, including rent, utilities, accepting calls from the jail at no charge, professional liability and worker’s compensation insurance, and case related travel (including mileage). Attorneys are also required to track and report the number of cases assigned on a monthly basis at their own cost.

Attorneys serve at pleasure of the County Board of Commissioners and may only be terminated for cause. Indigent defense work may not be sub-contracted out to other attorneys although the contractors are specifically allowed to employ assistant attorneys to help cover the court appointed representation.

Both of the primary defenders are paid \$168,300 annually, in monthly installments, to serve as a principal provider for all indigent defendants in justice court and to continue representing any cases from that justice court that are bound over to the district court.³²⁸ The contracts further

³²⁸ The compensation under the contract increases to \$172,508 for 2019, and \$176,820 for 2020.

require attorneys to provide representation in direct appeals, revocation of probation or parole, and specialty courts. The defenders represent juveniles in delinquency cases. Each of the two defenders will represent a parent in 432B cases; children are represented by a third attorney, who contracts with the county specifically for those cases.³²⁹ One of the defenders employs an associate attorney and secretaries in his office; the other works alone.

1. Jacob Sommer
 - Sommer maintains an office in downtown Fallon. Sommer has no secretary or associate attorneys in his office. His office is clean and professional-looking. It is located in an office building on a main street in downtown Fallon, about 1.5 blocks from the courthouses.
2. Charlie Woodman; Associate Attorney: Peter Smith
 - Woodman maintains an office in Reno, but not in Fallon. Woodman's office is in a small office park in Reno. He shares space and two secretaries with another small firm; the office itself is very nicely adorned. His private practice appears rather lucrative.
3. Kaitlyn Miller: All children in 432B cases.

Initial conflicts arising in the District and Justice Courts are shared amongst the two primary attorneys, but the attorneys receive no additional compensation for taking each other's conflicts.

When the District and Justice Courts have to go outside of the three contract defenders for conflict representation,³³⁰ each court maintains a separate list of qualified attorneys (generally from the Reno/Carson City area). The courts call attorneys to find availability. There is not a strict rotational appointment policy. These attorneys are compensated at the statutory rate established by NRS 7.125 (i.e., \$100/hour): Jack Fox, John Oakes, Justin Oakes, John Malone, Matt Merrill, and, Troy Jordan.

CHURCHILL	FY2013	FY2014	FY2015	FY2016	FY2017	5 YR Total
PD Expenditure ³³¹			\$483,253.00	\$480,082.00	\$484,149.00	\$1,447,484.00
PD Recoupment ³³²	\$13,446.00	\$11,254.00	\$13,608.00	\$15,414.00		\$53,722.00
% Recouped	#DIV/0!	#DIV/0!	2.82%	3.21%	0.00%	3.71%
ANALYSIS						
% +/- (FY13-FY17)	#DIV/0!					
FY2018 (Budget)	\$487,000.00					
% +/- (FY17-FY18)	0.59%					

Nye County: Public defense services in Nye County are guided by limited county codes Title II, Chapter 2.48. Code 2.48.020 establishes the office of the public defender, to be appointed by and

³²⁹ That defender, Kaitlyn Miller, earns \$33,000 per year on her 432B contract.

³³⁰ Each contract specifically states that the attorneys are not required to incur the costs of these conflict cases that go to the private bar.

³³¹ CAFR and budget, in Expenditures under "Judicial > Indigent defense" line item

³³² CAFR and budget, in Revenues under "Charges for services > Public defender fees" line item

to serve at the pleasure of the County Board. The only qualifications to be appointed a public defender is that the person be licensed in Nevada. Code 2.48.020(b-c) authorizes “When representing an indigent person, the Public Defender shall: a) counsel and defend him or her at every stage of the proceedings, including revocation of probation or parole; and b) prosecute, subject to the provisions of subsection 4 of Nevada Revised Statutes 180.060, any appeals or other remedies before or after conviction that the Public Defender considers to be in the interests of justice when designated pursuant to Nevada Revised Statutes 62.085, 171.188 or 432B.420, and within the limits of available money, represent without charge each indigent person to whom he or she is appointed.”

Similar codes allow public defenders to hire full-time or part-time assistant public defenders. All attorneys are allowed to have private caseloads. Code 2.48.040(A) states: The Board shall provide office space, furniture, equipment and supplies for the use of the Public Defender suitable for the conduct of the business of his or her office.” However, Code 2.48.040(B) states: In lieu of the provision of office space, furniture, equipment and supplies to the Public Defender, the Board may provide for a monetary allowance. Any such allowance may be incorporated in the aforementioned contract executed between the Board and the Public Defender.”

Nye County contracts with five attorneys to represent all indigent defendants in the three justice courts and the district court. All five contracts are identical in terms of compensation and requirements. Attorneys agree to provide representation in all criminal and juvenile cases, including any and all necessary appeals and/or parole/probation revocation proceedings. This includes representation in one capital case (if any). However, any additional capital cases will be compensated at \$125/hour.

All overhead expenses are the responsibility of the attorneys, including rent, utilities, accepting calls from the jail at no charge, professional liability and worker’s compensation insurance, and case related travel (including mileage). Attorneys are also required to track and report the number of cases assigned on an annual basis at their own cost.

Attorneys serve at pleasure of the County Board of Commissioners and may only be terminated for cause. Indigent defense work may not be sub-contracted out to other attorneys although the contractors are specifically allowed to employ assistant attorneys to help cover the court appointed representation. None of the defenders employ associate attorneys in their offices; none have assistants or secretaries either. The 6AC did not interview the attorneys at their offices and cannot comment on office accommodations.

Each attorney is paid \$150,000 annually, in quarterly installments of \$37,500, to serve as the principal provider for all indigent defendants in one specific justice court and to continue representing any cases from that justice court that are bound over to the district court.³³³ The contracts further require attorneys to provide representation in direct appeals, revocation of probation or parole, and specialty courts.

³³³ Four attorneys are primary providers in Pahrump Justice Court; one attorney is the primary provider in Beatty and Tonopah Justice Courts.

- Harry Gensler:³³⁴ Primary Assignment: Pahrump Justice Court. Gensler was identified as the chief public defender by the County Manager, but his contract has no additional terms or requirements beyond what is required of the other defenders.
- Jason Earnest: Primary Assignment: Pahrump Justice Court.
- Nathan Gent: Primary Assignment: Pahrump Justice Court. David Rickert: Primary Assignment: Pahrump Justice Court.
- Jonathan Nelson: Primary Assignment: Tonopah & Beatty Justice Courts.

Initial conflicts arising in the District and Justice Courts are shared amongst the five primary attorneys, but the attorneys receive no additional compensation for taking each other's conflicts. Defenders check for conflicts by reviewing old case files for names that sound familiar in new cases to which they are assigned.

When the District and Justice Courts have to go outside of the three contract defenders for conflict representation,³³⁵ each court maintains a separate list of qualified attorneys (generally from the Las Vegas area). The courts call attorneys to find availability. There is not a strict rotational appointment policy. These attorneys are compensated at the statutory rate established by NRS 7.125 (i.e., \$100/hour):

- *Pahrump Justice Court*: Alan Buttell, Alex DeCastroverde, Andrew Fritz, Carl Joerger, Chris Arabia, David Fischer, David Neely, Frank Kocka, Garrett Ogata, George Cromer, Gerald Neal, Gregory Cortese, James Hartsell, James Krah, Kent Kozal, Kristian Lavigne, Lisa Rasmussen, Michael Printy, Molly Rosenblum, Osvaldo Fumo, Paul Adras, Paul Wommer, Robert Glennen, Stephanie Kice, and, Tony Abbatangelo.
- *Beatty Justice Court*: Robert Glennen, J. Forest Cahlan, David Neely, Ralph Dawson, David Polley, Frank Stapleton, Andrew Wentworth, Michael Printy, Robert Handfuss, Jeffery A. Cogan, Beavers & Young, Carl Joerger, Steve Evenson, Chris Arabia, Lisa Chamlee, Andrew Fritz, Sean Sullivan, and, David Fischer.

NYE	FY2013	FY2014	FY2015	FY2016	FY2017	5 YR Total
PD						
Recoupment ³³⁶	\$1,955.00	\$2,037.00	\$3,782.00	\$7,103.00	\$13,718.00	\$28,595.00

Though requested, Nye County did not provide information about its total annual expenditures for indigent defense services and there is no line item in the county's annual financial documents from which the information can be obtained.

Douglas County: Douglas County contracts with four attorneys to represent all indigent defendants in the three justice courts and the district court. All contracts are identical in terms of compensation and requirements. Attorneys agree to provide representation in all criminal and juvenile cases, including any and all necessary appeals and/or parole/probation revocation

³³⁴ Gensler has been a public defender in Nye County for 25 years.

³³⁵ Each contract specifically states that the attorneys are not required to incur the costs of these conflict cases that go to the private bar.

³³⁶ CAFR and budget, in Revenues under "Charges for services > Public defender and discovery fees"

proceedings. Capital cases are outside the scope of the contracts; the county would have to appoint an attorney pursuant to the statutory compensation rates.

All overhead expenses are the responsibility of the attorneys, including rent, utilities, accepting calls from the jail at no charge, professional liability and worker's compensation insurance, and case related travel (including mileage). Attorneys are not contractually required to track and report the number of cases assigned to them.

Attorneys serve at pleasure of the County Board of Commissioners and may only be terminated for cause. Indigent defense work may not be sub-contracted out to other attorneys although the contractors are specifically allowed to employ assistant attorneys to help cover the court appointed representation.

Each of the primary defenders is paid \$195,833.33 annually, in quarterly installments, to serve as a principal provider for all indigent defendants in justice court and to continue representing any cases from that justice court that are bound over to the district court. The contracts further require attorneys to provide representation in direct appeals, and revocation of probation or parole.³³⁷ The defenders represent juveniles in delinquency cases. None of the defenders employ associate attorneys; two employ part-time secretaries.

- Kristine Brown
- Matthew Ence
Ence has a private office in a small office park about a half mile away from the courthouse in Minden. The office appears clean and professional. It is easy to find with his logo printed on the glass door facing the parking lot. The office signs and door do not identify him as a public defender. He has a part-time secretary
- Maria Pence
Pence has a private office on the second floor of a small office park about a half mile away from the courthouse in Minden (the same office park as Matthew Ence). The office appears clean and professional. It is easy to find with clear signage throughout the building. The office signs and door do not identify her as a public defender. She relies on an unpaid intern to help with filing, and an accountant friend who helps manage her office finances, free of charge.
- Matthew Work.
Work took over in May 2018 for Derek Lopez, who had been a public defender in Douglas County for more than 15 years.

The defenders note that, despite their relatively high compensation (compared to other rural counties), their take-home pay from the public defender contracts is not very sizeable. This is due to the high costs of maintaining a practice in Douglas County, where real estate is quite expensive. Further, as private contractors, defenders pay taxes on their compensation. Nearly 40% of the contract amount is taken off the top. Maria Pence spends \$30,000 or more on office overhead. The defenders have not had a raise in at least 10 years, even to adjust for the cost of living. The defenders cannot afford to live in Douglas County.

³³⁷ A separate attorney – and former Douglas county public defender – is the defense bar representative on the drug court team.

While the caseload and cost of maintaining a practice has risen over the years, defenders' compensation has not kept pace. One defender (Maria Pence) estimates that her take-home pay on the defender contract is no more than \$75,000 per year. Another – Matthew Ence – reports that the contract would “probably “ be sufficient to maintain his practice without the private cases, but would leave him very little for savings. A third attorney – Kristine Brown – is the only one to have an online legal research subscription of her own. Her Lexis account costs about \$175 per month. She also uses an answering service for her office phone, from a company based in Reno. This cost her about \$250 per month. About \$400 or more of what Kristine receives every month goes to legal research and an answering service. Maria does most of her legal research at the courthouse because she cannot afford an online research subscription. Maria asked for the key to the courthouse law library, and was denied. Because she can't have the key, she cannot do any research after 5:00pm. She also cannot print off cases at the courthouse- she has to email them to herself, and print them at her office.

Initial conflicts arising in the District and Justice Courts are shared amongst the four primary attorneys, but the attorneys receive no additional compensation for taking each other's conflicts. When the District and Justice Courts have to go outside of the three contract defenders for conflict representation, each court maintains a separate list of qualified attorneys (generally from the Reno/Carson City area). The courts call attorneys to find availability. There is not a strict rotational appointment policy. These attorneys are compensated at the statutory rate established by NRS 7.125 (i.e., \$100/hour): Justin Clouser, Loren Graham, Robert Morris, Daniel Spence, John Malone, and, Alan Erb.

DOUGLAS	FY2013	FY2014	FY2015	FY2016	FY2017	5 YR Total
PD Expenditure ³³⁸	\$642,837.00	\$631,324.00	\$800,631.00	\$802,452.00	\$798,982.00	\$3,676,226.00
PD Recoupment ³³⁹			\$5,910.00	\$3,610.00	\$4,962.00	\$14,482.00
% Recouped	\$0.00	\$0.00	0.74%	0.45%	0.62%	0.39%
ANALYSIS						
% +/- (FY13-FY17)	24.29%					
2018 (Budget)	\$828,334.00					
% +/- (FY17-FY18)	3.67%					

Lyon County: Lyon County Code, Title I, Chapter 9 sets out the limited local statutory framework for indigent defense services. Lyon County Code 1.09.01 simply states “There is hereby created the office of Lyon County Public Defender. The County Public Defender shall be authorized to private practices of law pursuant to NRS 260.040(4). (Ord. 340, 4-19-90, eff. 7-1-90).”

The only other code is Lyon County Code 1.09.02 which sets out compensation for the public defender. “The compensation to be paid for the services of the County Public Defender shall be established by contract between the County and the Public Defender on terms and conditions as

³³⁸ CAFR and budget, under Expenses in "Judicial > "Public defender" line item

³³⁹ CAFR and budget, in Revenues under "Fines and Forfeits > Judicial > Public Defender Restitution" line item

mutually agreed. The contract shall provide that the compensation paid upon shall cover the cost of office space, furniture, equipment, supplies and personnel. (Ord. 340, 4-19-90, eff. 7-1-90).”

What this means in reality is that Lyon County contracts with three attorneys to represent all indigent defendants in the three justice courts and the district court. All three contracts are identical in terms of compensation and requirements. Attorneys agree to provide representation in all criminal and juvenile cases, including any and all necessary appeals and/or parole/probation revocation proceedings. This includes representation in one capital case (if any). However, any additional capital cases will be compensated at \$125/hour.

Each attorney must maintain an office in Lyon County. All overhead expenses are the responsibility of the attorneys, including rent, utilities, accepting calls from the jail at no charge, professional liability and worker’s compensation insurance, and case related travel (including mileage). Attorneys are also required to track and report the number of cases assigned on a quarterly basis at their own cost.³⁴⁰ Attorneys serve at pleasure of the County Board of Commissioners and may only be terminated for cause.

Indigent defense work may not be sub-contracted out to other attorneys although the contractors are specifically allowed to employ assistant attorneys to help cover the court appointed representation. This means that a public defense attorney may enter into a contract with the county and then assign the majority of the public case work to a less experienced attorney. To whatever extent the county is contracting with an attorney based on that attorney’s specific experience and reputation, the work may in fact be done by attorneys the County has not specifically vetted.

Each attorney is paid \$185,400 annually, to serve as the principal provider for all indigent defendants in one specific justice court and to continue representing any cases from that justice court that are bound over to the district court.³⁴¹

- Aaron Mouritsen:³⁴² Canal Township Justice Court (Fernley). Mouritsen does not employ an associate attorney; he has one full-time secretary/legal assistant who is training to become a paralegal. The 6AC did not interview him at his office and thus cannot comment on his office accommodations.
- Kenneth Ward:³⁴³ Dayton Justice Court.

³⁴⁰ The contracts do not specify to whom these reports go. In a May 16, 2018 telephone interview with Ken Ward, we were told that the reports go to the County Manager and the justice court clerks.

³⁴¹ The contracts do not specify which of the three justice courts each attorney must staff. That said, it is understood that each will get the bulk of their cases from a single justice court.

³⁴² Mouritsen had experience in criminal courts prior to becoming a public defender. He worked two semesters in the public defender’s office in Clark County while in law school, then spent a year working as a clerk in District Court in Lyon County. He was hired by Ken Ward after the clerkship, where he spent a little over a year. In his first week, he “trailed” Ken Ward, but after that received no training.

³⁴³ Ken Ward was part of state public defender system back when it served Lyon county, and has had the contract since they allowed the counties to determine their own offices. When Ward worked at the state public defender office he used to cover justice courts in Dayton, Yerington, Fernley, Hawthorne, Beatty, Tonopah, and two other

The Law Office of Ken Ward is a short walk down Main Street from the Dayton Justice Court. Out-of-custody clients often meet their appointed attorney there prior to court. Kenneth Ward employs Matt Merrill as an associate attorney. Ward has a receptionist/legal secretary. During the course of the study Ken Ward retired. Effective April 5, 2018, Matt Merrill signed a contract with Lyon County to provide the services Ward formerly contracted to perform.

- Wayne Pederson: Walker River Justice Court.

The Law Office of Wayne Pederson are located on the main road in downtown Yerington and is a quick drive to Justice Complex. The office is extremely well-apportioned and professional looking. Wayne said that his family were contractors and that he designed and built the offices with their help. The office is furnished with antiques to make it look and feel like a law office from the 1800's (in a good way). There is plenty of space for confidential communications. Wayne Pederson employs Patrick Mansfield as an associate attorney. Pederson employs a paralegal and a high school intern to file and copy.

Initial conflicts arising in the district and justice courts are shared amongst the three contract attorneys. That is, the Law Offices of Wayne Pederson and the Law Offices of Kenneth Ward provide conflict representation in the Canal Township Justice Court. The Law Office of Wayne Pederson and Aaron Mouritsen provide conflict services in the Dayton Justice Court. And, the Law Offices of Kenneth Ward and Aaron Mouritsen provide conflict services in the Walker River Justice Court. All contract attorneys handle all conflicts as part of their compensation under their contract without additional remuneration.

How the conflict representation is dispersed amongst the three primary providers is not specifically written into the contracts, but the contracts state that contracts are to be coordinated amongst the three contractors. Ward stated there is a loose framework where he takes Canal Township Justice Court conflicts, Mouritsen takes Walker River Justice Court conflicts, and Pederson takes Dayton Justice Court conflicts in the first instance. Having said that, if there was a particularly serious case and knew, for example, that Mouritsen would be good for the defendant Ward might recommend to the court to "skip the line" so to speak. Ward said it was more likely for Mouritsen to skip him and ask Pederson to take a conflict if the defendant was in jail in Yerington. And, because Ward and Pederson have more years at the bar, they have more conflicts of interests which subsequently get moved to the Mouritsen contract.

When the District and Justice Courts have to go outside of the three contract defenders for conflict representation,³⁴⁴ each court maintains a separate list of qualified attorneys (generally from the Carson City/Reno area). The courts call attorneys to find availability. There is not a

regions plus a total of three district courts. (Note: The ACLU was really upset that I said I saw some decent representation in Lyon County because Ken Ward has been a target of theirs for years. But he is retiring).

³⁴⁴ Each contract specifically states that the attorneys are not required to incur the costs of these conflict cases that go to the private bar.

strict rotational appointment policy. These attorneys are compensated at the statutory rate established by NRS 7.125 (i.e., \$100/hour):

- Canal Township Justice Court: Troy Jordan; John Malone; and, Justin Oakes.
- Dayton Justice Court: Richard Davis; Laura Grant; Anne Laughlin; Thomas Luria; Justin Oakes; and, Daniel Spence.
- Walker River Justice Court: Brad Johnson; Jacob Sommer; Adam Wynott; and, Stephen Young.

LYON	FY2013	FY2014	FY2015	FY2016	FY2017	5 YR Total
PD						
Expenditure ³⁴⁵	\$406,517.00	\$406,517.00	\$406,517.00	\$406,517.00	\$495,000.00	\$2,121,068.00
PD						
Recoupment ³⁴⁶	\$19,526.00	\$13,550.00	\$15,937.00	\$17,573.00	\$18,905.00	\$85,491.00
% Recouped	4.80%	3.33%	3.92%	4.32%	3.82%	4.03%
ANALYSIS						
% +/- (FY13 FY17)	21.77%					
2018 (Budget)	\$556,200.00					
% +/- (FY17-FY18)	12.36%					

A WORD ABOUT MUNICIPAL COURTS

Cities receive almost no direction at all from the state about how to provide representation in the municipal courts to indigent defendants charged with misdemeanors that carry possible jail sentences. There are four free-standing municipal courts in all of the 15 rural counties combined,³⁴⁷ and the indigent defense systems provided by the cities that operate those courts are explained separately in the final section of this chapter. The other six municipal courts located within the rural counties³⁴⁸ have entered into agreements for their jailable misdemeanor cases to be heard in the appropriate justice court, where indigent defense representation is provided by the county.

What are the Differences Between Justice Courts and Municipal Courts? Nevada has two types of trial courts of limited jurisdiction: justice courts and municipal courts. Both are courts of record. Judges in each court are elected on non-partisan ballot, serve six-year terms and are not required to be attorneys. Municipal courts have jurisdiction over misdemeanor cases³⁴⁹ and traffic/ordinance violations alleged to have occurred within a

³⁴⁵ CAFR and budget, under Expenditures in "Judicial > Public Defender" line item

³⁴⁶ CAFR and budget, under Revenues in "Fines & forfeitures > Public defender reimbursement" line item

³⁴⁷ Fallon Municipal Court within Churchill County; Fernley Municipal Court and Yerington Municipal Court within Lyon County; and Ely Municipal Court within White Pine County. (See table of "Courts & Judges in the Rural Counties" at page ____.)

³⁴⁸ Carson City Municipal Court within Carson City; Carlin Municipal Court, West Wendover Municipal Court, Elko Municipal Court, and Wells Municipal Court within Elko County; and Caliente Municipal Court within Lincoln County. (See table of "Courts & Judges in the Rural Counties" at page ____.)

³⁴⁹ "A misdemeanor offense is a crime that is less serious than a felony and punishable by imprisonment in the county or city jail for no more than 6 months, or by a fine of not more than \$1,000, or by both fine and

city limit where such courts exist. Justice courts have jurisdiction over all misdemeanor cases and traffic/ordinance violations alleged to have occurred within the county but outside of any municipality that has established a municipal court. In addition, justice courts oversee preliminary hearings in all felony and gross misdemeanor³⁵⁰ cases no matter where they are alleged to have occurred in a county.³⁵¹

Do all Municipal Courts in Nevada Function in the Same Manner? No. The Carson City Justice and Municipal Court functions as a single court. Indeed, in 2006 the lower courts consolidated administration functions with the First Judicial District Court to “maximize staff resources and to improve efficiencies.”³⁵² In essence, the “Municipal and Justice Court” is just a name since the same judges oversee cases brought by the same prosecutor’s office against the same state defender office and contract defenders.

Each of the four municipal courts located within the geographic boundaries of Elko County (Carlin Municipal, Elko Municipal, Wells Municipal, and West Wendover Municipal) is physically located in, and shares a judge with, the local justice court. The county public defenders provides primary representation in all justice and municipal court cases, although cases are brought respectively by county or municipal prosecutors depending on where the crime is alleged to have been committed.

Therefore, it is only in the remaining four municipal courts within the geographic region of counties with less than 100,000 population where the justice and municipal courts are entirely separate: Ely Municipal Court (White Pine County), Fallon Municipal Court (Churchill County), Fernley Municipal Court and Yerington Municipal Court (Lyon County). This means that these four courts have separate locations, judges, prosecutors and defense attorneys and the municipalities pay for all associated costs.

Fallon Municipal Court (within Churchill County): Fallon is the county seat of Churchill County and the only incorporated city in the county. Nearly all of Churchill County’s approximately 24,200 people reside within about 10 miles of Fallon.

The Fallon Municipal Court is presided over by Judge Mike Lister.³⁵³ It is located in the municipal government building on a main thoroughfare right in the center of town. Court is held every Tuesday, Thursday, and Friday. Because indigent defense attorneys are appointed on a case-by-case basis, they only come to court when there are proceedings involving a defendant whom they have been appointed to represent. As a result, there is no attorney present in court to advise unrepresented defendants at most sessions of court.

imprisonment, unless the statute in force at the time of commission of such misdemeanor prescribed a different penalty.” NRS 193.150.

Limited Jurisdiction Courts Bench Book (2014 Revision).

³⁵⁰ Gross misdemeanors are criminal cases carrying a potential penalty of not more than one year in jail but not less than six months in jail, or less than \$2,000 in fines.

³⁵¹ Municipal courts do not have this authority.

³⁵² <http://carson.org/government/departments-a-f/courts-6387>.

³⁵³ Judge Lister is a non-lawyer. He is also the juvenile court master for the Churchill County district court.

The city does not have a formalized process to select attorneys to represent indigent defendants and has not adopted any ordinance for that purpose.³⁵⁴ The judge appoints counsel on a case-by-case basis, from among three attorneys: Troy Jordan,³⁵⁵ David Neidert,³⁵⁶ and Jacob Sommer³⁵⁷.³⁵⁸ Once appointed, the attorney is paid by the hour as required by Nevada statutes.³⁵⁹

Funding for indigent defense services in the Fallon Municipal Court comes from the city of Fallon. The city expended the following amounts for all indigent defense services:³⁶⁰

FALLON	FY2013	FY2014	FY2015	FY2016	FY2017	5 YR Total
PD Expenditure	\$6,606.80	\$4,141.46	\$8,803.87	\$17,458.40	\$10,676.74	\$47,687.27
FY2018 (Budget)	\$11,000.00					

Though requested, the Fallon Municipal Court did not provide information on their recoupment practices.

Fernley Municipal Court (within Lyon County): Fernley is one of four populations centers in Lyon County, though the only other incorporated city is Yerington. Located about 34 miles from Reno, Fernley's population has exploded in recent years, with many retirees from California settling in the area. The Fernley Municipal Court is located within the geographic area of the Canal Justice Court.

The Fernley Municipal Court is presided over by Judge Lori Matheus.³⁶¹ It is located in a complex of public buildings that also house the Canal Justice Court and a library branch. Court is held every Tuesday.

The City of Fernley contracts with one private attorney to provide representation to all indigent defendants in the Fernley Municipal Court, in exchange for which it pays the attorney a fixed

³⁵⁴ Email from Robert Erquiaga, City of Fallon Legal and Administrative Director, to David Carroll, Sixth Amendment Center (May 5, 2018).

³⁵⁵ Troy Jordan also serves as indigent defense counsel in: Carson City – additional conflicts list for the district and justice courts; Churchill – additional conflicts list for district and justice court cases arising out of the New River justice court; Lyon - additional conflicts list for district and justice court cases arising out of the Canal justice court; and Washoe – additional conflicts list for the district and justice courts.

³⁵⁶ David Neidert also serves as indigent defense counsel in: Pershing – additional conflicts list for the district and justice courts; and Washoe – additional conflicts list for the district and justice courts.

³⁵⁷ Jacob Sommer also serves as indigent defense counsel in: Churchill – holds one of the three contracts responsible for providing primary & conflict representation in the district and justice courts; and Lyon – additional conflicts list for district and justice court cases arising out of the Walker River justice court.

³⁵⁸ Email from Robert Erquiaga, City of Fallon Legal and Administrative Director, to David Carroll, Sixth Amendment Center (May 5, 2018).

³⁵⁹ Email from Robert Erquiaga, City of Fallon Legal and Administrative Director, to David Carroll, Sixth Amendment Center (May 5, 2018).

³⁶⁰ Email from Roxane Cluckey, City of Fallon, on behalf of Robert Erquiaga, City of Fallon Legal and Administrative Director, to David Carroll, Sixth Amendment Center (June 25, 2018). City of Fallon, Nevada, Public Defender Expense (June 20, 2017) (on file with Sixth Amendment Center).

³⁶¹ Judge Matheus is a non-lawyer who previously worked as a Clerk of Courts. She is one of the three juvenile masters for the Lyon County juvenile court. She oversees juvenile infraction cases arising principally within the geographic boundaries served by the Canal Township Justice Court.

annual fee of \$60,000. The contract requires the attorney to maintain a local office, and the attorney is responsible for paying all overhead costs (rent, mileage, insurance, etc.). The attorney is required by the contract to return all phone calls from defendants within 48 hours of receipt and to meet with defendants prior to post-arraignment hearings. Additionally, the contract requires the attorney to report caseload information to the city on a quarterly basis. The City of Fernley can terminate the contract without cause.

The Law Office of Kenneth Ward has held the indigent defense provider contract with the City of Fernley since it incorporated as a city in 2001.³⁶² The city is not required to put professional service contracts out for bid, but it periodically advertises a request for proposal for the indigent defense contract. The last time the city of Fernley conducted an indigent defense RFP was August 2011,³⁶³ and only Ken Ward applied.

Ward employs an associate attorney Matthew Merrill³⁶⁴ in his law office. Both Ward and Merrill provide representation to indigent defendants in the Fernley Municipal Court under Ward's contract. Ward does not assign the cases to himself or Merrill in any specific fashion.

For conflict cases or multi-defendant cases, the Fernley Municipal Court appoints a private attorney on a case by case basis and pays the attorney at whatever rate the attorney charges. The City of Fernley does not have a set hourly rate or rate based on the type of case. The bills received from conflict counsel vary in hourly rates.

The court appoints Doug Nutton if he is available. During the years of 2014 and 2015, Nutton charged the court \$150.00 per court appearance. His rate decreased to \$100 per appearance in 2016.³⁶⁵ If Nutton is unavailable in a particular case, the court contacts Aaron Mouritsen or Wayne Pederson.³⁶⁶

Funding for indigent defense services in the Fernley Municipal Court comes from the City of Fernley. The city reported expending the amounts shown in the table below for the primary indigent defense contract.³⁶⁷ These expenditures do not include funds for conflict representation or for case related expenses such as experts or investigators; funding for those items comes from the court's budget. The city also reported recouping the amounts shown in the table below as assessments from indigent defendants to partially reimburse the city for the cost of their appointed counsel.

³⁶² Until April 4, 2018, Ward also held one of the three Lyon County contracts responsible for providing all primary and conflict representation in the district and justice courts. Mr. Ward has gone into semi-retirement and gave up that contract.

³⁶³ Email from Trisha Conner, Administrative Specialist III, City of Fernley to 6AC Director, David Carroll (May 23, 2018).

³⁶⁴ On April 4, 2018, Merrill took over from Ward one of the three Lyon County contracts responsible for providing primary and conflict representation in the district and justice courts. Prior to April 4, that contract was held by Ward, and Merrill assisted in the performance of the contract.

³⁶⁵ Email from Judge Lori Matheus, Fernley Municipal Court, to 6AC Director David Carroll (Apr. 26, 2018).

³⁶⁶ Mouritsen and Pederson each hold one of the three Lyon County contracts responsible for providing primary and conflict representation in the district and justice courts.

³⁶⁷ Email from Trisha Conner, City of Fernley Administrative Specialist III, to 6AC Director David Carroll (May 14, 2018).

FERNLEY	FY2013	FY2014	FY2015	FY2016	FY2017	5 YR Total
PD Expenditure	\$30,000.00	\$30,000.00	\$30,000.00	\$60,000.00	\$60,000.00	\$210,000.00
PD Recoupment	\$1,495.00	\$2,828.00	\$3,469.00	\$6,608.00	\$11,419.00	\$25,819.00
% Recouped	4.98%	9.43%	11.56%	11.01%	19.03%	12.29%

ANALYSIS	
% +/- (FY2013-FY2017)	100.00%
2018 (Budget)	\$60,000.00
% +/- (2017 to 2018)	0.00%

Yerington Municipal Court (within Lyon County): Yerington is the county seat of Lyon County and is one of four populations centers in the county, though the only other incorporated city is Fernley. The Yerington Municipal Court is located within the geographic area of the Walker River Justice Court.

The Yerington Municipal Court is presided over by Judge Cheri Emm-Smith.³⁶⁸ It is located in the city hall building. Court is held on the 1st and 3rd Wednesday of the month and on the 3rd Thursday of the month. Indigent defense counsel is only in court for one of those three days each month.

The City of Yerington contracts with one private attorney to provide representation to all indigent defendants in the Yerington Municipal Court, in exchange for which it pays the attorney a fixed annual fee of \$24,000. The contract requires the attorney to maintain a local office, and the attorney is responsible for paying all overhead costs (rent, mileage, insurance, etc.). The contract allows the attorney to have employed associates perform the contracted work. The attorney is required by the contract to return all phone calls from defendants within 48 hours of receipt and to meet with defendants prior to post-arraignment hearings. Additionally, the contract requires the attorney to report caseload information to the city on a quarterly basis. The City of Yerington can terminate the contract without cause. The municipal court judge is a party to the contract.

The City of Yerington does not put out a formal RFP for indigent defense representation. Rather, the judge calls attorneys and law firms she thinks may be interested in the work. The last time a contract was available, Judge Emm-Smith contacted two law firms. Only Brad Johnston was available and interested, so the court contracted with the Law Offices of Brad Johnston.³⁶⁹ Brad Johnston employs Leann Schumann³⁷⁰ as an associate attorney in his law office, and Schumann actually performs the indigent defense representation in the Yerington Municipal Court.

³⁶⁸ Judge Emm-Smith is a lawyer. She is one of the three juvenile masters for the Lyon County juvenile court. She oversees juvenile infraction cases arising principally within the geographic boundaries served by the Walker River Justice Court.

³⁶⁹ Email from Seema Shaw, Administrative Assistant to the Yerington City Manager, to 6AC Executive Director David Carroll (June 7, 2018)

³⁷⁰ Schumann also accepts conflict list appointments from the Lyon County district court.

For conflict cases or multi-defendant cases, the Yerington Municipal Court appoints private attorney Aaron Mouritsen³⁷¹ on a case by case basis and pays him \$250/case.

Funding for indigent defense services in the Yerington Municipal Court comes from the City of Yerington. The city reported expending the amounts shown in the table below.³⁷² The city also reported recouping the amounts shown in the table below as assessments from indigent defendants to partially reimburse the city for the cost of their appointed counsel.³⁷³

YERINGTON	FY2013	FY2014	FY2015	FY2016	FY2017	5 YR Total
PD Expenditure	\$24,535.00	\$17,250.00	\$17,125.00	\$24,250.00	\$28,518.76	\$111,678.76
PD Recoupment	\$5,944.00	\$10,284.00	\$9,899.00	\$12,747.00	\$11,918.00	\$50,792.00
% Recouped	24.23%	59.62%	57.80%	52.56%	41.79%	45.48%

ANALYSIS	
% +/- (FY2013- FY2017)	16.24%
2018 (Budget)	\$27,500.00
% +/- (2017 to 2018)	-3.57%

The recoupment numbers from the Yerington Municipal Court are concerning. Over the past five years, the court has recouped almost 46% of all indigent defense costs. And, in two years (FY2014 and FY2015), they collected 59% and 58% respectively. This comports with our courtroom observations where everyone was assessed recoupment regardless of ability to pay.

Ely Municipal Court (within White Pine County): Ely is the county seat of White Pine County and the only incorporated city in the county. It is home to a little less than half of White Pine County's 9,682 population.

The Ely Municipal Court is presided over by Judge Michael Coster. It is located in a small room in the county's administration building, which also houses the sheriff's office and the county's jail. Court meets in the morning every Tuesday through Thursday.

The City of Ely contracts with one private attorney to provide representation to all indigent defendants in the Ely Municipal Court, in exchange for which it pays the attorney \$85/hour.³⁷⁴ The attorney is responsible for providing and paying for his own overhead costs.

Kevin Briggs³⁷⁵ is the contract indigent defense attorney in the Ely Municipal Court. To obtain his contract, Briggs submitted a proposal to the city; he believes he was the only one to apply.

³⁷¹ Mouritsen holds one of the three Lyon County contracts responsible for providing primary conflict representation in the district & justice courts.

³⁷² Email from Sheema Shaw, Yerington Municipal Court, to 6AC Executive Director David Carroll (June 7, 2018).

³⁷³ Email from Leslie Dew-Hedrick, Yerington Municipal Court Clerk, to 6AC Executive Director David Carroll (June 12, 2018).

³⁷⁴ Email from Ely Municipal Court Judge Mike Coster (Apr. 16, 2018).

³⁷⁵ Briggs is also on the additional conflicts list for the White Pine district and justice courts.

The contract with Briggs is oral; it was negotiated at a city council meeting, but it not reduced to writing.³⁷⁶

Briggs works from home, requiring little overhead, and he has no support staff. At the \$85/hour rate, he reports that the most he has ever billed on a single case is \$1100, and that bill included a full day of trial. He sees his work in the municipal court as “nice supplemental income.” Briggs estimates that he is appointed to about 15 or more cases every month, including some cases “where jail is not on the table.” He estimates that his work as the municipal indigent defense attorney takes about 15 to 20 hours per week. He reports that he has never requested an expert or investigator from the court.

For conflict cases or multi-defendant cases (which the judge reports are rare, “e.g. 2 times in 2017, 3 times so far in 2018”), the court clerk contacts nearby law firms until they find an available attorney.³⁷⁷ On occasion it takes as many as three phone calls to find an attorney available to be appointed.³⁷⁸ Among those who have accepted conflict appointments in the recent past are: Kelly Brown,³⁷⁹ David Lockie,³⁸⁰ Sherburne McFarlan,³⁸¹ Shain Manuele,³⁸² and Richard Sears.³⁸³ The court negotiates an hourly rate of payment, trying to stay as near as possible to the \$85 per hour rate paid to the contract attorney.

Funding for indigent defense services in the Ely Municipal Court comes from the city of Ely. Though requested, the city did not provide information about its total annual expenditures for indigent defense services.

The Ely Municipal Court typically assesses each indigent defendant to reimburse the city the full \$85 per hour for the cost of their appointed counsel. In the opinion of one local attorney, the court imposes this assessment “way too often.” If the defendant cannot afford that rate, the court will impose community service. Though requested, the city did not provide information about its total annual receipts from these assessments.

³⁷⁶ Email from Ely Municipal Court Judge Mike Coster (Apr. 16, 2018).

³⁷⁷ Email from Ely Municipal Court Judge Mike Coster (Apr. 16, 2018).

³⁷⁸ Email from Ely Municipal Court Judge Mike Coster (Apr. 16, 2018).

³⁷⁹ Brown also serves as indigent defense counsel in: Eureka County (holds the primary contract for indigent defense representation in district & justice courts; Lincoln County (on the additional conflicts list for district court); and White Pine County (on the additional conflicts list for district and justice courts).

³⁸⁰ Lockie also serves as indigent defense counsel in: Elko County (conflicts list for all courts); Eureka County (additional conflicts list for all courts); Lander County (conflicts list for all courts); Lincoln County (additional conflicts list for district court); and White Pine County (additional conflicts list for district and justice courts). David Lockie and Sherburne McFarlan are law partners.

³⁸¹ McFarlan also serves as indigent defense counsel in: Elko County (conflicts list for all courts); Eureka County (additional conflicts list for all courts); Lander County (conflicts list for all courts); Lincoln County (additional conflicts list for district court); and White Pine County (additional conflicts list for district and justice courts). David Lockie and Sherburne McFarlan are law partners.

³⁸² Manuele also serves as indigent defense counsel in: Eureka County (one of three conflicts list attorneys for all courts); Lincoln County (holds the only conflict contract to provide representation in all courts); and White Pine County (holds one of three primary contracts for the district and justice courts).

³⁸³ Sears also serves as indigent defense counsel in: Eureka County (one of three conflicts list attorneys for all courts); Lincoln County (additional conflicts list for district court and Meadow Valley justice court); and White Pine County (holds one of three primary contracts for the district and justice courts).

Were Differences Observed between the “Consolidated” Justice/Municipal Courts and the “Non-Consolidated” Municipal Courts? Yes. The Sixth Amendment Center (6AC) notes that non-consolidated courts are more likely to charge defendants the costs of public representation without conducting individualized colloquies on the record to determine if the defendant can afford said cost as is:

- Ely Justice Court routinely assesses \$85 per hour of a public defender’s time against indigent defendants;
- Yerington Municipal Court assess a flat \$250 charge against all defendants seeking a public defender.

The problem is that these practices chills the right to counsel. During our first court observation in the Yerington Municipal Court, three of the first five defendants, all of whom were facing jailable offenses, waived counsel after being advised counsel would cost them \$250. Because of the Sixth Amendment violation, a different 6AC team member went back to Yerington Municipal Court the next day and saw the same practices.

Although, the 6AC was not charged with studying municipal courts within the geographic boundaries of counties with populations greater than 100,000, we did reach out to these courts to determine which lawyers were providing representations in which courts. In one correspondence with the Boulder City Municipal Court, the court³⁸⁴ sent us a document that read in part:

Court Appointed Counsel Information – 12/18/2017

If you have been provided with a court appointed attorney, the fees that the attorney may charge you as a client are set forth by the Nevada Revised Statutes, section 7.125. (\$100 per hour with a cap of \$750).

Failure to contact the attorney and return on your specified date will result in a bench warrant being issued for your arrest.

YOU AS THE DEFENDANT/CLIENT ARE RESPONSIBLE FOR PAYING THE FEES CHARGED BY THE ATTORNEY. After your attorney has been relieved from the case, he will send the court an invoice (maximum allowed is \$750), the Judge may then order the amount due and owing on your case.

Over a five year period, the Yerington Municipal Court recouped, on average, 45.48% of their costs for providing indigent defense services. In one year (FY 2014) the court recouped 59.62% of their public defense costs.

³⁸⁴ Email from Bernadette M. Graham, Court Administrator, Boulder City Municipal Court to 6AC Director, David Carroll, on July 31, 2018 at 7:58 PM (on file at the Sixth Amendment Center).

YERINGTON	FY2013	FY2014	FY2015	FY2016	FY2017	5 YR Total
PD Expenditure	\$24,535.00	\$17,250.00	\$17,125.00	\$24,250.00	\$28,518.76	\$111,678.76
PD Recoupment	\$5,944.00	\$10,284.00	\$9,899.00	\$12,747.00	\$11,918.00	\$50,792.00
% Recouped	24.23%	59.62%	57.80%	52.56%	41.79%	45.48%

Finally, non-consolidated justice and municipal courts create more confusion amongst defendants. For example, one defendant in Yerington Municipal Court proceeded pro se for a pre-trial conference on a case of driving without insurance and registration. The defendant brought with him proof of insurance and proof that the car was repossessed rather than having to get it registered. The prosecutor suggested a 90-day suspended sentence held in abeyance to be dismissed if the defendant had no more traffic infractions. The defendant did not understand what "held in abeyance" meant. When he understood that he was still at risk of being jailed he got visibly nervous. He said that he did not understand because he had similar charges brought in Walker River Justice Court that were dismissed when he presented the exact same evidence to prosecutors there. The Judge explained the differences between justice and municipal courts in Lyon County which only served to confuse the defendant more. Finally, the municipal contract public defender suggested that the court appoint her. The judge did so only after telling the defendant that it would cost him \$250.

Chapter IV. The Cronic Assessment

Providing the Sixth Amendment right to effective counsel is an obligation of the states under the due process clause of the Fourteenth Amendment.³⁸⁵ Nevada has left it to each of the cities and the rural counties to determine how to provide the right to counsel in the courts located within their geographic boundaries. (See discussion of the organization and jurisdiction of the trial courts in Chapter I.) The U.S. Supreme Court has never directly announced whether it is unconstitutional for a state to delegate this responsibility to its counties and cities. When a state chooses to place this responsibility on local governments though, the state must guarantee not only that those local governments are capable of providing adequate representation but also that they are in fact doing so.³⁸⁶

The State of Nevada has no method of ensuring that its local governments meet the state's constitutional obligations. The lack of state oversight of indigent defense services is not by itself outcome-determinative. That is, the absence of institutionalized statewide oversight does not necessarily mean that all right to counsel services are constitutionally inadequate. What it does mean is that the State of Nevada simply does not know whether its services meet the federal requirements.

Every state in the nation has created some sort of system for providing an attorney to represent an indigent defendant charged with a crime and facing the possible loss of their liberty. Attorneys provide representation to indigent people within the structures of these systems. In *United States v. Cronic*,³⁸⁷ the U.S. Supreme Court explains that deficiencies in these systems can make any lawyer – even the best attorney – perform in a non-adversarial way that results in a “constructive”³⁸⁸ denial of the right to counsel.

The *Cronic* Court explains further that, when a lawyer provides representation within an indigent defense system that constructively denies the right to counsel, the lawyer is presumptively

³⁸⁵ *Gideon v. Wainwright*, 372 U.S. 335, 343-45 (1963).

³⁸⁶ *Cf. Robertson v. Jackson*, 972 F.2d 529, 533 (4th Cir. 1992) (although administration of a food stamp program was turned over to local authorities, “ultimate responsibility” . . . remains at the state level.”); *Osmunson v. State*, 17 P.3d 236, 241 (Idaho 2000) (where a duty has been delegated to a local agency, the state maintains “ultimate responsibility” and must step in if the local agency cannot provide the necessary services); *Claremont School Dist. v. Governor*, 794 A.2d 744 (N.H. 2002) (“While the State may delegate [to local school districts] its duty to provide a constitutionally adequate education, the State may not abdicate its duty in the process.”); Letter and white paper from American Civil Liberties Union Foundation *et al* to the Nevada Supreme Court, regarding Obligation of States in Providing Constitutionally-Mandated Right to Counsel Services (Sept. 2, 2008) (“While a state may delegate obligations imposed by the constitution, ‘it must do so in a manner that does not abdicate the constitutional duty it owes to the people.’”) available at http://www.nlada.net/sites/default/files/nv_delegationwhitepaper09022008.pdf.

³⁸⁷ 466 U.S. 648 (1984).

³⁸⁸ *Strickland v. Washington*, 466 U.S. 668, 683 (1984) (“The Court has considered Sixth Amendment claims based on actual or constructive denial of the assistance of counsel altogether, as well as claims based on state interference with the ability of counsel to render effective assistance to the accused.”) (citing *United States v. Cronic*, 466 U.S. 648 (1984)).

ineffective. The government bears the burden of overcoming that presumption. The government may argue that the defense lawyer in a specific case will not be ineffective despite the structural impediments in the system, but it is the government's burden to prove this. As the Seventh Circuit Court of Appeals noted over 30 years ago in *Wahlberg v. Israel*,³⁸⁹ "if the state is not a passive spectator of an inept defense, but a cause of the inept defense, the burden of showing prejudice [under *Strickland*] is lifted. It is not right that the state should be able to say, 'sure we impeded your defense – now prove it made a difference.'"³⁹⁰

1. Qualifications & selection

In *Strickland*, the U.S. Supreme Court declared that "independence of counsel" is "constitutionally protected," and "[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense."³⁹¹ Reflecting this command, the first of the American Bar Association's *Ten Principles of a Public Defense Delivery System* requires that the public defense function, including the defense attorneys it provides, must be "independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel."³⁹² Of course judges never select the retained attorney for a defendant with the resources to hire counsel, and so judges should not be selecting the attorney who will represent an indigent defendant.

While *Cronic* and *Powell* focus on independence of counsel from judicial interference, other U.S. Supreme Court decisions extend the independence standard to political interference as well. In the 1979 case of *Ferri v. Ackerman*,³⁹³ the United States Supreme Court stated that "independence" of appointed counsel to act as an adversary is an "indispensable element" of "effective representation." Two years later, the Court observed in *Polk County v. Dodson*³⁹⁴ that states have a "constitutional obligation to respect the professional independence of the public defenders whom it engages."³⁹⁵ Commenting that "a defense lawyer best serves the public not by acting on the State's behalf or in concert with it, but rather by advancing the undivided interests of the client," the Court notes in *Polk County* that a "public defender is not amenable to administrative direction in the same sense as other state employees."³⁹⁶ The *Cronic* Court clearly advises that governmental interference that infringes on a lawyer's independence to act in the stated interests of defendants or places the lawyer in a conflict of interest causes a constructive denial of counsel. Placing prosecutors in the position of selecting the attorney and determining the terms of the defense contract creates just this sort of inappropriate political interference with the independence of the defense function..

³⁸⁹ 766 F.2d 1071 (7th Cir. 1985).

³⁹⁰ *Id.* at 1076.

³⁹¹ *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

³⁹² ABA, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, commentary to Principle 1, at 2 (Feb. 2002).

³⁹³ 444 U.S. 193, 204 (1979).

³⁹⁴ 454 U.S. 312 (1981).

³⁹⁵ 454 U.S. 312, 321-22 (1981).

³⁹⁶ 454 U.S. 312, ____ (1981).

Although attorneys graduate from law school with a strong understanding of the principles of law, legal theory, and generally how to think like a lawyer, no graduate enters the legal profession automatically knowing how to effectively handle a felony criminal case. As the American Bar Association explained more than 20 years ago:

Criminal law is a complex and difficult legal area, and the skills necessary for provision of a full range of services must be carefully developed. Moreover, the consequences of mistakes in defense representation may be substantial, including wrongful conviction and death or the loss of liberty.³⁹⁷

National standards declare that an attorney's ability to provide effective representation to indigent defendants depends on his familiarity with the "substantive criminal law and the law of criminal procedure and its application in the particular jurisdiction."³⁹⁸

"Rule 250. Procedure in capital proceedings.

1. The scope and purposes of this rule. The provisions of this rule apply only in cases in which the death penalty is or may be sought or has been imposed, including proceedings for post-conviction relief from a judgment of conviction and sentence of death. This court places the highest priority on diligence in the discharge of professional responsibility in capital cases. The purposes of this rule are: to ensure that capital defendants receive fair and impartial trials, appellate review, and post-conviction review; to minimize the occurrence of error in capital cases and to recognize and correct promptly any error that may occur; and to facilitate the just and expeditious final disposition of all capital cases.

2. Appointment and qualifications of counsel.

(a) Applicability. This section applies to all defense counsel including public defenders who are appointed to represent indigent persons in capital cases.

(b) Trial counsel. Unless the district court determines pursuant to subsection (2)(e) that defense counsel otherwise has the competence to represent an indigent person in a capital case, an attorney appointed as lead counsel at trial at a minimum must have: (1) acted as lead defense counsel in five felony trials, including one murder trial, tried to completion (i.e., to a verdict or a hung jury); (2) acted as defense co-counsel in one death penalty trial tried to completion; and (3) been licensed to practice law at least three years.

(c) Counsel in post-conviction proceedings in district court. Counsel appointed to represent a petitioner for post-conviction relief in the district court must have acted as counsel in at least two post-conviction proceedings arising from felony convictions and must otherwise satisfy the court that counsel is capable and competent to represent the petitioner.

(d) Counsel on direct and post-conviction appeal. Counsel appointed to represent an appellant on direct or post-conviction appeal must have acted as counsel in at least two appeals of felony convictions and must otherwise satisfy the court that counsel is capable and competent to represent the appellant.

³⁹⁷ ABA, STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, 5-1.5 (3d ed. 1992).

³⁹⁸ NATIONAL LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION § 1.2(a) (1995).

(e) Exceptions. If an attorney does not satisfy the minimum requirements set forth in subsections (2)(b), (c), or (d) of this rule, or if the district court otherwise considers it warranted, the court shall hold a hearing to assess the attorney's competence and ability to act as defense counsel. The court shall thoroughly investigate the attorney's background, training, and experience and consult with the attorney on his or her current caseload. If satisfied that the attorney is competent and able to provide the representation, the court shall make that finding on the record and appoint the attorney.

(f) Co-counsel. When the district court appoints defense counsel to provide representation at trial, it shall appoint two counsel, one of whom must be qualified under this rule to act as lead counsel in a capital case. When the court appoints defense counsel to provide representation in a direct appeal, a first post-conviction petition for a writ of habeas corpus, or an appeal from such post-conviction proceeding, the court may only appoint one counsel who is qualified under this rule.

(g) Appointment of public defender. When the district court appoints an office of a public defender to provide representation in a capital case, any attorney assigned by the office to act as defense counsel shall prepare and file with the court the application form required by subsection (2)(h) of this rule.

(h) Application forms and list of qualified counsel. Each judicial district shall maintain a list of qualified defense counsel and shall establish procedures to ensure that defense counsel are considered and selected for appointment to capital cases from the list in a fair, equal and consecutive basis. The judicial districts shall further arrange for the preparation and distribution of application forms to defense attorneys who wish to be included on the list. The forms must require specific information respecting the attorney's qualifications to act as defense counsel in a capital case and a complete statement of any discipline or sanctions pending or imposed against the attorney by any court or disciplinary body. Before appointing any attorney to act as counsel in a capital case, the district court to which the case is assigned shall carefully consider the information in the attorney's application form.

3. Duties and compensation of defense counsel.

...

(c) Compensation of counsel and defense costs. Appointed defense counsel must be compensated for all time reasonably spent on a case and must be reimbursed for all expenses reasonably incurred. The court shall conduct ex parte proceedings to authorize employment and payment of investigative, expert, or other services for the defense, and the transcript of such proceedings must be placed in the record under seal.

...

Nev. S.Ct. Rules, Rule 250.

INSERT ATTORNEY QUALIFICATIONS FROM THE RURAL COUNTIES

2. Training & supervision

In *United States v. Cronin*,³⁹⁹ the U.S. Supreme Court pointed to the case of the so-called "Scottsboro Boys" -- *Powell v. Alabama*⁴⁰⁰ -- as representative of the constructive denial of the

³⁹⁹ 466 U.S. 648 (1984).

⁴⁰⁰ 287 U.S. 45 (1932).

right to counsel.⁴⁰¹ Perhaps the most noted critique of the Scottsboro Boys' defense was that it lacked independence from the judge presiding over the case. The *Powell* Court observed that the right to counsel rejects the notion that a judge should direct the defense:

[H]ow can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? . . . He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional.⁴⁰²

In other words, it is *never* possible for a judge presiding over a case to properly assess the quality of a defense lawyer's representation, because the judge can never, for example, read the case file, question the defendant as to his stated interests, follow the attorney to the crime scene, or sit in on witness interviews. That is not to say a judge cannot provide sound feedback on an attorney's in-court performance – the appropriate defender supervisors indeed should actively seek to learn a judge's opinion on attorney performance. And, in some extreme circumstances, a judge can determine that counsel is ineffective, for example, if the lawyer is sleeping through the proceedings. It is just that a judge's in-court observations of a defense attorney cannot comprise the totality of supervision.

“Rule 210. Minimum continuing legal education requirements. To meet the annual minimum continuing legal education requirements imposed by these rules, each attorney subject to these rules must timely: submit an annual fee, complete the requisite number of credit hours, and submit an annual compliance report.

1. **Annual Fee.** The amount of the annual fee is \$40, made payable to the Nevada Board of Continuing Legal Education, and must be postmarked on or before March 1 of the year for which the fee is required to be paid.

2. **Credit hours.**

(a) Subject to the carry forward provisions of subparagraph (c), a minimum of twelve (12) hours of accredited educational activity, as defined by the regulations adopted by the board, must be completed by December 31 of each year. Of the twelve (12) hours, at least two (2) shall be exclusively in the area of ethics and professional conduct. At least one (1) hour every three (3) years shall be exclusively in the area of substance abuse, addictive disorders and/or mental health issues that impair professional competence. In a year in which the attorney is subject to the requirement in the area of substance abuse, addictive disorders and/or mental health issues that impair professional competence, the attorney shall complete at least nine (9) hours of general continuing legal education, at least two (2) hours exclusively in the area of ethics and professional conduct, and at least one (1) hour exclusively in the area of substance abuse, addictive disorders and/or mental health issues that impair professional competence; in the

⁴⁰¹ *United States v. Cronin*, 466 U.S. 648, 659-60 (1984) (“[I]f counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. . . . Circumstances of that magnitude may be present on some occasions when, although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. *Powell v. Alabama*, 287 U.S. 45 (1932), was such a case.”).

⁴⁰² *Powell v. Alabama*, 287 U.S. 45, 61 (1932).

remaining two years of the three- year cycle, the attorney shall complete at least ten (10) hours of general continuing legal education and at least two (2) hours exclusively in the area of ethics and professional conduct. Credit hours in the area of ethics and professional conduct, and credit hours in the area of substance abuse, addictive disorders and/or mental health issues that impair professional competence, shall be tracked separately from general educational credit hours.

...”
Nev. S.Ct. Rules, Rule 210.

All national standards, including those of the National Advisory Commission on Criminal Justice Standards and Goals,⁴⁰³ require that the indigent defense system provide attorneys with access to a “systematic and comprehensive” training program,⁴⁰⁴ at which attorney attendance is compulsory, in order to maintain competence from year to year. Training must be tailored to the types and levels of cases for which the attorney seeks public appointment. If, for example, the lawyer has not received training on the latest forensic sciences and case law related to drugs, then the government should ensure that lawyer is not assigned to drug-related cases. If a public defense provider does not have the “knowledge and experience to offer quality representation to a defendant in a particular matter” then the attorney is obligated to move to withdraw from the case, or better yet to refuse the appointment at the outset.⁴⁰⁵ Ongoing training, therefore, is an active part of the job of being a public defense provider.

INSERT ATTORNEY TRAINING ISSUES FROM THE RURAL COUNTIES

3. Compensation (fees, overhead, and case-related expenses)

The financial resources needed for the defense of every indigent case fall into three categories: law office overhead; case-related expenses; and fair lawyer compensation.⁴⁰⁶

⁴⁰³ Building upon the work and findings of the 1967 President’s Commission on Law Enforcement and Administration of Justice, the Administrator of the U.S. Department of Justice Law Enforcement Assistance Administration appointed the National Advisory Commission on Criminal Justice Standards and Goals in 1971, with DOJ/LEAA grant funding to develop standards for crime reduction and prevention at the state and local levels. The NAC crafted standards for all criminal justice functions, including law enforcement, corrections, the courts, and the prosecution. Chapter 13 of the NAC’s report sets the standards for the defense function. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, c.13 (The Defense) (1973).

⁴⁰⁴ NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, c. 13 (The Defense), Standard 13.16 (1973) (“The training of public defenders and assigned counsel panel members should be systematic and comprehensive.”).

⁴⁰⁵ NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, c. 13 (The Defense), Standard 13.16 (1973); *see also* NATIONAL LEGAL AID & DEFENDER ASSOCIATION, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, Guideline 1.2(b), 1.3(a) (1995) (“Prior to handling a criminal matter, counsel should have sufficient experience or training to provide quality representation,” and “[b]efore agreeing to act as counsel or accepting appointment by a court, counsel has an obligation to make sure that counsel has available sufficient time, resources, knowledge and experience to offer quality representation to a defendant in a particular matter. If it later appears that counsel is unable to offer quality representation in the case, counsel should move to withdraw.”). The requirement of public defense lawyers to decline or withdraw from cases, rather than provide incompetent representation, is reflect in the IND. R. PROF. CONDUCT 1.16(a)(1) (as amended through Apr. 30, 2015).

⁴⁰⁶ *See, e.g.,* ABA-SCLAID, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, commentary to Principle 8 (Feb. 2002) (“Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses. Contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should . . . separately fund expert, investigative, and other litigation support services.”).

- *Law office overhead.* For an attorney to simply show up and be available to represent clients each day, there are certain expenses that must be paid. These include: office rent, furniture and equipment, computers and cellphones, telephone and internet and other utilities, office supplies including stationery, malpractice insurance, state licensing and bar dues, and legal research materials, plus the cost of staff such as a secretary or legal assistant. All of these expenses, commonly referred to as “overhead,” must be incurred before a lawyer represents a single client.⁴⁰⁷
- *Case-related expenses.* Once an attorney is designated to represent a specific client in a specific case, there are additional expenses that must be paid. These are the expenses that the attorney would not incur but for representing that client, and they include, for example: postage to communicate with the client and witnesses and the court system, long-distance and collect telephone charges, mileage and other travel costs to and from court and to conduct investigations, preparation of copies and exhibits, and costs incurred in obtaining discovery, along with the costs of hiring necessary investigators and experts in the case. These costs vary from case to case – some cases requiring very little in the way of expense; other cases costing quite a lot. The individual expenses that are necessary, though, must be paid for in every client’s case. On July 23, 2015, the Nevada Supreme Court ordered that “[i]f counties use the contract counsel method, they shall not use a totally flat fee contract, but execute contracts that allow for a modification of fees for extraordinary cases, and allow for investigative fees and expert witness fees.”⁴⁰⁸
- *Fair lawyer compensation.* As explained in Chapter I, Nevada has a long history of protecting the right of an attorney to be paid. Compensation is the attorney’s take home pay.

All national standards require that “counsel should be paid a reasonable fee in addition to actual overhead and expenses.”⁴⁰⁹ Further, “[c]ontracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual, or complex cases, and separately fund expert, investigative, and other litigation support services.”⁴¹⁰ The American Bar Association Standards for Criminal Justice explain that attorneys must have adequate resources and support staff in order to render quality legal representation.

⁴⁰⁷ “The 2012 Survey of Law Firm Economics by ALM Legal Intelligence estimates that over 50 percent of revenue generated by attorneys goes to pay overhead expenses,” NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, RATIONING JUSTICE: THE UNDERFUNDING OF ASSIGNED COUNSEL SYSTEMS 8 (Mar. 2013), and overhead tends to be a higher percentage of gross receipts as a law office gets smaller. See ALM LEGAL INTELLIGENCE, 2012 SURVEY OF LAW FIRM ECONOMICS, Executive Summary, at 4 (showing overhead ranging from 38.9 percent of receipts in the largest law firms to 47.2 percent in smaller law offices).

⁴⁰⁸ Order, *In re Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, ADKT 411 (Nev., July 23, 2015).

⁴⁰⁹ ABA, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, commentary to Principle 8, at 3 (Feb. 2002).

⁴¹⁰ ABA, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, commentary to Principle 8, at 3 (Feb. 2002).

Among these are secretarial, investigative, and expert services, which includes assistance at pre-trial release hearings and sentencing. In addition to personal services, this standard contemplates adequate facilities and equipment, such as computers, telephones, facsimile machines, photocopying, and specialized equipment required to perform necessary investigations.⁴¹¹

The government is responsible for providing the resources needed in each defendant's case. It can do so by providing a government paid-for building stocked with all the necessary supplies and equipment and a budget for investigation, experts, and support staff. Or it can do so by paying or repaying the public attorneys for these expenses. What government *cannot do*, as has been held by state supreme courts all across the country, is place the burden of paying for the indigent defense system onto the public attorneys.⁴¹²

When lawyers' compensation decreases with each additional case, or when forced to pay the overhead and case related expenses of every client's case out of a flat fee, lawyers often come to resent their clients or at least the number of clients they are appointed to represent. Put another way, the government's compensation structure creates a conflict between the lawyer's financial interests and the case-related interests of each of his court-appointed clients. As a result of that

⁴¹¹ ABA, STANDARDS FOR CRIMINAL JUSTICE – PROVIDING DEFENSE SERVICES, Standard 5-1.4 Commentary (3d ed. 1992).

⁴¹² See, e.g., *Wright v. Childree*, 972 So. 2d 771, 780-81 (Ala. 2006) (determining assigned counsel are entitled to a reasonable fee in addition to overhead expenses, in case where state's Attorney General had issued an opinion against paying the overhead rate and the state comptroller subsequently stopped paying); *May v. State*, 672 So. 2d 1307, 1308 (Ala. Crim. App. 1993) (determining indigent defense attorneys were entitled to overhead expenses, presumptively set at \$30 per hour, in addition to a reasonable fee); *DeLisio v. Alaska Superior Court*, 740 P.2d 437, 443 (Alaska 1987) (determining that appointed cases did not simply merit a reasonable fee and overhead, but rather the fair market rate of an average private case. "[R]equiring an attorney to represent an indigent criminal defendant for only nominal compensation unfairly burdens the attorney by disproportionately placing the cost of a program intended to benefit the public upon the attorney rather than upon the citizenry as a whole." Alaska's constitution "does not permit the state to deny reasonable compensation to an attorney who is appointed to assist the state in discharging its constitutional burden," because doing so would be taking "private property for a public purpose without just compensation."); *State ex rel Stephan v. Smith*, 747 P.2d 816, 242 Kan. 336, 383 (Kan. 1987) (the state "has an obligation to pay appointed counsel such sums as will fairly compensate the attorney, not at the top rate an attorney might charge, but at a rate which is not confiscatory, considering overhead and expenses;" testimony showed the average overhead rate of attorneys in Kansas in 1987 was \$30 per hour); *State v. Wigley*, 624 So.2d 425, 429 (La. 1993) (finding that "in order to be reasonable and not oppressive, any assignment of counsel to defend an indigent defendant must provide for reimbursement to the assigned attorney of properly incurred and reasonable out-of-pocket expenses and overhead costs."); *Wilson v. State*, 574 So.2d 1338, 1340 (Miss. 1990) (determining that indigent defense attorneys are entitled to "reimbursement of actual expenses" in addition to a reasonable sum; defining "actual expenses" to include "all actual costs to the lawyer for the purpose of keeping his or her door open to handle this case," and allowing defense attorneys to receive a "pro rata share of actual overhead"); *State v. Lynch*, 796 P.2d 1150, 1161 (Okla. 1990) (finding that state government "has an obligation to pay appointed lawyers sums which will fairly compensate the lawyer, not at the top rate which a lawyer might charge, but at a rate which is not confiscatory, after considering overhead and expenses;" "provision must be made for compensation of defense counsel's reasonable overhead and out of pocket expenses" in order "to place the counsel for the defense on an equal footing with counsel for the prosecution"); *Jewell v. Maynard*, 383 S.E.2d 536, 540 (W. Va. 1989) (raising the hourly rate paid to court appointed attorneys on a finding that they were forced to "involuntarily subsidize the State with out-of-pocket cash," because the then-current rates did not cover attorney overhead shown to be \$35 per hour in West Virginia in 1989. "Perhaps the most serious defect of the present system is that the low hourly fee may prompt an appointed lawyer to advise a client to plead guilty, although the same lawyer would advise a paying client in a similar case to demand a jury trial.").

conflict, the lawyer may triage the time and energy he puts into his cases.⁴¹³ A federal court in 2013 called the use of such flat fee contracts an “[i]ntentional choice[]” of government that purposely leaves “the defenders compensation at such a paltry level that even a brief meeting [with clients] at the outset of the representation would likely make the venture unprofitable.”⁴¹⁴

In a fixed fee compensation scheme, the attorney is responsible for representing an unlimited number of indigent felony defendants in return for a certain amount of money that does not change no matter how many or how few cases the attorney is appointed to. There is no guarantee of overhead reimbursement for attorneys who are paid a fixed fee.

Because an attorney is paid exactly the same amount no matter how few or how many cases he is appointed to handle and no matter how few or how many hours he devotes to each case, it is in the attorney’s own financial interest to spend as little time as possible on each individual defendant’s case. For example, if an attorney is paid \$24,000 a year to represent indigent felony defendants, and if his indigent felony cases take up all of his available working hours, then this attorney cannot earn more than \$24,000 in a year. On the other hand, if this attorney devotes only half of his working hours to his indigent clients, then he can spend the other half of his working year on more lucrative paying cases or other employment, thereby greatly increasing his annual income. A fixed fee creates an incentive for the attorney to rush a client to plead guilty without regard to the facts of the case, avoid conducting investigation or legal research, and avoid engaging in hearings or a trial. It also incentivizes the attorney to favor the legal interests of his paying clients or other employment over the legal interests of the indigent defendants he is appointed to represent.

The situation is worse yet if the attorney is not reimbursed for overhead and case-related expenses. In our example, this means any resources devoted to an indigent defendant will come out of the attorney’s \$24,000 compensation. This creates a disincentive for the attorney to hire an investigator or experts or to, for example, accept toll calls from the jail, in the case of an indigent defendant, or to incur any overhead costs that benefit indigent defendants (even such as secretarial time, legal research capability through books or online, or malpractice insurance), without regard to whether the resources are necessary to provide effective representation.

Fixed fees create a conflict of interest between the attorney’s own financial interest and the legal interests of the indigent defendants whom he is appointed to represent and also create a conflict between the legal interests of an attorney’s paying clients and those of his indigent clients.

INSERT ATTORNEY COMPENSATION ISSUES FROM THE RURAL COUNTIES

4. Caseloads & sufficient time

The Court in *Powell v. Alabama*⁴¹⁵ notes that the lack of “sufficient time” to consult with counsel and to prepare an adequate defense was one of the primary reasons for finding that the

⁴¹³ And the attorney has no incentive to dedicate time toward developing his client’s trust.

⁴¹⁴ *Wilbur v. City of Mount Vernon*, No. C11-1100RSL, Memorandum of Decision at 15 (W.D. Wash. Dec. 4, 2013), available at <http://sixthamendment.org/wp-content/uploads/2013/12/Wilbur-Decision.pdf>.

⁴¹⁵ *Powell v. Alabama*, 287 U.S. 45 (1932).

Scottsboro Boys were constructively denied counsel. Having been assigned unqualified counsel, the Scottsboro Boys' trials proceeded immediately that same day.⁴¹⁶ Impeding counsel's time "is not to proceed promptly in the calm spirit of regulated justice, but to go forward with the haste of the mob."⁴¹⁷ Insufficient time is, therefore, a marker of constructive denial of counsel. Further, the inadequate time may itself be caused by any number of things, including but not limited to excessive workload or contractual arrangements that create negative fiscal incentives for lawyers to dispose of cases quickly.

The U.S. Supreme Court further explained in *Cronic* that "[t]he right to the effective assistance of counsel" means that the defense must put the prosecution's case through the "crucible of meaningful adversarial testing."⁴¹⁸ For this to occur, states must ensure that both the prosecution and the defense have the resources they need at the level their respective roles demand. "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators."⁴¹⁹ If a defense attorney is either incapable of or barred from challenging the state's case because of a structural impediment – "if the process loses its character as a confrontation between adversaries"⁴²⁰ – a constructive denial of counsel occurs.

No matter how complex or basic a case may seem at the outset, no matter how little or how much time an attorney wants to spend on a case, and no matter how financial matters weigh on an attorney, there are certain fundamental tasks each attorney must do on behalf of every client in every case. Even in the simplest felony case, the attorney must, among other things:

- meet with and interview the client;
- attempt to secure pretrial release if the client remains in state custody (but, before doing so, learn from the client what conditions of release are most favorable to the client);
- keep the client informed throughout the duration of proceedings;
- request and review discovery from the prosecution;
- independently investigate the facts of the case, which may include learning about the defendant's background and life, interviewing both lay and expert witnesses, viewing the crime scene, examining items of physical evidence, and locating and reviewing documentary evidence;
- assess each element of the charged crime to determine whether the prosecution can prove facts sufficient to establish guilt and whether there are justification or excuse defenses that should be asserted;
- prepare appropriate pretrial motions and read and respond to the prosecution's motions;

⁴¹⁶ Over the course of the next three days, four separate all-white juries, trying the defendants in groups of two or three at a time, found all nine of the Scottsboro Boys guilty, and all but one was sentenced to death. The youngest—only 13 years old—was instead sentenced to life in prison.

⁴¹⁷ *Powell*, 287 U.S. 45 (1932).

⁴¹⁸ *United States v. Cronic*, 466 U.S. 648, 656-57 (1984) ("The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted – even if defense counsel may have made demonstrable errors – the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.").

⁴¹⁹ *Cronic*, 466 U.S. at 657 (citing *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (7th Cir. 1975)).

⁴²⁰ *Cronic*, 466 U.S. at 656-57.

- prepare for and appear at necessary pretrial hearings, wherein he must preserve his client's rights;
- develop and continually reassess the theory of the case;
- assess all possible sentencing outcomes that could occur if the client is convicted of the charged crime or a lesser offense;
- negotiate plea options with the prosecution, including sentencing outcomes; and
- all the while prepare for the case to go to trial (because the decision about whether to plead or go to trial belongs to the client, not to the attorney).⁴²¹

One state Supreme Court observed over twenty years ago, “as the practice of criminal law has become more specialized and technical, and as the standards for what constitutes reasonably effective assistance of counsel have changed, the time an appointed attorney must devote to an indigent’s defense has increased considerably.”⁴²²

National standards, as summarized by the American Bar Association, agree that “[d]efense counsel’s workload [must be] controlled to permit the rendering of quality representation.”⁴²³ Workload includes the cases an attorney is appointed to handle within a given system (i.e., caseload), but it also includes the cases an attorney takes on privately, public defense cases to which the attorney is appointed by other jurisdictions, and other professional obligations such as obtaining and providing training and supervision.⁴²⁴ In addition to considering the raw number of cases of each type that an attorney handles, all national standards agree that the lawyer’s workload must take into consideration “all of the factors affecting a public defender’s ability to adequately represent clients, such as the complexity of cases on a defender’s docket, the defender’s skill and experience, the support services available to the defender, and the defender’s other duties.”⁴²⁵

The National Advisory Commission on Criminal Justice Standards and Goals (“NAC”) created the first national defender caseload standards as part of an initiative funded by the U.S. Department of Justice.⁴²⁶ NAC Standard 13.12 prescribes absolute maximum numerical caseload limits of:

⁴²¹ See generally *PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION* (NAT’L LEGAL AID & DEFENDER ASS’N 1995).

⁴²² *State v. Wigley*, 624 So.2d 425, 428 (La. 1993).

⁴²³ TEN PRINCIPLES at § 5.

⁴²⁴ TEN PRINCIPLES at § 5 cmt.

⁴²⁵ Statement of Interest of the United States, *Wilbur v. City of Mount Vernon*, (W.D. Wash. Dec. 4, 2013) (No. C11-1100RSL), ECF No. 322, available at <http://www.justice.gov/crt/about/spl/documents/wilbursoi8-14-13.pdf>. See e.g., Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L. J. 1031, 1125 (2006) (“Although national caseload standards are available, states should consider their own circumstances in defining a reasonable defender workload. Factors such as availability of investigators, level of support staff, complexity of cases, and level of attorney experience all might affect a workable definition. Data collection and a consistent method of weighing cases are essential to determining current caseloads and setting reasonable workload standards.”).

⁴²⁶ Building on the work and findings of the 1967 President’s Commission on Law Enforcement and Administration of Justice, the Administrator of the U.S. Department of Justice Law Enforcement Assistance Administration appointed the National Advisory Commission on Criminal Justice Standards and Goals in 1971, with DOJ/LEAA grant funding, to develop standards for crime reduction and prevention at the state and local levels. The NAC crafted standards for all criminal justice functions, including law enforcement, corrections, the courts, and the prosecution. Chapter 13 of the NAC’s report sets the standards for the defense function.

- 150 felonies per attorney per year;
- 400 misdemeanors per attorney per year;
- 200 juvenile delinquencies per attorney per year;
- 200 mental health per attorney per year; or
- 25 appeals per attorney per year.⁴²⁷

This means a lawyer handling felony cases should not be responsible for more than a total of 150 felony cases in a given year, counting both cases the lawyer had when the year began and cases assigned to the lawyer during that year, and including all of the lawyer's cases (public, private, and *pro bono*). The caseload limits also assume that the lawyer does not have any other duties, such as management or supervisory responsibilities.

The standards further contemplate that a full contingent of support staff – including paralegals, investigators, social workers, and secretaries – is available to defenders.⁴²⁸ As noted, defenders in most of the counties in Nevada studied for this report have no investigators, paralegals, or social workers on staff, and only a few even have secretaries. Even where public defender offices exist, those offices do not maintain the support staff attorneys need to work most effectively. That support staff includes one supervisor for every ten attorneys; one investigator for every three attorneys;⁴²⁹ one social service caseworker for every three attorneys; one paralegal for every four felony attorneys;⁴³⁰ and one secretary for every four felony attorneys.⁴³¹ The lack of assistance for discovery review and investigation exacerbates the amount of time it takes attorneys to adequately prepare for cases.

Finally, the U.S. Department of Justice has advised that “caseload limits are no replacement for a careful analysis of a public defender’s *workload*, a concept that takes into account all of the factors affecting a public defender’s ability to adequately represent clients, such as the complexity of cases on a defender’s docket, the defender’s skill and experience, the support services available to the defender, and the defender’s other duties.”⁴³²

The NAC standards can be prorated for mixed caseloads. For example, an attorney could have a mixed caseload over the course of a given year of 75 felonies (50% of a maximum caseload) and 200 misdemeanors (50% of a maximum caseload) and be in compliance with national caseload standards. It is these NAC caseload maximums to which national standards refer when they say that “in no event” should national caseload standards be exceeded.

⁴²⁷ NAC STANDARDS at § 13.12.

⁴²⁸ See NSC GUIDELINES at § 4.1 (“Social workers, investigators, paralegal and paraprofessional staff as well as clerical/secretarial staff should be employed to assist attorneys in performing tasks not requiring attorney credentials or experience and for tasks where supporting staff possess specialized skills.”).

⁴²⁹ NSC GUIDELINES at § 4.1 (“Defender offices should employ investigators with criminal investigation training and experience. A minimum of one investigator should be employed for every three staff attorneys in an office. Every defender office should employ at least one investigator.”).

⁴³⁰ See BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE PUB. NO. NCJ185632, KEEPING DEFENDER WORKLOADS MANAGEABLE 10 (2001), available at <https://www.ncjrs.gov/pdffiles1/bja/185632.pdf>.

⁴³¹ *Id.*

⁴³² Statement of Interest of the United States, *Wilbur v. City of Mount Vernon* 9 (W.D. Wash. Dec. 4, 2013) (No. C11-1100RSL), ECF No. 322, available at <http://www.justice.gov/crt/about/spl/documents/wilbursoi8-14-13.pdf>.

The NAC caseload limits were established and remain as absolute maximums. Yet, policymakers in many states have since recognized the need to set localized workload standards. Such localized standards often consider the additional demands made on defense attorneys in each case (such as the travel distance between the court and the local jail, or the prosecution's charging practices, or increased complexity of forensic sciences and criminal justice technology). Demands of this type increase the amount of time, beyond that contemplated by the NAC standards, that is necessary for the lawyer to provide effective representation. For these reasons, many criminal justice professionals argue that the caseloads permitted by the NAC Standards are far too high and that the maximum caseloads allowed should be much lower.⁴³³

Nevada does not have any statewide limits on the number of cases that an attorney representing indigent clients may handle in a year. The State of Nevada has no entity charge with setting maximum indigent defense caseload limits to ensure sufficient time to provide effective assistance of counsel. The State Public Defender has no internal caseload policies or standards.

Section 7D of both the Lincoln County and White Pine County public defense contracts require attorneys to “maintain average annual caseloads per full-time attorney, or full-time equivalent (FTE) no greater than”⁴³⁴ the NAC standards for felony, misdemeanor, juvenile delinquency, and appellate cases. Additionally, both counties have established caseload limits for the following case-types: juvenile dependency cases (60); civil commitment cases (250); contempt of court cases (250); and drug court cases.

According to both counties indigent defense contracts, these are the maximum limits assuming an attorney handles only one case-type. Like the NAC standards, the caseload limits may be pro-rated if an attorney represents multiple cases types. However, “[i]t is assumed that the level of competent assistance of counsel anticipated by the Contract cannot be rendered by an attorney who carries an average annual caseload substantially above these levels.”⁴³⁵ Importantly, “[f]ailure on the part of the Firm to limit its attorneys to these caseload levels is considered to be a material breach of this agreement.”⁴³⁶ However, as will be established under the proceeding

⁴³³ See, e.g., AMERICAN COUNCIL OF CHIEF DEFENDERS, STATEMENT ON CASELOADS AND WORKLOADS (Aug. 24, 2007), available at https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_train_caseloads_standards_ethics_opinions_combined.authcheckdam.pdf (“In many jurisdictions, caseload limits should be lower than the NAC standards.”).

⁴³⁴ Agreement for Public Defender Services July 1, 2017 Through June 30, 2019, between the County of Lincoln, a political subdivision of the State of Nevada and Dylan V. Frehner (May 1, 2017), p. 6, (on file with Sixth Amendment Center). Agreements for Public Defender Services July 1, 2017 Through June 30, 2019, between the County of White Pine, a political subdivision of the State of Nevada and Jane Eberhardy of Jane Eberhardy Law; White Pine County, NV and Shain Manuele of Manuele Law LLC Gensler; White Pine County, NV and Richard W. Sears of Sears Law Firm, Ltd.; (April 12, 2017), p. 6, (on file with Sixth Amendment Center).

⁴³⁵ Agreement for Public Defender Services July 1, 2017 Through June 30, 2019, between the County of Lincoln, a political subdivision of the State of Nevada and Dylan V. Frehner (May 1, 2017), p. 6, (on file with Sixth Amendment Center). Agreements for Public Defender Services July 1, 2017 Through June 30, 2019, between the County of White Pine, a political subdivision of the State of Nevada and Jane Eberhardy of Jane Eberhardy Law; White Pine County, NV and Shain Manuele of Manuele Law LLC Gensler; White Pine County, NV and Richard W. Sears of Sears Law Firm, Ltd.; (April 12, 2017), p. 6, (on file with Sixth Amendment Center).

⁴³⁶ Agreement for Public Defender Services July 1, 2017 Through June 30, 2019, between the County of Lincoln, a political subdivision of the State of Nevada and Dylan V. Frehner (May 1, 2017), p. 6, (on file with Sixth

finding, neither county has established caseload reporting processes that could be employed to determine if said standards are breeched.

Outside of these two instances, there are no other local government standards limiting excessive caseloads in rural Nevada.

The State of Nevada statutorily requires the State Public Defender to track the following information pertaining to attorney workload:

“1) The number of cases that are pending in each participating county; 2) The number of cases in each participating county that were closed in the previous fiscal year; 3) The total number of criminal defendants represented in each participating county with separate categories specifying the crimes charged and whether the defendant was less than 18 years of age or an adult; 4) The total number of working hours spent by the State Public Defender and the State Public Defender’s staff on work for each participating county; and 5) The amount and categories of the expenditures made by the State Public Defender’s office.”⁴³⁷

The State of Nevada has no entity to collect data on indigent defense caseloads regarding rural jurisdiction where the State Public Defender does not provide representation. Therefore, the State of Nevada has no way of knowing whether or not public defense providers are carrying excessive caseloads.

An additional five rural county governments require no data reporting of public defender caseloads: Douglas, Elko, Esmeralda, Eureka,⁴³⁸ and Mineral. Fallon, Ely and the four cities with municipal courts within the geographic boundaries of Elko County also do not require caseload reporting.

Eight rural counties⁴³⁹ require public defense attorneys to regularly report on caseloads: Churchill, Humboldt, Lander, Lincoln, Lyon, Nye, Pershing and White Pine. Likewise, the cities of Fernley and Yerington require similar caseload reporting.

Three counties have codified the public defense caseload reporting requirements, although what

Amendment Center). Agreements for Public Defender Services July 1, 2017 Through June 30, 2019, between the County of White Pine, a political subdivision of the State of Nevada and Jane Eberhardy of Jane Eberhardy Law; White Pine County, NV and Shain Manuele of Manuele Law LLC Gensler; White Pine County, NV and Richard W. Sears of Sears Law Firm, Ltd.; (April 12, 2017), p. 6, (on file with Sixth Amendment Center).

⁴³⁷ NRS 180.080(1)(A): Duties: Reports to Governor, participating counties and Legislative Commission.

⁴³⁸ Attachment C of the contract between Eureka County and Kelly Brown contains the original proposal and cover letter submitted by Brown to the County on March 3, 2015. The proposal states that Brown “will collect and provide the data the County needs to evaluate the effectiveness and efficiency of this contract for public defense services. The information collected will include not only financial and caseload data but also demographic data and detailed information on case handling.” However, none of those requirements were made part of the formal contract. Agreement for Public Defender Services July 1, 2015 Through June 30, 2017, Eureka County, a political subdivision of the State of Nevada, and Kelly Brown (March 11, 2015), (on file with Sixth Amendment Center).

⁴³⁹ The three Carson City contracts for conflict services also require caseload reporting. Agreements for Public Defender Services July 1, 2017 Through June 30, 2020, between the Carson City, a political subdivision of the State of Nevada, and John E. Malone; Carson City, NV and Robert S. Walker; Carson City, NV and Noel S. Waters.; (June 6, 2017); Exhibit A, “Procedural Provisions,” Section (h)(i-v). p. 3. (on file with Sixth Amendment Center).

is to be reported varies widely. For example, Nye County Code, Title II, Chapter 2.48.050A, simply requires that the “Public Defender shall make an annual report to the Board, covering all cases handled by the office of the Public Defender during the preceding year,”⁴⁴⁰ without specifying what “handled” means (e.g., cases assigned; cases disposed; or, new cases plus pending cases at the start of the fiscal year) and without specificity about how to report cases (e.g., by case-type, by court, etc.). Contrastingly, both Humboldt County⁴⁴¹ and Pershing County⁴⁴² require more detailed reporting, including: a) the number of new cases received during the report period;⁴⁴³ b) the number of cases closed during the report period; c) the number of open and active cases; d) the dollar amount of all attorneys’ fees levied upon public defender clients; and, e) the dollar amount of all revenue collected during the report period.

The other five counties and two municipalities contractually obligate public defense attorneys to report caseloads. Here too the contract language varies widely on what data is to be tracked. For example, the Churchill County contracts require only that attorneys monthly report numbers of cases assigned by case-type.⁴⁴⁴ Lander County contract requires the attorney to submit quarterly reports indicating: a) number of appointments; b) number of conflicts; and, c) how cases are resolved.⁴⁴⁵ And, the cities of Fernley and Yerington require monthly reports requiring: a) charges; b) case numbers; c) dispositions; d) appeals filed; and e) number of cases conflicted out.⁴⁴⁶

Although both Lincoln County and White Pine County have established caseload limits the reporting only requires the firms on a quarterly basis to “report the number of cases completed”

⁴⁴⁰ NCC § 2.48.050(A).

⁴⁴¹ HCC § 2.44.080.

⁴⁴² PCC § 2.80.070(B).

⁴⁴³ Both counties categorized case-types as follows: a. Felonies, b. Gross misdemeanors, c. Misdemeanors, d. Municipal ordinance violations, e. Juvenile matters, f. Child protection proceedings, g. Guardianship proceedings, h. Drug court proceedings, i. Extradition proceedings, j. Modifications of probation or sentence, k. Insanity hearings, l. Probation revocations, m. Parole violations, n. Post-conviction proceedings, o. District court appeals, p. Supreme Court appeals, and, q. Miscellaneous proceedings.

⁴⁴⁴ Agreement for Public Defender Services December 1, 2017 Through June 30, 2021, Churchill County, a political subdivision of the State of Nevada, and Jacob Sommer (November 28, 2017); Churchill County, NV and Charles Woodman (December 26, 2017); p. 3, (on file with Sixth Amendment Center): “Contractor shall provide, on a monthly basis, a report to the County Manager containing the following information: i. The total number of cases on which the Contractor has been appointed during the month, designated by their status: misdemeanor, gross misdemeanor, felony in a form approved by the County.”

⁴⁴⁵ Agreement for Public Defender Services January 5, 2015 Through December 31, 2016, Lander County, a political subdivision of the State of Nevada, and Belanger & Plimpton; Official Document #0272940. January 23, 2015. Section 11, p. 3-4. “Contractor shall submit a report every THREE (3) months to County showing how many appointments have been made, how many conflict cases there were and how many cases were resolved within that THREE (3) month period.”(on file with Sixth Amendment Center).

⁴⁴⁶ The City of Fernley and the City of Yerington use similar contract templates. Section G of Attachment A for all municipal contracts states: “The Public Defender shall file monthly reports with the city delineating clients who have been appointed to the Public Defender, including charge(s), case number(s), disposition, and whether an appeal was filed. The report shall designate whether the client was ‘conflicted’ to another attorney for representation or the client hired another private attorney.” Agreements for Public Defender Services July 1, 2017 Through June 30, 2018, between the City of Fernley and Kenneth V. Ward; (July 5, 2017), p. 6, (on file with Sixth Amendment Center). Agreements for Public Defender Services June 1, 2017 Through May 31, 2018, between the City of Yerington and Johnston Law Offices, P.C.; (July 11, 2017); (on file with Sixth Amendment Center).

(not the total number of cases assigned plus pending at the start of the year) and “hours spent on cases in the past quarter, separated by category, to the Contracting Authority Administrators.”⁴⁴⁷

Lyon County requires the most data reporting of all of the rural jurisdictions. There, contract public defenders are required quarterly to report:

1. “Attorney shall report quarterly to the County Manager and Board of County Commissioners the following information:
 - A. Adult Criminal Cases: (1) number of cases opened; (2) types of offenses (with a breakdown of felony/misdemeanor, and court; and, (3) other pertinent information requested by the County Manager.
 - B. Extraordinary Cases/Capital Cases: (1) number of cases pending; (2) additional costs incurred and charged to the County on the case; and, (3) other pertinent information requested by the County Manager.
 - C. Juvenile Cases: (1) number of cases opened; (2) types of offenses (with a breakdown of felony/misdemeanor, and court; (3) number of probation violations handled and resolved; (4) number of parole violations handled and resolved; and, (5) other pertinent information requested by the County Manager.
 - D. NRS 432B Cases: (1) number of cases opened; (2) number of children represented; (3) number of adults represented; and (4) other pertinent information requested by the County Manager.
 - E. Probation and Parole Violations: (1) number of cases opened, separated by probation and parole violations; and (2) other pertinent information requested by the County Manager.
2. Attorney shall provide this information in a format approved by and acceptable to the County Manager.
3. In any State statute in effect now or hereinafter enacted requires public defenders to provide certain information on reports, Attorney agrees to provide and maintain that information at no additional costs to County.
4. Attorney is not required to provide any information which would compromise client confidentiality or violate any laws or rules of professional conduct. In cases of a dispute, the Attorney should attempt to resolve the matter with the County Manager and, if necessary, the Board of County Commissioners.”⁴⁴⁸

Despite multiple attempts to obtain copies of the required caseload reports, the following counties did not provide said reports: Lander, Lincoln, Nye, Pershing and White Pine. Additionally, neither the City of Fernley nor the City of Yerington produced said reports. To be

⁴⁴⁷ Agreement for Public Defender Services July 1, 2017 Through June 30, 2019, between the County of Lincoln, a political subdivision of the State of Nevada and Dylan V. Frehner (May 1, 2017), p. 6, (on file with Sixth Amendment Center). Agreements for Public Defender Services July 1, 2017 Through June 30, 2019, between the County of White Pine, a political subdivision of the State of Nevada and Jane Eberhardy of Jane Eberhardy Law; White Pine County, NV and Shain Manuele of Manuele Law LLC Gensler; White Pine County, NV and Richard W. Sears of Sears Law Firm, Ltd.; (April 12, 2017), p. 6, (on file with Sixth Amendment Center).

⁴⁴⁸ Agreement for Public Defender Services July 1, 2017 Through June 30, 2020, Lyon County, a political subdivision of the State of Nevada, and Aaron Mouritsen (June 15, 2017); Lyon County and Wayne A. Pederson (June 13, 2017); Lyon County, NV and Kenneth V. Ward (June 8, 2017). Section G: Reporting, p. 4. (on file with Sixth Amendment Center).

clear, local governments did not appear to be withholding the reports. Rather, they simply were unable to find the reports. This indicates that even if the public defense attorneys submitted the reports, these local governments do not use them to monitor public defense workload.

Churchill and Humboldt counties were able to provide complete caseload reports, while Lyon County provided only some reports from some attorneys for some quarters scattered throughout FY2014 through FY2018. The State Public Defender provided their requested caseload reports.

Nationally, governments and courts define a criminal or delinquency “case” differently: some count cases by “prosecutor charging instrument,” others by “charge,” while still others by “defendant.” However, the National Center for State Courts and the Conference of State Court Administrators (NCSC/COSCA) recommend the following uniform case definition: “Count the defendant and all charges involved in a single incident as a single case. If the charging document contains multiple defendants involved in a single incident, count each defendant as a single case.”⁴⁴⁹

Using a district attorneys’ charging instrument to define a “case” does not produce uniform caseload data because different prosecutors have different philosophies on how to charge (as it should be). For example, one prosecutor may want to charge suspected co-conspirators on a single charging document. However, two separate public defense providers must each represent the individual co-defendants. Each right to counsel provider is ethically bound to provide zealous representation to the co-defendant assigned to them, meaning that each defense provider must conduct independent investigations and engage in separate case prep and plea negotiations. They are in every sense of the word, two separate “cases.”

Similarly, if a defendant is charged with a shoplifting in one store on one day, and a separate store on another day, and yet a third store on a third day, a prosecutor may want to file a single charging document to show the serial pattern of the accused. But, from the defense perspective, an attorney must interview three potential sets of eyewitnesses, and investigate three different crimes scenes. It is quite possible that the defendant committed two of the alleged crimes, but not the third. Each one must be treated as its own case.⁴⁵⁰

This differs in kind with the work and effort needed to investigate and defend all of the charges arising from a single incident. Say a defendant is charged with reckless driving, and subsequently is alleged to have resisted arrest or to have accosted the arresting officer. All of the work effort of a defense attorney is around the same sets of facts, the same eyewitnesses and the same crime scene.

⁴⁴⁹ Conference of State Court Administrators and the National Center for State Courts. *State Court Guide to Statistical Reporting*. Version 2.1.2, Updated March 20, 2017. P. 14. Available at: <http://www.courtstatistics.org/~media/Microsites/Files/CSP/State%20Court%20Guide%20to%20Statistical%20Reporting%20v%202point1point2.ashx>

⁴⁵⁰ The uniform case definition in no way “favors” the defense function. It simply affords the only accurate depiction of the defense function’s workload. But using this definition of a “case” does not prevent the court from keeping track of data by other means like by “defendant,” or by “charge” or by “charging instrument.” Indeed, each of these data categories can still be counted as they represent broader cross-sections of the same workload of the courts. For example, a report could say that Justice Court “A” disposed of 2,456 misdemeanor cases reflecting 4,123 charges against 1,900 individuals.

Similar issues arise when trying to count a “case” by “charge” or by “defendant” in comparison with the NAC standards. Because defendants are sometimes charged with multiple counts arising out of a single incident, using “charges” as the definition of a “case,” will inflate the numbers when attempting a comparison to national caseload standards. That is, an attorney providing representation on 450 misdemeanor charges may in fact only be representing 325 cases. Using “charges” will show the attorney to be over the NAC maximum for misdemeanors (400) when in fact she is under the threshold of excessive caseloads.

The opposite is true when counting cases by “defendant.” Because defendants may be charged in multiple offenses occurring on different days in different places, conducting a comparison against the NAC standards by defendant will undercount cases. In this scenario, a NAC comparison may show an attorney to have an appropriate caseload when in fact she has an excessive caseload. For example, if Attorney B represents only 140 people charged with felonies, but those 140 defendants are accused of committing 175 individual incidents, then a NAC comparison will show her under the maximum standard for felonies (150) when she is in fact in breach of the standard.

When cases involve multiple charges arising out of a single incident, NCSC/COSCA recommends that cases are to be counted by “top charge”⁴⁵¹ at the time of filing, regardless of the severity of the case when it is disposed.⁴⁵² That is, a case is filed as a felony but disposed as a misdemeanor through plea negotiations should be counted in caseload reports as a felony. This also reflects the work-effort that went into the case. That is, the prosecutor and defense attorney must consider and treat the case as a felony, and therefore should get “credit” so to speak for the nature of their work on the case, regardless that it is disposed as a misdemeanor.⁴⁵³

Finally, national caseload standards require that attorneys report the total number of cases touched in a given year. Thus, annual caseload reports should indicate the number of pending cases at the start of the year in addition to any new assignments. For example, an attorney assigned only 125 felony cases in a given year would appear to be in compliance with the NAC standards. However, if that attorney had 50 cases pending at the start of the year that were worked on during the year the attorney would be over the NAC standard (150). This problem

⁴⁵¹ “Classify cases by the most serious offense, first based on subcategory (Felony or Misdemeanor) then on case type listed in the Matrix in descending order of severity. *Example:* When a criminal case includes a felony drug offense, felony weapons offense, and a misdemeanor drug offense, report the case only as a felony drug offense.” Conference of State Court Administrators and the National Center for State Courts. *State Court Guide to Statistical Reporting*. Version 2.1.2, Updated March 20, 2017. P. 14-15.

⁴⁵² “Report the disposition of a criminal case in the same case type that was used when the case was filed. *Example:* When a criminal case is filed as a Felony, but is subsequently reduced to a Misdemeanor and a judgment is obtained on the Misdemeanor charge, report both the filing and disposition as a Felony on the Caseload Summary Matrix.” Conference of State Court Administrators and the National Center for State Courts. *State Court Guide to Statistical Reporting*. Version 2.1.2, Updated March 20, 2017. P. 15.

⁴⁵³ Although, the NCSC/COSCA definition does call for appeals to be counted new cases, it states that probation/parole violations should simply be denoted as “re-opened” cases. From a defender workload perspective though, a defense attorney must investigate a new set of facts, potential new eyewitnesses, etc., as to whether or not a violation of probation orders occurred.

gets compounded whenever indigent defense attorneys continually open more new cases per year than they can dispose of existing cases.

Despite all of the detailed data reporting required in the Lyon County contracts, there is no processes established by which all of the providers must report caseloads uniformly. And, even though Lyon County provided only incomplete caseload reports most of the providers in that county did produce their complete reports. However, each of the three primary indigent defense law firms reported caseload differently.

For example, one law firm reported “charges” and then has a column for “defendants” in each particular court. That is, a report may say that a justice court appointed the specific law firm to 15 felonies, five gross misdemeanors, and 63 misdemeanors in a given quarter representing 58 defendants. Unfortunately, the “defendant” information does not break that general number down across case types. Another law firm’s caseload reports indicate only the most serious “offense” for each defendant, so that each offense actually represents one defendant. This means the attorney reporting out in this manner may be handling multiple offenses.

But there is even a more pressing issue regarding caseload reporting in Lyon County. As mentioned above, the public defense contracts allow for the contracting lawyer to employ assistants. And, it is not at all unusual for a more experienced attorney to get an indigent defense contract and hire a junior attorney to provide some part of the representation to the indigent accused. That is, the junior may do all the justice court work and/or district court work on lower level gross misdemeanors and felonies with the senior attorney focusing his attention on more serious public defender felony cases and private work. However, in Lyon County the public defense providers report only the total cases represented by the law office *and not by individual attorneys within those law firms*. That is, the Law Offices of Attorney X may report 100 felonies, 350 misdemeanors, and 50 delinquency cases. If this caseload is split evenly among two lawyers it appears to be reasonable in comparison with the NAC standards. However, if Attorney X is handling only 25 felonies and 10 delinquency cases and Attorney Y is handling 75 felonies, 350 misdemeanors and 40 delinquency cases – there is an excessive caseload problem for Attorney Y as defined by the NAC standards.

Churchill County was able to provide complete caseload reports by defender, by month and annual totals. However, the county requires attorneys to report “new cases.” But, the case count does not break out the case type (by top charge). The county also records “charges” by type, but there is not a correlation to number of cases. That is, ten new cases with five felonies and fifteen misdemeanors, for example, could be: a) one felony case (consisting of all five charges), or, b) five felony cases with two trailing misdemeanors.

The State Public Defender and Humboldt County have established uniform data collection processes to measure excessive caseload appropriately.

Only Humboldt County provided complete uniform caseload information in a manner consistent to conduct a caseload analysis using the NAC standards.

Public Defender		2013	2014	2015	2016	2017
Adult	Felonies	167	159	121	135	129
	Gross Misdemeanors	21	25	25	15	26
	Misdemeanors	134	156	145	154	116
	Probation Violations	27	22	28	22	22
	Parole Violations	4	2	4	4	4
	Direct Appeals	13	4	7	8	4
	Justice Court Appeals	4	2	1	1	2
	Others	0	2	34	28	19
Juvenile	Felonies	13	16	7	10	6
	Gross Misdemeanors	1	5	1	1	2
	Misdemeanors	34	38	79	40	5
	Probation Violations	15	19	11	13	9
	Parole Violations	0	0	0	2	0
	Direct Appeals	0	3	0	0	0
	Other	14	43	58	32	5
	432B Cases	N/A	N/A	N/A	7	2
Total Cases		447	496	521	472	351
Jury Trials		2	2	3	2	1
Trial %		0.00	0.00	0.01	0.00	0.00

Alternate Public Defender		2017
Adult	Felonies	53
	Gross Misdemeanors	3
	Misdemeanors	29
	Probation Violations	18
	Parole Violations	0
	Direct Appeals	0
	Justice Court Appeals	0
	Others	14
Juvenile	Felonies	16
	Gross Misdemeanors	5
	Misdemeanors	34
	Probation Violations	21
	Parole Violations	0
	Direct Appeals	0
	Other	108
	432B Cases	16
Total Cases		317
Jury Trials		1
Trial %		0.00

One clarification is needed before an assessment against the NAC standards can be conducted. The Humboldt County Public Defender indicated that a NAC assessment against the above caseload numbers will be inflated because some misdemeanor cases, in fact, reflect charges arising out of incidents that also resulted in felony cases. That is, because prosecutors in Nevada must file such misdemeanor cases separately in justice court, the Humboldt County Public Defender suggested that a NAC analysis may be double counting these cases (43 such instances in 2017).

However, the NCSC/COSCA “case” definition understands that many state trial courts are not unitary and asserts: “[I]n two-tiered court systems, if the lower court initiates the case with a preliminary hearing and disposes the case by binding it over to the higher court, the case should be counted in each court.”⁴⁵⁴ Although the preparation time needed on such “trailing misdemeanor” cases may appear to reduce the workload the fact that a defense attorney must make appearances in justice court on these cases likely evens out the effort needed to resolve the cases.

Whether or not these cases are counted in a NAC assessment of indigent defense cases in Humboldt County is a bit beside the point because the caseloads are troubling regardless:

⁴⁵⁴ Conference of State Court Administrators and the National Center for State Courts. *State Court Guide to Statistical Reporting*. Version 2.1.2, Updated March 20, 2017. P. 14.

PD Cases		2013	2014	2015	2016	2017
Adult	Felonies	1.11	1.06	0.81	0.90	0.86
	Gross Misdemeanors	0.05	0.06	0.06	0.04	0.07
	Misdemeanors	0.34	0.39	0.36	0.39	0.29
	Probation Violations					
	Parole Violations					
	Direct Appeals	0.52	0.16	0.28	0.32	0.16
	Justice Court Appeals					
	Others					
Juvenile	Felonies	0.07	0.08	0.04	0.05	0.03
	Gross Misdemeanors	0.01	0.03	0.01	0.01	0.01
	Misdemeanors	0.17	0.19	0.40	0.20	0.03
	Probation Violations					
	Parole Violations					
	Direct Appeals					
	Other					
	432B Cases					
Total FTE's Needed		2.26	1.97	1.95	1.90	1.44

Alternate PD Cases		2017
Adult	Felonies	0.35
	Gross Misdemeanors	0.01
	Misdemeanors	0.07
	Probation Violations	
	Parole Violations	
	Direct Appeals	0.00
	Justice Court Appeals	
	Others	
Juvenile	Felonies	0.08
	Gross Misdemeanors	0.03
	Misdemeanors	0.17
	Probation Violations	
	Parole Violations	
	Direct Appeals	
	Other	
	432B Cases	
Total FTE's Needed		0.71

To be clear, there are no NAC standards related to probation/parole violations, justice court appeals, 432B cases or general “other” cases (e.g. juvenile truancy). Despite holding aside these cases, the Humboldt County Public Defender handled a caseload in 2013 that required 2.26 attorneys using the NAC standards while he served as the sole attorney handling indigent defense cases. Although the number of needed full-time equivalent (FTE) attorneys reduced slightly the next three years, the sole indigent defense provider still handled a caseload that required nearly two FTE attorneys in each of those years (before accounting for probation/parole violations, justice court appeals and 432B cases).

As noted above, in April 2017, Humboldt County opened the alternate public defender office. In that year, Humboldt County needed 2.15 FTE lawyers to handle the workload under the NAC standards when they operated with 1.75 FTE's.⁴⁵⁵

And, even that analysis does not paint the full picture. First, the Humboldt County NAC analysis only considers new assignments. In every caseload report from 2013-2017 the public defender reported that they opened more cases than they closed meaning that the number of cases touched by the public defender in each year was more than the number of new assignments reported.

Furthermore, the public defender and alternate defender confirmed that the caseload reports do not include specialty court representation. Currently, the alternate public defender staffs all specialty court but the public defender did so before the creation of the alternate office. Here is a list of the specialty courts in Humboldt County:

⁴⁵⁵ The alternate public defender is a full-time position begun in April 2017. Thus, she only worked three quarters of the 2017 calendar year.

1. Drug Court
2. Drug Court, Track II (focusing on offenders aged 18-22 years)
3. Family Treatment Court (certain 432 B cases where there are no guardians available)
4. DUI Third Offender Court (known colloquially as “Las Chance” court. Participants must pay for all costs associated with staying clean for 5-years)

All specialty courts are held every Monday afternoon from 1-5 PM. This means that if the public defender is paid to work an eight-hour day, five days per week, for 52 weeks per year, the public defense attorney works 2,040 hours per year. Reducing that time an attorney has to work on the reported caseload by 208 hours (equating to the four hours needed to cover specialty courts each week) indicates that the NAC standards should be reduced by 10% (208 hours/2,040 annual work year hours = 0.10).

There are eight Nevada counties with populations less than 15,000: Esmeralda, Eureka, Lander, Lincoln, Mineral, Pershing, Storey and White Pine.

The State Public Defender provided caseload numbers for Storey County.⁴⁵⁶ The State Public Defender assigns one attorney to staff the Storey County courts. In 2017, that attorney was assigned 20 felony cases, three gross misdemeanor cases, 45 misdemeanor cases, one juvenile delinquency case, three probation revocations, and no 432B cases.⁴⁵⁷ Collectively, this attorney spent 688.4 hours⁴⁵⁸ on these cases or approximately a third of an attorney work year. There appears to be no issues with excessive caseloads in Storey County.

And, just because rural jurisdictions either do not require caseload reporting, or were unable to produce caseload reports where they are required, it should not be concluded that it is impossible to state anything about excessive caseloads in all of the other rural jurisdictions that are not Humboldt County or Storey County.

For example, although Lander County was unable to provide copies of the contractually obligated caseload reports, District Court Judge Jim Shirley and Justice of the Peace Max Bunch undertook an effort to have staff hand-count indigent defense cases,⁴⁵⁹ as detailed below:

⁴⁵⁶ Email from State Public Defender, Karin Kreizenbeck, to 6AC Director, David Carroll, on August 3, 2018 at 5:06 PM (On file at the Sixth Amendment Center).

⁴⁵⁷ State Public Defender, Fiscal Year 2017 report, p. 1-3.

⁴⁵⁸ The breakdown of hours: Felonies: 416 hours; Gross Misdemeanors: 11.5 hours; Misdemeanors: 216.5 hours; Juvenile Delinquency: 9.4 hours; and travel: 35 hours. See: State Public Defender, Fiscal Year 2017 report, p. 1-3.

⁴⁵⁹ Email from Argenta Justice Court Judge Max Bunch to 6AC Director, David Carroll, on August 3, 2018 at 1:50 PM. Judge Bunch acknowledges that because this was done through a hand count that “we could be off a few but the best we can tell this is real close.”

Cases	2016	2017	2018
Felony	54	63	72
Gross Misdemeanor	12	25	16
Misdemeanor	71	50	42
Total	137	138	130

FTEs Needed	2016	2017	2018
Felony	36.00%	42.00%	48.00%
Gross Misdemeanor	3.00%	6.25%	4.00%
Misdemeanor	17.75%	12.50%	10.50%
Total	56.75%	60.75%	62.50%

In 2016, Lander County had a caseload that under the NAC standards require 56.75% of a full-time equivalent attorney. As is generally expected, indigent defense caseloads increased in the next year meaning that more effort was needed to cover the cases. In 2017, Lander County's indigent defense caseload required a 60.75% FTE. And, annualizing the indigent defense caseload for 2018 based on the first six months of data projects that Lander County will need a 62.50% FTE to handle representation for the indigent accused.

Certainly, a complete caseload analysis requires accounting for the distance needed to drive between courts in a county that covers 5,490 square miles.⁴⁶⁰ However, although there are two justice courts in Lander County [Argenta Township Justice Court (Battle Mountain) and Austin Township Justice Court (Austin)] that are 89 miles apart, the Austin Justice Court judgeship was vacant for the majority of this review.⁴⁶¹ All Austin cases were heard in Battle Mountain where the Argenta Justice Court Judge was appointed as a special master to hear the Austin cases.

And, it is never possible to conduct a thorough NAC analysis without an understanding of the amount of time a contract attorney spends on private cases. That said, court observations showed the Lander County contract defender to be well prepared and zealously advocating for his indigent defendants.⁴⁶² Therefore, no excessive caseload concerns arose in Lander County.

⁴⁶⁰ Slightly larger than Connecticut. (All data in background section from US Census, Quick facts).

⁴⁶¹ A new Justice of the Peace in Austin was appointed during the site work in Lander County but the Austin Justice Court had not yet started hearing cases again.

⁴⁶² On June 5, 2018 the Sixth Amendment Center conducted a court observation in the 11th Judicial District Court. In one case, the prosecution alleged that a young man was a passenger in the car when his friend was pulled over for a minor offense. In securing the car, the police officer allegedly noticed that the passenger had a large hunting knife on him. The police said that the defendant was not under arrest but that he needed him to hand over the knife for the time being to secure the area. The defendant allegedly had a small amount of crystal meth in the knife holster, panicked and fled. Police caught him and wrestled him to the ground – the defendant allegedly took a swing at the police officer. The defendant was charged with three felonies and was bound over to District Court.

The Lander County contract defender got the felonies dismissed in exchange for a misdemeanor drug charge. And then, he got the defendant into drug court where even the misdemeanor may be dismissed if he successfully completes the program.

In Lincoln County, the contract defender reported a 2017⁴⁶³ caseload of: 109 clients assigned; 65 felony, eight gross misdemeanor cases; 29 misdemeanor, four other cases (family/juvenile). This too, suggests that the single contract attorney does not carry an excessive caseload.

The relatively few cases in counties with populations of 15,000 or less, suggest that excessive caseloads are also not an issue in Esmeralda, Eureka, Mineral, Pershing, and White Pine counties. No caseload reports were obtained for any of these counties.⁴⁶⁴ However, the Annual Report of the Nevada Judiciary includes appendix tables that detail the number of new filings by county, by county, by case-type. To be clear this will be the total number of new filings regardless of whether the defendant secured private counsel, proceeded pro se without an attorney, or was appointed an indigent defense lawyer. In 2017, the annual report showed the following new filings for the remaining counties with fewer than 15,000 population.⁴⁶⁵

	District Court			Justice Court			Total
	Felony	Gr. Misdr.	Delinquency	Felony	Gr. Misdr.	Misdr.	
Esmeralda	0	0	2	6	0	7	15
Eureka	5	2	5	8	2	39	61
Mineral	39	9	1	205	19	391	664
Pershing	75	7	98	95	10	336	621
White Pine	95	4	66	140	11	95	411

To estimate the number of indigent defense cases in these counties, the authors of this report compared new filings in the Annual Report of the Nevada Judiciary to the actual numbers provided by the State Public Defender (in Storey County) and the courts (in Lander County) to determine a percentage of cases handled by public defenders for each case type.⁴⁶⁶ Below is the estimated adjusted indigent defense caseload for the five counties:

	Felony	Gr. Misdr.	Misdr.
Esmeralda	5	0	2
Eureka	11	4	12
Lincoln	63	6	43
Mineral	207	28	125
Pershing	145	17	108
White Pine	200	15	30

⁴⁶³ 2017 figures reflect July 1, 2017 – May 31, 2018

⁴⁶⁴ To be clear, Esmeralda, Eureka, and Mineral do not contractually require public defense attorneys to track caseloads.

⁴⁶⁵ Annual Report of the Nevada Judiciary, 2017, Appendix Tables.

⁴⁶⁶ There were 97 new felony filings in Lander and Storey County combined and 83 new felony indigent defense cases. This is an estimated indigency rate of 85%. All gross misdemeanor cases were handled by public defense attorneys in both counties (100% indigency rate). Finally, there were a combined 295 new misdemeanor filings in the two counties, but only 95 were represented by public defense attorneys. This is an alarmingly low indigency rate of 32%. It suggests that a lot of people may be going unrepresented that might otherwise qualify for a public attorney. However, for consistency sake the authors of this report used that rate in the above analysis.

The following table shows the number of FTE's needed to meet the NAC standards and the current number of FTE's providing representation:

	Felony	Gr. Misdr.	Misdr.	FTEs Needed	Current FTEs
Esmeralda	0.03	0.00	0.01	0.04	0.5
Eureka	0.07	0.01	0.03	0.11	0.5
Mineral	1.38	0.07	0.31	1.77	0.5
Pershing	0.96	0.04	0.27	1.27	1.0
White Pine	1.33	0.04	0.08	1.45	1.5

All but Mineral County and Pershing County fall within the acceptable ranges. And, in those two counties there did not appear to be signs of excessive caseloads while conducting the site visits.⁴⁶⁷

There are seven rural Nevada counties with populations greater than 15,000: Carson City, Churchill, Douglas, Elko, Humboldt, Lyon, and Nye. As demonstrated above, Humboldt County has been shown to have excessive caseloads.

- Carson City

The State Public Defender provided caseload numbers for Carson City.⁴⁶⁸ The State Public Defender assigns 4.75 FTE attorneys⁴⁶⁹ to staff the Carson City courts. In 2017, those attorneys were assigned 378 felony cases, 63 gross misdemeanor cases, 946 misdemeanor cases, and, 52 juvenile delinquency cases.⁴⁷⁰ Before factoring in any other work responsibilities, the total number of FTE attorneys needed to just handle the criminal and delinquency work is 5.3 attorneys.

However, in 2017 the state public defenders handling Carson City also handled 71 adult probations revocations, 31 juvenile probation revocations, 72 432B cases, 153 drug court cases, 43 mental health court cases; 4 DUI specialty court cases; 10 Families First court cases; and, 60 misdemeanor treatment court cases.⁴⁷¹ More troubling, is that the number of felony and

⁴⁶⁷ The authors of this report do not have an explanation for the Mineral County NAC analysis. We are surprised to see that there were 205 felony cases reported in the Hawthorne Justice Court in the 2017 Annual Report of the Nevada Judiciary and that only 39 felonies made it to District Court. In 2016, Mineral County reported only 152 felonies in the Hawthorne Justice Court. Using that number in a NAC analysis reduces the number of FTE's from 1.77 to 1.29.

⁴⁶⁸ Email from State Public Defender, Karin Kreizenbeck, to 6AC Director, David Carroll, on August 3, 2018 at 5:06 PM (On file at the Sixth Amendment Center).

⁴⁶⁹ The State Public Defender has four trial-level attorneys dedicated full-time to Carson City. Deputy Chief, Marcie Ryba covers Storey County part-time. She is included in the Carson City analysis at .5 of an FTE. Additionally, Chief Public Defender Karin Kreizenbeck notes that she covers two of the four specialty courts and fills in as needed. She is counted as a .25 FTE attorney in this analysis. Email from Nevada State Public Defender, Karin Kreizenbeck, to 6AC Director, David Carroll on April 4, 2018 at 12:00 PM (On file at the Sixth Amendment Center).

⁴⁷⁰ State Public Defender, Fiscal Year 2017 report, p. 4-6.

⁴⁷¹ State Public Defender, Fiscal Year 2017 report, p. 4-6.

misdemeanor cases pending at the start of the year are high. At the start of 2017, the State Public Defender had 335 felonies pending before being assigned 378 new cases. At the close of 2017, the office had 410 cases pending in Carson City. Similarly, the State Public Defender had 443 pending misdemeanor cases pending at the start of the same year before being assigned 946 new misdemeanor cases. The office had 549 case pending at the close of the year, meaning that the backlog is increasing each year.

- Churchill County

As mentioned earlier, Churchill County was able to provide complete caseload reports. However, the data is not reported in a way that is useful for analyzing workload. However, some pertinent information can be gleaned from the reports.

Totals 2017

<u>Description</u>	<u>Neidert</u>	<u>Sommer</u>	<u>Woodman</u>	<u>Monthly Totals</u>
Total New Cases	168	176	158	502
% Allocation	33%	35%	31%	100%
<u>Adult Criminal Cases</u>				
Number of New Cases	145	152	130	427
Total Felony Charges	166	198	138	502
Total Gross Misdemeanor Charges	20	38	20	78
Total Misdemeanor Charges	132	139	119	390
Probation Revocation Hearings	27	29	6	62
Parole Revocation Hearings	0	0	0	0
<u>Juvenile Delinquency Cases</u>				
Number of New Cases	8	14	11	33
Total Felony Charges	4	13	5	22
Total Gross Misdemeanor Charges	3	2	6	11
Total Misdemeanor Charges	2	16	6	24
<u>Juvenile Delinquency Cases</u>				
New 432B Cases	15	10	17	42
Notices of Appeal Filed with Nevada Supreme Court	0	2	0	2
Notices of Appeal Filed with District Court	0	0	0	0
Jury Trial (Adult Criminal)	1	0	0	1
Evidentiary Hearing (Juvenile Delinquency)	3	2	0	5
Number of Judicial Days attorney appeared at one or more hearings	141	149	143	433
Other	0	0	1	1
Sub-Totals	667	764	602	2033
% Allocation	33%	38%	30%	100%

Again, it is not possible to determine how many of the 427 new adult criminal cases were felonies and how many were gross misdemeanors and misdemeanors. For sake of analysis, the

number of felony charges associated with those new cases are about the same as the number of combined gross misdemeanors and misdemeanor cases. Therefore, for this analysis we will assume that the new cases are also divided evenly. With 213 felony cases, 213 gross misdemeanor or misdemeanor cases, and 33 juvenile delinquency cases, Churchill County needs 2.11 FTE attorneys when they operate with 1.5 (three part-time contract defenders) before factoring in 432B cases, specialty courts and appeals.

Although that may not seem to be the most egregious caseload breach, it is important to remember that Churchill County elected to decrease the number of contract attorneys from three to two (meaning that they now have one FTE attorney to handle the caseload of 2.11 FTE attorneys) in January 2018. The two remaining defenders got a 40% raise, and the county saved about \$24,000 per year on the contract by eliminating the one attorney, the workload for each attorney increased by about 50%.

- Elko County:

Somewhere near the close of 2016, the Elko County Public Defender started using a new case management system called “Justware.” The database contains records going back to 2000. It can be broken down by individual attorneys, active cases at a time, and number of cases over a given time frame. For records before 2016, the system can display only records of the total number of cases assigned to an attorney.⁴⁷² While on site, we attempted to garner information from the database, but it appears the office cannot produce consistent, reliable, per-attorney caseload data from its case management system.

The office did provide a report on new assignments for 2017. All defenders except the chief exceeded NAC Standards, even when excluding all case types except felony, misdemeanor, and juvenile – *without even considering carryover cases*. Along with the NAC Standards comparison is a calculation of the number of hours attorneys could dedicate to each case (at a rate of 2,000 billable hours per year).

2017 New Cases Opened⁴⁷³:

Hill:	134 cases; 77 felonies, 2 gross, 41 misdemeanors (61.58% of NAC Standards) (14.9 hours per case)
Stewart:	358 cases, 147 felonies, 17 gross, 180 misdemeanors (143% of NAC Standards) (5.59 hours per case)
Foster:	368 cases, almost all juvenile (184% of NAC standards) (5.43 hours per case)

⁴⁷² These reports could theoretically show caseloads per attorney over any given time frame; each of the caseworkers separately maintains data on assignments to their attorneys. But to link the data in the system with the caseworkers’ records would take a lot of time and effort. Further, when the data from 2016 and earlier was copied over, there were errors in transmission and some of the files were not recorded properly into the new case management system.

⁴⁷³ NAC Standard comparison only counts felonies, misdemeanors, and juvenile cases (juvenile all counted as one case type, regardless of charge; office tracks cases differently depending on charge juvenile would receive if an adult). Gross misdemeanors and family cases are excluded because there is no corresponding category. Appeals are excluded because we do not have exact numbers. The cases listed here are based on manual calculations of the number of new files opened, by the office Manager Colleen Brown.

Gaumond: 303 cases, 118 felonies, 16 gross, 154 misdemeanors (117.17% of NAC Standards) (6.60 hours per case)

Green: 264 cases, 138 felonies, 9 gross, 112 misdemeanors (120% of NAC Standards) (7.58 hours per case)

Pennell: 292 cases, 83 felonies, 8 gross, 188 misdemeanors (102.33% of NAC Standards) (6.85 hours per case)

Leamon: 386 cases, 65 felonies, 5 gross, 308 misdemeanors (120.33% of NAC Standards) (5.18 hours per case)

- Lyon County:

What can be gleaned from the Lyon County caseload reports provided are concerning. For example, all caseload reports were obtained from attorney Wayne Pederson for each quarter of FY2016 and FY 2017, and the first three quarters for FY 2018.⁴⁷⁴ In each instance, the total full-time equivalent attorneys needed to cover the caseload based on the NAC standards is greater than two despite Pederson only having two part-time attorneys covering the caseload (himself and Mansfield).

2018 (Annualized on 9 months of data)						
PEDERSON	Felony	Gr. Misdr.	Misdr.	Juvenile	Appeal	Total
Walker River Justice Court	171	27	260	0	0	457
Canal Township Justice Court	5	0	0	0	0	5
Dayton Justice Court	12	1	5	0	0	19
District Court	9	0	4	43	0	56
TOTAL	197	28	269	43	0	537
FTE's required under NAC	1.32	0.07	0.67	0.21	0.00	2.27

FY 2017 (July 2016 to June 2017)						
PEDERSON	Felony	Gr. Misdr.	Misdr.	Juvenile	Appeal	Total
Walker River Justice Court	148	8	160	8	0	324
Canal Township Justice Court	44	11	12	2	0	69
Dayton Justice Court	0	0	0	0	0	0
District Court	26	0	0	52	0	78
TOTAL	218	19	172	62	0	471
FTE's required under NAC	1.45	0.05	0.43	0.31	0.00	2.24

FY 2016 (July 2015 to June 2016)						
PEDERSON	Felony	Gr. Misdr.	Misdr.	Juvenile	Appeal	Total
Walker River Justice Court	158	15	239	10	0	422
Canal Township Justice Court	63	0	47	0	0	110
Dayton Justice Court	5	0	6	0	0	11
District Court	20	0	0	90	2	110
TOTAL	246	15	292	100	2	653
FTE's required under NAC	1.64	0.04	0.73	0.50	0.08	2.91

⁴⁷⁴ Email from Salina Belt, Legal Assistant to Wayne A. Pederson, Esq., to 6AC Director, David Carroll, on May 16, 2018 at 2:38 PM (on file at the Sixth Amendment Center).

Additionally, the caseload for all Lyon County public defense attorneys should be significantly less than the NAC standards because of the significant travel time required to provide representation in the Lyon County courts. And, Lyon County has a drug court and a mental health court. Each meets every other week and Pederson staffs both courts.⁴⁷⁵ And, when assessing Pederson's workload prior to 2017 it is important to note that Pederson also was contracted to also provide indigent defense representation in Mineral County too (Yerington is 58 miles from Hawthorne).

Despite each of the three Lyon County public defense attorneys receiving the same compensation caseloads are not distributed evenly. For example, because Ken Ward and Wayne Pederson have been practicing for a significant period of time, those two attorneys have more conflicts of interest, which subsequently get moved to the third contract (covering the Canal Township Justice Court; the one Mouritsen currently holds).

Indeed, the contract covering Canal Township Justice Court is a bit of a merry-go-round. While the Dayton Justice Court is covered by Ward and Walker River Justice Court is covered by Pederson, Canal Township Justice Court has been covered by a number of different attorney attorneys. The Lyon County Manager states that all the turnover in the Canal Township Justice Court was not simply about workload:

1. Paul Yohey (July 2013 through January 2014).
2. Anne Laughlin (February 2014 through June 2014): The county contracted with Laughlin to finish out the terms of Yohey's contract;
3. Anne Laughlin (FY 2015);
4. Laurie Trotter (FY 2016);
5. Brad Johnston (July 2016 through January 2017).⁴⁷⁶
6. Doug Nutton (February 2017 through June 2017): The county contracted with Nutton to finish out the terms of Johnston's contract;
7. Aaron Mouritsen (FY 2018).

While on site, Brad Johnston talked about the problems with his formerly held contract to staff the Canal Township Justice Court. He stated that he could not maintain a private caseload; "the only way to do it would be to meet with everyone in jail on the weekends." Johnston thinks each justice court needs two defenders and a secretary to handle the caseload. But on the other hand, there is not enough private work to sustain more than a handful of lawyers in Lyon County and that the defenders "need the contracts to survive." However, Brad Johnson left because of excessive caseloads less than a year into the contract.⁴⁷⁷ What we know of his caseload bares out the excessive caseload issues in the Canal Township Justice Court. The felony caseload alone, requires 1.5 full-time equivalent attorneys to meet the NAC standards.

⁴⁷⁵ Additionally, there is another impact on workload in that there is no electronic-filing.

⁴⁷⁶ Brad Johnston indicated that he terminated the contract due to excessive caseloads during the contract year. According to the County Manager, there was no point fighting Johnston over it because he was clearly not going to do a good job anymore on the cases.

⁴⁷⁷ Brad Johnson thinks defenders should track their hours to be able to compare their work on private and public cases. Some defenders think that judges skew cases assignments to direct complex cases to more experienced lawyers.

FY 2017 (annualized based on one quarter)						
JOHNSTON	Felony	Gr. Misdr.	Misdr.	Juvenile	Appeal	Total
Walker River Justice Court	12	0	4	0	0	16
Canal Township Justice Court	184	20	168	8	0	380
Dayton Justice Court	0	0	0	0	0	0
District Court	28	0	0	32	0	60
TOTAL	224	20	172	40	0	456
FTES under NAC	1.49	0.05	0.43	0.20	0.00	2.17

This troubling analysis continues when one reviews the other partial data from other past providers staffing the Canal Township Justice Court.⁴⁷⁸ In FY2015, Lyon County contracted with defense attorney Laurie Trotter. Annualizing two quarters worth of data, the analysis shows that more than three attorneys should have handled the caseload.

FY 2015 (Annualized based on two quarters)						
TROTTER	Felony	Gr. Misdr.	Misdr.	Juvenile	Appeal	Total
Walker River Justice Court	12	0	4	0	0	16
Canal Township Justice Court	188	56	268	0	0	512
Dayton Justice Court	16	4	20	0	0	40
District Court	4	4	0	128	4	140
TOTAL	220	64	292	128	4	708
FTES under NAC	1.47	0.16	0.73	0.64	0.16	3.16

Similarly, Lyon County contracted with Anne Laughlin in 2014. Again, more than two full-time equivalent attorneys are needed to meet the NAC standards.

Calendar 2014 (Annualized based on three quarters)						
LAUGHLIN	Felony	Gr. Misdr.	Misdr.	Juvenile	Appeal	Total
Walker River Justice Court	5	1	0	0	0	7
Canal Township Justice Court	139	29	193	0	0	361
Dayton Justice Court	9	3	16	0	0	28
District Court	8	0	0	90	0	98
TOTAL	161	33	209	90	0	494
FTES under NAC	1.08	0.08	0.52	0.45	0.00	2.13

At the municipal court level, the caseload does not appear to be excessive in the City of Yerington Municipal Court. Based solely on caseload reports provided by the Law Offices of Brad Johnston, Leann Schumann (who handles the appointments in the City of Yerington Municipal Court) was appointed to 44 misdemeanor cases over the past four quarters (covering April 2017 through March 2018). Using the NAC standards as reference, a full-time equivalent

⁴⁷⁸ The partial caseload information was sent by Email from Erin Lopez, Administrative Assistant, Lyon County Manager's Office, to 6AC Director, David Carroll, on May 11, 2018 at 5:23 PM (on file at the Sixth Amendment Center).

attorney would need to dedicate approximately 11% of her time.⁴⁷⁹ In an independent interview, Schumann estimated that 20% of her time is spent on indigent defense cases.

The City of Fernley Municipal Court has significantly more indigent defense cases than the one in Yerington. Based on 12-months of data (covering the 2017 calendar year), the Law Offices of Ken Ward was appointed to 303 misdemeanor cases. Again, under the NAC misdemeanor standard (400 per year), a three-quarters attorney is needed to handle the caseload.

Unfortunately, the caseload reports for the Law Office of Ken Ward concerning justice and district court work cannot be used to establish workload because it does not breakdown work by attorney or by “case,” but rather by “charge.”

- Douglas County and Nye County

Reliable caseload information on Douglas and Nye County were not obtained. The authors of this report, once again used the Annual Report of the Nevada Judiciary to conduct a study against the NAC standards for each county

Cases reported in the 2017 annual judicial report:⁴⁸⁰

	Felony	Gr. Misdr.	Misdr.	Delinquency	Total
Nye	845	123	825	93	1,886
Douglas	456	66	1,266	58	1,846

Adjusted cases based on an 85% felony indigency rate, a 100% gross misdemeanor and juvenile indigency rate, and a 32% misdemeanor indigency rate.

	Felony	Gr. Misdr.	Misdr.	Delinquency	Total
Nye	718	123	264	93	1,198
Douglas	388	66	405	58	917

FTE comparison against the NAC standards:

	Felony	Gr. Misdr.	Misdr.	Delinquency	FTEs Needed	Current FTEs
Nye	4.79	0.31	0.66	0.47	6.22	2.5
Douglas	2.58	0.17	1.01	0.29	4.05	2

⁴⁷⁹ Forty-four cases divided by the NAC misdemeanor standard (400) equals .11 full-time equivalent attorneys.

⁴⁸⁰ Annual Report of the Nevada Judiciary, 2017, Appendix Tables.

Chapter VI. Recommendations

The State of Nevada has a Fourteenth Amendment obligation to ensure effective Sixth Amendment services in every court at every level everywhere in the state. This means that the State of Nevada must, at the very least, have an entity authorized to promulgate and enforce systemic standards that align with the parameters outlined in *United States v. Cronin*.

With no pre-existing, uniform “cookie-cutter” indigent defense service delivery model that states *must* apply, the question for Nevada policymakers, in conjunction with criminal justice stakeholders and the broader citizenry of the state, is simply how best to do so given the uniqueness of the state. The following recommendations serve to guide policymakers to Nevada-specific answers to overcome the systemic deficiencies highlighted in the report.

Recommendations 1: The State of Nevada should create a permanent Board of Indigent Defense Services (BIDS). BIDS will provide advice and guidance to an executive branch organization, the Office of Indigent Defense Services (OIDS), to oversee the provision of defender services in rural jurisdictions of the state.

The first of the ABA *Ten Principles* requires that the public defense function, including the selection, funding, and payment of defense counsel, be “independent.”⁴⁸¹ Commentary on *Principle 1* states that the defense function must be insulated from outside political or judicial interference by a board or commission appointed from diverse authorities, so that no one branch of government can exert more control over the system than any others.⁴⁸² It is just such a commission that should be vested with the authority to promulgate indigent defense standards.

The *Ten Principles* rely in part on the National Study Commission on Defense Services’ (NSC) *Guidelines for Legal Defense Systems in the United States* (1976).⁴⁸³ The *Guidelines* were created in consultation with the United States Department of Justice (DOJ) under a DOJ Law Enforcement Assistance Administration (LEAA) grant. NSC *Guideline 2.10 (The Defender Commission)* states in part: “A special Defender Commission should be established for every defender system, whether public or private. The Commission should consist of from nine to thirteen members, depending upon the size of the community, the number of identifiable factions or components of the client population, and judgments as to which non-client groups should be represented.”⁴⁸⁴

NSC *Guideline 2.10* continues on to state that Commission members should be selected under the following criteria: “(a) The primary consideration in establishing the composition of the Commission should be ensuring the independence of the Defender

⁴⁸¹ American Bar Association. TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM. February 2002. P. 1.

⁴⁸² American Bar Association. TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM. February 2002. at § 1 cmt.

⁴⁸³ NAT’L STUDY COMM’N ON DEFENSE SERVS. GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES. 1976, *available at* http://www.nlada.net/sites/default/files/nsc_guidelinesforlegaldefensesystems_1976.pdf.

⁴⁸⁴ NAT’L STUDY COMM’N ON DEFENSE SERVS. GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES. 1976, § 2.10.

Director. (b) The members of the Commission should represent a diversity of factions in order to ensure insulation from partisan politics; (c) No single branch of government should have a majority of votes on the Commission; (d) Organizations concerned with the problems of the client community should be represented on the Commission; [and] (e) A majority of the Commission should consist of practicing attorneys.”⁴⁸⁵

In practice, jurisdictions with indigent defense commissions generally give an equal number of appointments to the executive, legislative, and judicial branches of government.⁴⁸⁶ To fill out the remainder of appointments, governments often give responsibility for one or two positions to the state bar association. Additionally, many jurisdictions try to have a voice from communities impacted by the indigent defense function represented on the commission (for example, Native American interests in Montana). Jurisdictions have also found that giving appointments to the deans of accredited law schools can create nexuses that help the indigent defense commissions (for example, law schools can help with standards-drafting, training facilities, etc.).⁴⁸⁷ Appointments by such non-governmental organizations generally must go through a confirmation process by an official branch of state government.

Examples of indigent defense commission appointments from other states include:⁴⁸⁸

- **Michigan:** The Michigan Indigent Defense Commission (MIDC) is a 15-member commission. The governor appoints all members of MIDC based on recommendations submitted by: the Senate Majority Leader (2 appointees); Speaker of the House of Representatives (2); Chief Justice (1); Criminal Defense Attorney Association of Michigan (3); Michigan Judges Association (1); Michigan District Judges Association (1); State Bar of Michigan (1); a bar association advocating for minority interests (1); former prosecutor recommended by Prosecuting Attorney’s Association of Michigan (1); local units of government (1); and one member of the general public. The Chief Justice of the Supreme Court serves as an ex officio member of the MIDC without vote.⁴⁸⁹
- **Montana:** The Montana Public Defender Commission (MPDC) is an 11-member public defender commission. Appointments by: the Supreme Court (2 appointees); the President of the State Bar (3); the President of the Senate (1); the Speaker of the House (1); and the Governor (4 appointments, but they must be nominated from

⁴⁸⁵ GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § ** (NAT’L STUDY COMM’N ON DEFENSE SERVS. 1976), available at http://www.nlada.net/sites/default/files/nsc_guidelinesforlegaldefensesystems_1976.pdf [hereinafter NSC GUIDELINES].

⁴⁸⁶ For example: Connecticut, Idaho, Indiana, Louisiana, Maryland, Massachusetts, Michigan, Montana, New Hampshire, New Mexico, New York, North Carolina, North Dakota, South Carolina, Texas, Utah, and Virginia.

⁴⁸⁷ For example: Kentucky and New Mexico.

⁴⁸⁸ For ease of discussion, the authors of the report point the Nevada Right to Counsel Commission to specific jurisdictions. However, Task Force members may browse how each state funds and administers right to counsel services on the 6AC website at: <http://sixthamendment.org/the-right-to-counsel/state-indigent-defense-systems/>.

⁴⁸⁹ MCLS § 780.987 (1)(a-k).

organizations representing: (a) indigent persons, (b) Native American interests, (c) people with mental illness, and (d) people with addictions).⁴⁹⁰

- **New Mexico:** The New Mexico Public Defender Department is an 11-member commission appointed by diverse authorities: Governor (1 appointee); Chief Justice (3); dean of University of New Mexico School of Law (3); Speaker of the House of Representatives (1); Senate President (1); and the majority floor leaders of each chamber (one each).⁴⁹¹
- **North Carolina:** The North Carolina Office of Indigent Defense Services (IDS) is an independent 13-member commission appointed by: Chief Justice (1 appointee, current or retired judge); Governor (1 – non-attorney); President Pro Tempore of the Senate (1 attorney); Speaker of the House of Representatives (1 attorney); North Carolina Public Defenders Association (1 attorney); North Carolina State Bar (1 attorney); North Carolina Bar Association (1 attorney); North Carolina Academy of Trial Lawyers (1 attorney); North Carolina Association of Black Lawyers (1 attorney); North Carolina Association of Women Lawyers (1 attorney); and the IDS Commission itself (3, one non-attorney, one judge, and one Native American).⁴⁹²
- **North Dakota:** The North Dakota Commission on Legal Counsel for Indigents (CLCI) is a seven-person commission appointed by: Governor (2 appointees, one from a county of less than 10,000 people); House of Representatives (1); Senate (1); Chief Justice (2 appointees, one from a county of less than 10,000 people); and North Dakota State Bar Association (1).⁴⁹³

NSC Guideline 2.10 (*The Defender Commission*) continues on to state that the “Commission should not include judges, prosecutors or law enforcement officials.” These prohibitions are only on *sitting* judges, defenders and prosecutors. States often find former judges, defenders and law enforcement officials to make very good commission members. Additionally, more and more states have found it a conflict to have any member that stands to benefit financially from the policies of the commission. This means that some states have banned criminal defense lawyers that handle public cases. Again, here are a few examples of states on this point:

- **Louisiana:** “Persons appointed to the board shall have significant experience in the defense of criminal proceedings or shall have demonstrated a strong commitment to quality representation in indigent defense matters. No person shall be appointed to the board that has received compensation to be an elected judge, elected official, judicial officer, prosecutor, law enforcement official, indigent defense provider, or employees of all such persons, within a two-year period prior to appointment. No

⁴⁹⁰ Mont. Code Ann. § 2-15-1028(2)(a-g).

⁴⁹¹ NMSA § 31-15-2.1(A)(1-6).

⁴⁹² NC Gen Stat. § 7A-498.4 (b)(1-11).

⁴⁹³ N.D.C.C. § 54-61-01 (2).

active part-time, full-time, contract or court-appointed indigent defense provider, or active employees of such persons, may be appointed to serve on the board as a voting member. No person having an official responsibility to the board, administratively or financially, or their employee shall be appointed to the board until two years have expired from the time the person held such position and the date of appointment to the board.”⁴⁹⁴

- **Montana:** “While serving a term on the commission, a member of the commission may not serve as a judge, a public defender employed by or under contract with the office of state public defender ... , a county attorney or a deputy county attorney, the attorney general or an assistant attorney general, the United States district attorney or an assistant United States district attorney, or a law enforcement official.”⁴⁹⁵
- **New Mexico:** “A person appointed to the commission shall have: (1) significant experience in the legal defense of criminal or juvenile justice cases; or (2) demonstrated a commitment to quality indigent defense representation or to working with and advocating for the population served by the department. “The following persons shall not be appointed to and shall not serve on the commission: (1) current prosecutors, law enforcement officials or employees of prosecutors or law enforcement officials; (2) current public defenders or other employees of the department; (3) current judges, judicial officials or employees of judges or judicial officials; (4) current elected officials or employees of elected officials; or (5) persons who currently contract with or receive funding from the department or employees of such persons.”⁴⁹⁶

The names “Board of Indigent Defense Services” and “Office of Indigent Defense Services” are simply placeholders to distinguish these new entities from the State Public Defender, the Nevada Right to Counsel Commission, and the Office of Indigent Legal Services (as proposed in SB 377 during the 2017 session). The important thing is not what the commission and central office are called but that the Nevada Legislature should: a) follow national standards in the creation of a new Board regarding: i.) commission size, ii.) appointing authorities; and iii.) qualifications/disqualifications for serving on the Board; and, empower the central office to ensure that localized systems are meeting the systemic parameters for effective representation through the promulgation and enforcement of standards.⁴⁹⁷

Recommendations 2: The State of Nevada should authorize OIDS to promulgate standards including, but not limited to: a) attorney qualifications; b) attorney training; c) early appointment of counsel; d) attorney supervision; e) attorney workload; f) uniform data collection and reporting; and, g) contracting. Standards

⁴⁹⁴ La. R.S. 15 §146(B)(2).

⁴⁹⁵ Mont. Code Ann. § 2-15-1028(7).

⁴⁹⁶ NMSA§ 31-15-2.2.

⁴⁹⁷ In our experience, policy-makers often like to look for local precedents in creating new boards and agencies. The Governor’s Office of Economic Development and the Board of Economic Developments may serve as an example for the Nevada Right To Counsel Commission to consider. See: NRS 231.033-231.069 and NRS 231.125-231.139.

should undergo a public comment period and be approved by an official branch of government.

Louisiana delineates its commission and central office's overall power by statutorily requiring the promulgation of specific standards in the following areas: attorney qualification standards;⁴⁹⁸ attorney performance guidelines;⁴⁹⁹ attorney supervision protocols;⁵⁰⁰ time sufficiency standards;⁵⁰¹ continuity of services standards whereby the same attorney provides representation from appointment through disposition;⁵⁰² client communication protocols;⁵⁰³ and, data collection standards.⁵⁰⁴

Montana and Michigan are two other examples of states with statutory language setting out the specific standards that each of their respective commissions and central offices must promulgate. For example, the Montana Public Defender Commission is statutorily required to: "Establish statewide standards for the qualification and training of attorneys providing public defender services to ensure that services are provided by competent counsel and in

⁴⁹⁸ LA. REV. STAT. § 15:148(B)(2) (2016) ("Creating mandatory qualification standards for public defenders that ensure that the public defender services are provided by competent counsel. Those standards shall ensure that public defenders are qualified to handle specific case types which shall take into consideration the level of education and experience that is necessary to competently handle certain cases and case types such as juvenile delinquency, capital, appellate, and other case types in order to provide effective assistance of counsel. Qualification standards shall include all of the following: (a) The specific training programs that must be completed to qualify for each type of case. (b) The number of years the public defender has spent in the practice of law in good standing with the Louisiana State Bar Association.").

⁴⁹⁹ LA. REV. STAT. § 15:148(B)(1)(e) (2016) ("Performance of public defenders in all assigned public defense cases. The board shall adopt general standards and guidelines that alert defense counsel to courses of action that may be necessary, advisable, or appropriate to a competent defense including performance standards in the nature of job descriptions." Louisiana Revised Statutes, §§ 15:148(B)(10): "Creating separate performance standards and guidelines for attorney performance in capital case representation, juvenile delinquency, appellate, and any other subspecialties of criminal defense practice as well as children in need of care cases determined to be feasible, practicable, and appropriate by the board.").

⁵⁰⁰ LA. REV. STAT. § 15:148(B)(1)(d) (2016) ("Performance supervision protocols. The board shall adopt standards and guidelines to ensure that all defense attorneys providing public defender services undergo periodic review of their work against the performance standards and guidelines in a fair and consistent manner throughout the state, including creating a uniform evaluation protocol.").

⁵⁰¹ LA. REV. STAT. § 15:148(B)(1)(a) (2016) ("Manageable public defender workloads that permit the rendering of competent representation through an empirically based case weighting system that does not count all cases of similar case type equally but rather denotes the actual amount of attorney effort needed to bring a specific case to an appropriate disposition. In determining an appropriate workload monitoring system, the board shall take into consideration all of the following: (i) The variations in public defense practices and procedures in rural, urban, and suburban jurisdictions; (ii) Factors such as prosecutorial and judicial processing practices, trial rates, sentencing practices, attorney experience, extent and quality of supervision, and availability of investigative, social worker, and support staff.; (iii) Client enhancers specific to each client such as the presence of mental illness.").

⁵⁰² LA. REV. STAT. § 15:148(B)(1)(b) (2016) ("Continuity of representation. The board shall adopt standards and guidelines which ensure that each district devises a plan to provide that, to the extent feasible and practicable, the same attorney handles a case from appointment contact through completion at the district level in all cases.").

⁵⁰³ LA. REV. STAT. § 15:148(B)(1)(c) (2016) ("Documentation of communication. The board shall adopt standards and guidelines to ensure that defense attorneys providing public defender services provide documentation of communications with clients regarding the frequency of attorney client communications as required by rules adopted by the board.").

⁵⁰⁴ LA. REV. STAT. § 15:148(B)(11) (2016) ("Ensuring data, including workload, is collected and maintained in a uniform and timely manner throughout the state to allow the board sound data to support resource needs.").

a manner that is fair and consistent throughout the state.” The standards must take into consideration:

1. The level of education and experience that is necessary to competently handle certain cases and case types, such as criminal, juvenile, abuse and neglect, civil commitment, capital, and other case types in order to provide effective assistance of counsel;
2. Acceptable caseloads and workload monitoring protocols to ensure that public defender workloads are manageable;
3. Access to and use of necessary professional services, such as paralegal, investigator, and other services that may be required to support a public defender in a case;
4. Continuing education requirements for public defenders and support staff;
5. Practice standards;
6. Performance criteria; and
7. Performance evaluation protocols.⁵⁰⁵

Michigan is even more direct with their reform legislation. The Michigan Indigent Defense Commission “shall establish minimum standards, rules, and procedures to effectuate the following:

1. The delivery of indigent criminal defense services shall be independent of the judiciary but ensure that the judges of this state are permitted and encouraged to contribute information and advice concerning that delivery of indigent criminal defense services.
2. If the caseload is sufficiently high, indigent criminal defense services may consist of both an indigent criminal defender office and the active participation of other members of the state bar.
3. Trial courts shall assure that each criminal defendant is advised of his or her right to counsel. All adults, except those appearing with retained counsel or those who have made an informed waiver of counsel, shall be screened for eligibility under this act, and counsel shall be assigned as soon as an indigent adult is determined to be eligible for indigent criminal defense services.”

The Michigan statutory language continues on to require the Michigan Indigent Defense Commission to implement minimum standards, rules, and procedures that adhere to the following principles:

1. “Defense counsel is provided sufficient time and a space where attorney-client confidentiality is safeguarded for meetings with defense counsel's client.
2. Defense counsel's workload is controlled to permit effective representation. Economic disincentives or incentives that impair defense counsel's ability to

⁵⁰⁵ Mont. Code Ann. § 47-1-105.

provide effective representation shall be avoided. The MIDC may develop workload controls to enhance defense counsel's ability to provide effective representation.

3. Defense counsel's ability, training, and experience match the nature and complexity of the case to which he or she is appointed.
4. The same defense counsel continuously represents and personally appears at every court appearance throughout the pendency of the case. However, indigent criminal defense systems may exempt ministerial, nonsubstantive tasks, and hearings from this prescription.
5. Defense counsel is required to attend continuing legal education relevant to counsel's indigent defense clients.
6. Defense counsel is systematically reviewed at the local level for efficiency and for effective representation according to MIDC standards.”⁵⁰⁶

Of particular note is how a Nevada indigent defense commission may deal with ensuring attorneys have sufficient time to zealously advocate for their defendants. The proposed Nevada BIDS/OIDS should be authorized to create workload standards that require attorney time tracking against specific performance criteria to garner a more accurate projection of what it actually takes to handle each component of a client's advocacy needs, based on each type of case – a far more accurate method of measuring (and thereby limiting) workload than any other available. More than that, however, tracking time enables policymakers to tie specific variables (such as “time meeting with the client in person”) not only to specific case outcomes and dispositions, but also to systemic outcomes (like recidivism rates, or the rate of former clients now employed and contributing to the tax base).⁵⁰⁷

The Louisiana legislature codified this in La R.S. 15:148(1)(a) by requiring the Louisiana Public Defender Board to develop an empirical case-weighting system (a term of art requiring time-tracking). Delineating the areas requiring uniform standards it states the LPDB must create a:

“Manageable public defender workloads that permit the rendering of competent representation through an empirically based case weighting system that does not count all cases of similar case type equally but rather denotes the actual amount of attorney effort needed to bring a specific case to an appropriate disposition. In determining an appropriate workload monitoring system, the board shall take into consideration all of the following: (i) The variations in public defense practices and procedures in rural, urban, and suburban jurisdictions; (ii) Factors such as

⁵⁰⁶ As a matter of policy, all indigent defense attorneys should be made to track their time. For example, Montana requires time tracking under the rules promulgated by the commission under its inherent authority to set policies for manageable caseloads. MCLS § 780.991.

⁵⁰⁷ In September 2013, the Montana Office of the State Public Defender filed a motion seeking to decline new cases in two courts of limited jurisdiction. Though the lower court found in October of that year that it did not have the authority to grant relief, a subsequent appeal was put on hold to allow for a political resolve. Because they had significant time-based data, the office received significant funding to resolve the excessive caseload issues. See: <http://sixthamendment.org/montana-caseload-challenge-results-in-a-significant-increase-in-resources/>

prosecutorial and judicial processing practices, trial rates, sentencing practices, attorney experience, extent and quality of supervision, and availability of investigative, social worker, and support staff; and, (iii) Client enhancers specific to each client such as the presence of mental illness.”⁵⁰⁸

Recommendations 3: Local governments should be authorized to select the method of delivering indigent defense services that most appropriately serves their local needs. When the Office of Indigent Defense Services (OIDS) promulgates a new standard, and it is approved under Nevada regulatory practices, local governments should be given a set reasonable amount of time to create and submit plans to the OIDS regarding: a) how their localized systems intend to meet said standard; and, b) the associated budget to meet the standard. If plans are approved by OIDS, all new spending to meet said standards should come from the state and not local governments.

Once a state has established a commission and authorized it to promulgate appropriate standards, the question becomes how to empower the commission to best enforce that the standards? States have settled on three basic ways in which to do so:

Unified state system. When Montana created its statewide indigent defense commission in 2005,⁵⁰⁹ the state struggled with how to pay for the improved services, including compliance with standards. After exploring many options, Montana elected to cap the amount that counties were required to spend on indigent defense at the amount they had spent during the immediate prior year. The state adjusted the matrix by which it provides funding to counties for all obligations, and essentially lowered the state’s financial obligations to the counties by the capped amount.

In effect, Montana’s public defense system became 100% state funded, though the state did not have to come up with the entire funding amount in year one. This is a good deal for counties, because the counties are assured that their spending on indigent defense is never going to increase regardless of any future expansion of the right to counsel by the U.S. Supreme Court or increased responsibilities based on standards. And, it is easier to enforce state standards, because everything is under the auspices of the state commission and it is incumbent on the commission to argue for adequate resources to meet standards through the normal state budgeting process.

Penalties for non-compliance. In 2014, the Idaho legislature created the Idaho State Public Defender Commission (“SPDC”) within the Department of Self-Governing Agencies⁵¹⁰ – under a constitutional provision in Idaho that means the commission, though technically in the executive branch, does not have to answer directly to the governor. The SPDC is

⁵⁰⁸ La R.S. 15:148(1)(a)

⁵⁰⁹ Montana Public Defender Act, 2005 Mont. Laws ch. 449 (codified as amended at MONT. CODE ANN. §§ 47-1-101 *et seq.* (2015)).

⁵¹⁰ Idaho Public Defense Act, 2014 Idaho Sess. Laws H0542 (codified as amended at IDAHO CODE §§ 19-848 *et seq.* (2015)).

empowered to promulgate standards consistent with *Cronic* and the ABA *Ten Principles*.⁵¹¹

Counties can apply to the SPDC for financial assistance in meeting state standards, though they must comply with the standards without regard to whether they seek state funding.⁵¹² The hammer to compel compliance with standards is significant. If the SPDC determines that a county “willfully and materially” fails to comply with state standards, and if the SPDC and county are unable to resolve the issue through mediation, the SPDC is authorized to step in and remedy the specific deficiencies, including by taking over all services and charging the county for the cost.⁵¹³ If the county does not pay within 60 days, “the state treasurer shall immediately intercept any payments from sales tax moneys that would be distributed to the county,” the intercepted funds go to reimburse the commission, and the “intercept and transfer provisions shall operate by force of law.”⁵¹⁴

Enforcement based on state funding. The Michigan legislature did something similar to Montana in terms of capping costs to counties. There, counties are required to annually spend no less than the average of the funding they spent in the three fiscal years preceding the adoption of the Michigan Indigent Defense Commission Act.⁵¹⁵ Any new monies to meet standards above and beyond that required local spending amount are the responsibility of the state.

As each new standard is promulgated and approved by the Supreme Court, the Act requires each Michigan county to submit a plan for how they intend to meet the new standard. For example, if the MIDC requires counties to implement continuous representation by the same attorney appointed to represent a defendant, and if County A traditionally uses horizontal representation (i.e., one attorney handles the arraignment, a different lawyer handles preliminary hearings, a third attorney handle trial, etc.), then County A might submit a plan to MIDC stating that they need to hire additional attorneys at an additional cost of say \$500,000 to move away from horizontal representation and comply with state standards. If MIDC then approves the county’s plan, the additional costs get factored into a statewide plan presented to the governor and legislature during budget negotiations. So, if county compliance with state standards requires additional funding, the state is the responsible party.

However, if a local unit of government fails to meet MIDC standards, the MIDC is authorized to take over the administration of indigent criminal defense services for the local unit of government. As a disincentive for counties to purposefully fail to meet standards, the Act mandates that county government in jurisdictions taken over by MIDC will pay a percentage of the costs the MIDC determines are necessary to meet standards, *in addition to* the county’s originally required local contribution – in the first year, the county will have

⁵¹¹ IDAHO CODE § 19-850(a)(vii) (2015).

⁵¹² IDAHO CODE § 19-862A (2015).

⁵¹³ IDAHO CODE § 19-862A(11) (2015)).

⁵¹⁴ IDAHO CODE § 19-862A(12) (2015)).

⁵¹⁵ Michigan Indigent Defense Commission Act, 2013 Mich. Pub. Acts 93 (codified at MICH. COMP. LAWS §§ 780.981 *et seq.* (2015)).

to pay 10% of the state costs, increasing to 20% in year two of a state take-over, and 30% in year three.

Although all three models are viable options to be debated, the 6AC strongly recommends the enforcement based on state-funding exemplified in the Michigan model. First, the local governments have, for the most part, settled on models that work for them. Second, if the state is establishing new standards it is the state that should pay for them.

Recommendation 4: OIDS should additionally: a) qualify, train and supervise attorneys that local governments may contractually engage; b) conduct on-going system evaluations against standards; c) review, approve and fund requests for trial-related expenses (investigators and experts); and, collect uniform data. OIDS should also oversee the State Public Defender office. The State Public Defender's appellate responsibilities should be expanded to include direct appeals.

OIDS should be statutorily authorized to qualify, train and supervise attorneys such that county managers know they can engage contractually from a pool of qualified attorneys.

The best comparison here is to the Massachusetts Committee for Public Counsel Services (CPCS). The CPCS board appoints a chief counsel to run the agency from its central office in Boston. Traditionally, since its founding in 1983, CPCS has employed the assigned counsel model to provide the bulk of its representational needs, with public defender offices handling only the most serious cases in the more urban areas of the state.

More than 2,000 private attorneys handle direct services on behalf of CPCS statewide. Of the 2,000 attorneys participating in the statewide panel, more than 600 are certified to handle cases in Superior Court (cases involving more than 2.5 years in jail). Of those certified for Superior Court work, 150 attorneys are certified even further still to handle murder cases. And as implied, the certification requirements increase with each level of court.

But while the minimum standards for certification are promulgated at the state level, the initial screening of attorney applicants is handled locally.⁵¹⁶ Private attorneys accepting public case-assignments are agreeing to abide by CPCS' "Performance Guidelines Governing Representation of Indigents in Criminal Cases." But as with most everything else in the Massachusetts assigned counsel program, the direct review of ongoing attorney performance is also handled locally. CPCS contracts with private attorneys who handle no cases, and instead act solely as supervisors for other private attorneys handling direct case-assignments.

⁵¹⁶ CPCS maintains annual contracts with non-profit bar advocate programs in each county. Those bar advocate programs in turn select a volunteer board to review attorney applications using CPCS' minimum statewide qualification standards. (The composition of the local volunteer boards is also done according to statewide standards promulgated by CPCS.) However, in Nevada local governments could set up local panels to help make decisions on contracting.

There is no minimum level of experience required for attorneys in order to apply to handle misdemeanors and concurrent felonies in District Court (the lowest level of qualification). Instead, selection is based on merit and by interviews with the local volunteer board. Attorneys selected must then complete a 7-day training program (or apply for a waiver), which involves lectures each day, along with small group sessions targeting skills training (client interviews, ethics, direct/cross, immigration, etc.).

Attorneys seeking approval for Superior Court work have to have handled a minimum of six criminal jury trials as lead counsel within the past five years. A state blue ribbon panel of “top notch” attorneys then reviews their applications. Finally, each attorney must complete 8 hours of mandatory CLE, with CPCS pre-approving specific sessions. Certain attorneys may also need additional training, which is determined by the attorneys and the private bar supervisors. Certification to handle murder cases requires a minimum of 10 jury trials, of which five must be felonies carrying a potential of life imprisonment, within the past five years.

The CPCS central office also approves all requests for trial-related expenses, such as investigators or expert witnesses, and the funding comes from the state.

Nevada’s new board and central office could set up similar qualification, training and supervision programs for local private attorney systems. That said, as mentioned above, Massachusetts CPCS also has a public defender division. Similarly, the Nevada State Public Defender could continue to provide trial-level services for Carson City and Storey county and provide post-conviction appellate services under the auspices of CPDS.

Indeed, the State Public Defender’s appellate services could be expanded to direct appeals as many states have found it appropriate to separate the public defense appeals system from the public defense trial system. For example:

- **Florida.** Each of the state’s 20 judicial circuits (covering 67 counties in total) has a public defender office, overseen by an elected chief public defender, with full-time attorneys who provide representation to indigent defendants at trial. However, five independent state appellate defender offices provide representation in all appeals.
- **Louisiana.** The Louisiana Public Defender Board (“LPDB”) is a statewide commission that oversees all indigent defense services throughout the state. Each of Louisiana’s 43 judicial districts (together comprising the 64 parishes of the state) has a local chief defender who oversees the public defender office or the contract defenders that provide representation to indigent defendants at trial. For all indigent appeals, LPDB contracts with a non-profit that itself contracts with individual attorneys to provide representation.
- **Massachusetts.** The Committee for Public Counsel Services (CPCS) is a judicial branch agency that oversees the delivery of indigent defense services in all courts across the state. Full-time staff public defenders (felonies and delinquencies) and

private assigned counsel (misdemeanors) provide trial level services. CPCS uses private attorneys who are paid hourly to ensure independent appellate review.

- **Michigan.** The State Appellate Defender Office (“SADO”) provides appellate representation to indigent defendants. SADO is overseen by the Appellate Defender Commission, which is entirely separate from and independent of the newly established Michigan Indigent Defense Commission that oversees trial representation.
- **North Carolina.** The North Carolina Office of Indigent Defense Services (“OIDS”) is a judicial branch agency that oversees the provision of right to counsel services throughout the state. OIDS employs staff public defenders in a centralized unit to provide appellate representation, separate and apart from the trial services.
- **Oregon.** Oregon provides trial level indigent defense services through a 100% contract model. However, the Office of Public Defense Services has an appellate division of full-time staff attorneys to provide representation in direct appeals. The state has a separate Oregon Capital Resource Center to work on capital appeals and assist trial level counsel.

Appellate indigent defense services in Nevada should be state-run and separate from trial services. Making direct appeals a function of the State Public Defender will relieve local governments that are currently funding these services.

Recommendation 5: The Nevada Supreme Court should adopt an administrative rule specifically requiring all courts to conduct on the record individualized colloquies using the court ordered indigency standard to determine if a defendant can afford to reimburse government all or a part of their indigent defense representation if a court elects to impose public defense recoupment fees. OIDS should be statutorily authorized to collect data on assessments and recoupments and to conduct assessments to see that the practice is correctly followed.

Misdemeanors matter. For most people, our nation’s misdemeanor courts are the place of initial contact with our criminal justice systems. Much of a citizenry’s confidence in the courts as a whole – their faith in the state’s ability to dispense justice fairly and effectively – is framed through these initial encounters. Although a misdemeanor conviction carries less incarceration time than a felony, the collateral consequences can be just as severe. Going to jail for even a few days may result in a person losing professional licenses, being excluded from public housing and student loan eligibility, or even being deported. A misdemeanor conviction and jail term may contribute to the break-up of the family, the loss of a job, or other consequences that may increase the need for both government-sponsored social services and future court hearings (e.g., matters involving parental rights) at taxpayers’ expense. Despite this, courts in rural Nevada are chilling the right to counsel by requiring indigent defendants to pay for the right to counsel or proceed unrepresented.

The Nevada Supreme Court must work to stop these practices immediately through the creation of a new court rule setting out that no recoupment fees can be collected without on the record, individualized colloquies to determine if a defendant can afford such fees using the indigency determinations, and training judges on the rule. OIDS can then conduct court observations and require financial reporting by local government to determine if the processes are being followed correctly.

Recommendation 6: The Nevada Legislature should create a student loan forgiveness program to encourage young lawyers to serve as public defenders in those counties with less than 100,000 populations.

The State of Nevada already has statutory loan forgiveness programs to help entice doctors and nurses to provide healthcare in underserved areas of the state, and to support young teachers practicing in rural jurisdictions. The Sixth Amendment Center thinks a similar program should be established to encourage lawyers to practice indigent defense representation in counties with populations less than 100,000 people. The Nevada Right to Counsel Commission should look to the following programs for inspiration: Program to Provide Loans to Nursing Students;⁵¹⁷ Nevada Health Services Corps;⁵¹⁸ and Teach Nevada Scholarship Program.⁵¹⁹

Recommendation 7: The Nevada Legislature should draft legislation directing the Legislative Commission to conduct an interim study of the court structure.

We suggest that the Nevada Legislature retain a national court management organization to study the current criminal court structure in the state with an aim of improving court efficiency. To be clear, the 6AC are not experts in this realm because court management involves functions that go beyond just indigent defense services. Although such a study should not be limited to the following, we urge that the following questions be a focus:

- Should municipal courts be consolidated with the justice courts for all misdemeanors, including those brought by municipal prosecutors?
- Should district courts judges preside over all court hearings regarding felonies and gross misdemeanors?
- Should district court judges preside over all misdemeanor cases arising in conjunction with felony/gross misdemeanor cases?

⁵¹⁷ NRS 396.890-396.898.

⁵¹⁸ NRS 396.899-396.908.

⁵¹⁹ NRS 391A.555-391A.590.