THE RIGHT TO COUNSEL IN RURAL NEVADA

EVALUATION OF INDIGENT DEFENSE SERVICES

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SIXTH AMENDMENT CENTER

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

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."[i] Since *Gideon*, 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. The attorney must also be effective, subjecting the prosecution's case to "the crucible of meaningful adversarial testing."[ii]

Gideon also established that the provision of the Sixth Amendment right to effective assistance of counsel is an obligation of the states – not local government – under the due process clause of the Fourteenth Amendment. 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. The State of Nevada only funds the very limited portion of indigent defense representation that is provided by the State Public Defender office. The U.S. Supreme Court has never directly announced whether it is unconstitutional for a state to delegate these responsibilities to its counties and cities. However, when a state chooses to place the responsibility on its local governments, 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. The State of Nevada has no governmental agency charged with ensuring that local governments can and are meeting the parameters of the Sixth Amendment in providing services.

In 2017, Nevada's legislature took a preliminary step toward state government oversight of the right to counsel by establishing the Nevada Right to Counsel Commission (NRTCC) to study the provision of indigent defense services in jurisdictions with populations less than 100,000. The Sixth Amendment Center (6AC) conducted this study on behalf of the NRTCC. Chapter I (pages 5 – 23) gives an overview of the criminal justice system in Nevada to allow the reader to understand the various levels of courts in which the right to counsel is provided and the prosecutorial and law enforcement agencies that enforce state and local criminal laws.

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[i] Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

[ii] United States v. Cronic, 466 U.S. 648, 656 (1984).

Early on in the study, it became apparent that Nevada's decades of efforts to ensure the effective assistance of the right to counsel are a critical prelude to the issues that confront the rural counties today. The history recounted in Chapter II (pages 24 – 43) 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 where the state has failed to do so. Much of Chapter II focuses on the Nevada Supreme Court's efforts to fix systemic deficiencies in Nevada's right to counsel systems. However, 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.

Hallmarks of a structurally sound indigent defense system include the early appointment of qualified and trained attorneys who have 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. The 6AC collected and analyzed available data, conducted interviews with policymakers and criminal justice stakeholders, and observed court proceedings. The provision of the right to counsel in Nevada's rural counties is evaluated against Sixth Amendment case law and national standards in Chapters III, IV, and V.

Chapter III (pages 44 – 109) details the current right to counsel delivery systems established by county and city governments in rural Nevada. Nationally, there are only two models for the delivery of indigent defense services. Jurisdictions either employ government staff attorneys and/or they compensate private attorneys to provide representation.

Carson City and Storey County, alone among the rural jurisdictions, use the State Public Defender office to provide primary (but not conflict) representation. Only the three rural counties of Elko, Humboldt, and Pershing have a county funded and administered public defender office, furnished and equipped at government expense and staffed by full-time government employees who receive a salary and benefits. Churchill, Douglas, Esmeralda, Eureka, Lander, Lincoln, Lyon, Mineral, Nye, and White Pine counties instead provide right to counsel services by contracting with private attorneys for a fixed annual fee and out of which the attorney must provide all overhead necessary to serve as an attorney. In many instances, these contract attorneys are also responsible for paying for much of the case-related expenses that are necessary to the defense of the indigent defendants whom they are appointed to represent.

Cities receive almost no direction at all from the state about how to provide representation to indigent defendants charged in the municipal courts with misdemeanors that carry possible jail sentences. There are four free-standing municipal courts in all of the 15 rural counties combined: Fallon Municipal Court within Churchill County; Fernley Municipal Court and Yerington Municipal Court within Lyon County; and Ely Municipal Court within White Pine County.

Chapter IV (pages 110 – 150) assesses the rural indigent defense systems regarding: a) the manner in which attorneys are selected and whether the defense function is independent; b) the extent to which attorneys have necessary qualifications, training, and supervision; c) the workloads imposed on attorneys and whether they have sufficient time; and d) the ways in which funding for attorney fees, overhead, and case-related expenses create conflicts of interest for the attorneys. Chapter V (pages 151 – 163) assesses whether attorneys are entering cases early enough in the process to be effective and explains some of the court processes that encourage indigent defendants to forgo counsel all together.

6AC's findings and recommendations are set out in Chapter VI (pages 164 – 180).

1. 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. Cronic*. No such entity currently exists.

2. The State of Nevada has only very limited oversight of primary representation (not conflict representation) in just two jurisdictions (Carson City and Storey County) that use the State Public Defender. However, the State Public Defender system suffers from undue political interference and inadequate funding.

3. The State of Nevada does not require uniform indigent defense data collection and reporting. Without objective and reliable data, right to counsel funding and policy decisions are subject to speculation, anecdotes and, potentially, even bias.

4. The majority of rural counties stepped into the void created by the State of Nevada to fund and administer local indigent defense structures that fit the uniqueness of each individual jurisdiction. However, without guidance from the State of Nevada on how to create local structures that meet the parameters of the Sixth Amendment, the local indigent defense systems suffer, to various degrees, with:
   - a pervasive lack of independence from judges, prosecutors, and county/city governance;
   - a pervasive lack of institutionalized attorney supervision and training;

- a pervasive lack of attorneys at initial appearance to advocate for pretrial release of defendants;
- a pervasive lack of independent defense investigations in all but the most serious felony cases;
- a pervasive lack of support services including social workers, legal secretaries/ paraprofessionals, mental health services, and translation services for non-English-speaking indigent defendants;
- fixed fee contracts that pay the same no matter how few or how many cases the attorney handles, and that require the attorney to pay for overhead out of the fixed compensation, and that in some instances require the attorney to pay for conflict counsel out of the fixed compensation;
- excessive caseloads in those rural counties with populations greater than 15,000.

5. Despite most rural cities and counties requiring attorneys to report caseload information, in many places the attorneys simply do not do so. In places where attorneys do report this information, most cities and counties do not make any use of the data because the data is not maintained uniformly, even among attorneys providing representation in the same jurisdiction.

6. Without the State of Nevada tracking which attorneys are providing representation in which courts and/or which public defense attorneys are employed in other court functions (e.g., magistrates, prosecutors) it is impossible for local policymakers to gauge workloads even in those jurisdictions trying to review excessive caseloads.

7. Rural counties administering and funding their own local indigent defense systems, for the most part, do not have standards for the selection of qualified attorneys with the experience to match the complexity of the cases to which they are assigned. While most rural attorneys appear to be qualified to handle the criminal cases to which they are appointed, this is serendipitous. There is nothing to prevent future local policymakers from hiring non-qualified lawyers offering the lowest costs to cover the greatest number of cases.

8. The vast geographical distances, the paucity of attorneys in many areas of the state, the structure of Nevada's courts, and its procedures layered on top of all that seems to render it nearly impossible for the individual counties and cities alone to provide public defense systems that can ensure effective assistance of counsel. All of this results in:
   - delays for indigent defendants in receiving appointed counsel and in the timely conclusion of the criminal proceedings against them;
   - judges not adhering to Court ordered indigency determination procedures, resulting in over-appointment and under-appointment (depending on jurisdiction);

- imposition of recoupment of public defense costs on indigent defendants (along with other fines and fees) without determining a defendant's ability to pay;
- judges refusing to appoint counsel to misdemeanor defendants facing jail time where the judge predicts a suspended sentence;
- uncounselled defendants negotiating directly with prosecutors and then pleading guilty to misdemeanors with a suspended sentence, and doing so at initial appearance/arraignment;
- judges sentencing convicted indigent defendants to pay fines & fees without determining their ability to pay, and attorneys failing to advocate on behalf of indigent defendants against imposition of these fines & fees.

9. Although defendants have a right to appeal misdemeanor convictions from non-lawyer judge courts (justice courts and municipal courts) and to take that appeal to a district court where the judge is a lawyer, these misdemeanor convictions most often result from cases where the defendant did not have a lawyer in the non-lawyer court to begin with. As a result, the defendant is on their own and incapable of making a defense and of making an appropriate record in the non-lawyer court and of taking the necessary steps to obtain review by a court where the judge is a lawyer. And the appellate review is based solely on the record made in the court of the non-lawyer judge.

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.

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 the state.

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 should undergo a public comment period and be approved by an official branch of government.

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.

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 d) 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.

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.

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.

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 misdemeanors?

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CHAPTER I
INTRODUCTION

Nevada has 16 counties and the one independent city of Carson City that is the state's capital – 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 counties[5] 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

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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.

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 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

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[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.

[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. Cronic, 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).

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 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]

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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).

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).

"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 health[31] or intellectual disability[32] and those facing involuntary quarantine because of disease.[33] 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 IV.)

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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).

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).

B. NEVADA COURT 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]

1. 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]

2. 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.

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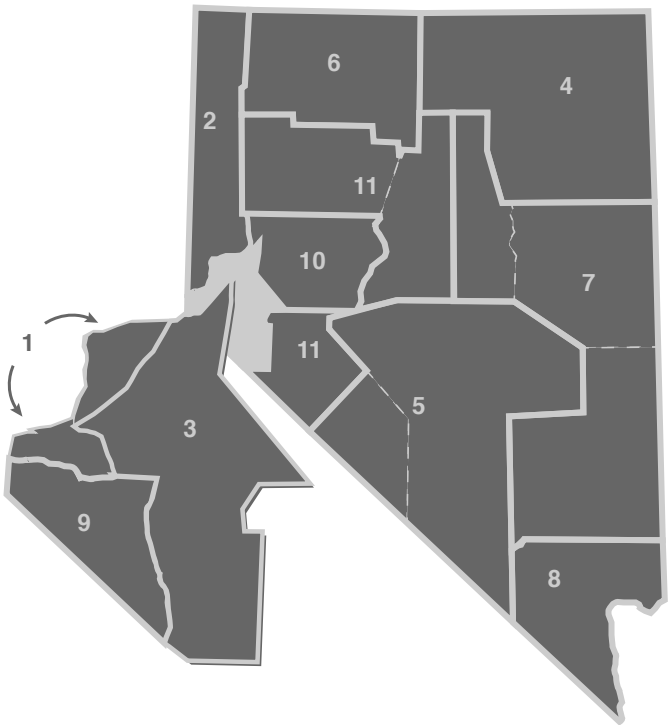
35 Nev. Const. art. 6, §§ 1, 4, 19; Nev. Rev. Stat. §§ 1.010, 2.120, 2A.160 (2017).
36 Nev. Const. art. 6, § 2; Nev. Rev. Stat. § 2.010 (2017).
37 Nev. Const. art. 6 § 19; Nev. Rev. Stat. § 2.120 (2017).
38 *See* Nev. R. Admin. Docket, preamble.
39 Nev. Const. art. 6 § 4; Nev. Rev. Stat. § 2.090 (2017).
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).

a. Organization of the courts

District courts. 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 14.)

Map of Nevada's judicial districts



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 62.) 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

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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.

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 81.) Eureka, Lincoln, and White Pine counties 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 89.) 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 81.)

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.

Justice courts. 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

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

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*.

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 elected[62] 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 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. Justice 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.[66]

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 14.)

Municipal courts. Any Nevada community of more than 1,000 inhabitants can become an incorporated city.[67] Each incorporated city is required by the state legislature to have a municipal court located in the city.[68] 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.[69] A municipal judge has authority to act within the city limits from which he is elected.[70] A municipal judge does not have

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 Nev. Rev. Stat. §§ 4.060 through 4.140 (2017).
67 Nev. Rev. Stat. §§ 265.010, 266.016 through 266.029 (2017).
68 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.
69 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.
70 Nev. Rev. Stat. §§ 5.020, 5.050, 266.555 (2017).

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.[71] The salary of a municipal judge is set and paid for by the city,[72] 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.[73] 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 14.)

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 Pahranagat 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.

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71 Nev. Rev. Stat. § 5.020 (2017); *see* Nev. Const. art. 2 § 1.
72 Nev. Rev. Stat. § 5.030 (2017).
73 Nev. Rev. Stat. § 5.020(3) (2017).

Table: Courts & Judges in the Rural Counties

DISTRICT COURTS			JUSTICE COURTS MUNICIPAL COURTS	# of	# of
Judicial District	# of Dist Judges	County	* Combined Justice & Municipal Court	Just. / Muni. Judges	Non-atty Judges
1st	2	Carson City	Carson City Justice & Municipal *	2	1
		Storey	Virginia City Justice	1	1
3rd	2	Lyon	Canal Justice	1	0
			Fernley Municipal	1	1
			Dayton Justice	1	1
			Walker River Justice	1	1
			Yerington Municipal	1	0
4th	2	Elko	Carlin Justice & Municipal *	1	1
			Eastline Justice & West Wendover Municipal *	1	1
			Elko Justice & Municipal *	2	1
			Wells Justice & Municipal *	1	1
5th	2	Esmeralda	Esmeralda Justice	1	1
		Nye	Beatty Justice	1	1
			Pahrump Justice	2	2[iii]
			Tonopah Justice	1	1
6th	1	Humboldt	Union Justice	1	1
7th	2	Eureka	Eureka Justice	1	1
		Lincoln	Meadow Valley Justice & Caliente Municipal * [i]	1	1
			Pahranagat Valley Justice	1	1
		White Pine	Ely Justice	1	0
			Ely Municipal	1	0
9th	2	Douglas	East Fork Justice	1	0
			Tahoe Justice	1	0
10th	1	Churchill	New River Justice	1	1
			Fallon Municipal	1	1
11th	1	Lander	Argenta Justice	1	1
			Austin Justice [ii]	1	1
		Mineral	Hawthorne Justice	1	1
		Pershing	Lake Justice	1	1
TOTAL	**15**			**32**	**24**

[i] 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.

[ii] From March 6, 2018 through time of the 6AC 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.

[iii] At the time of the 6AC 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 traveling to Pahrump to hear cases.

b. 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.[74] 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.[75]

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.[76] 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.[77] They advise defendants of the charges upon which they have been arrested and of the rights to which they are entitled.[78] They determine who is entitled to public counsel and whether a person seeking a lawyer is indigent, then they appoint an attorney "as appropriate."[79] 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.[80] And they set conditions of bail.[81]

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74 Nev. Rev. Stat. §§ 5.050(2), 266.550, 266.555 (2017).
75 Nev. Rev. Stat. §§ 173.115(2) (2017); *see* Nev. Rev. Stat. § 5.050(2) (2017).
76 Nev. Rev. Stat. §§ 4.370(3)-(5), 269.165 (2017); *see* Nev. Const. art. 6 § 8.
77 Nev. Rev. Stat. § 171.178 (2017).
78 Nev. Rev. Stat. § 171.186 (2017).
79 Nev. Rev. Stat. § 171.188 (2017).
80 Nev. Rev. Stat. §§ 171.196, 171.206 (2017).
81 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."[82] 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 proceedings[83] and child in need of supervision proceedings,[84] and they are referred to as juvenile courts when exercising this jurisdiction.[85] 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."[86] 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.[87]

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82 Nev. Const. art. 6 § 6.
83 Nev. Rev. Stat. § 62B.330 (2017).
84 Nev. Rev. Stat. § 62B.320 (2017).
85 Nev. Rev. Stat. § 62B.300 (2017).
86 Nev. Rev. Stat. § 62B.020 (2017).
87 Nev. Const. art. 6 § 6.

A WORD ABOUT NON-LAWYER JUDGES

Like Nevada, thirty other states have some courts where judges do not have to be a lawyer.[88] Nine of these states, though, prevent the non-lawyer judges from taking a defendant's liberty in a criminal proceeding.[89] 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.[90] The United States Supreme Court held in 1976 that a criminal defendant who faces the possibility of incarceration can be tried by a non-lawyer judge, *so long* as the defendant has the right to a *de novo* trial before a judge who is a lawyer.[91]

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.[92] 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.[93]

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 V.)

- 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.[94]

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[88] 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.

[89] 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.

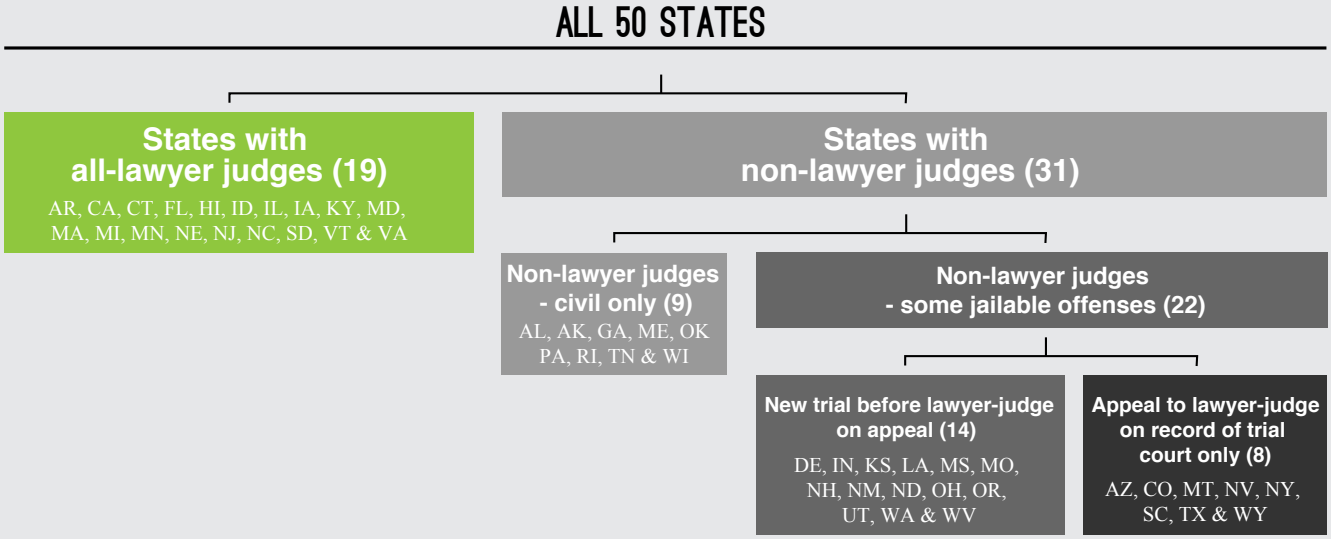
[90] Delaware, Indiana, Kansas, Louisiana, Mississippi, Missouri, New Hampshire, New Mexico, North Dakota, Ohio, Oregon, Utah, Washington, and West Virginia (unless in West Virginia the defendant had a jury trial).

[91] North v. Russell, 427 U.S. 328 (1976).

[92] Arizona, Colorado, Montana, New York, South Carolina, Texas, and Wyoming.

[93] Nev. Rev. Stat. § 5.010 (2017).

[94] 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.[95]
- 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.[96]

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 felony[97] 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.[98]

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.

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

[96] Iowa v. Tovar, 541 U.S. 77 (2004).

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

[98] Nev. Rev. Stat. §§ 171.178, 171.186, 171.188, 171.196, 171.206 (2017).

C. PROSECUTORS

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.[99] The office of district attorney is part of county government, yet all district attorneys are under the supervisory powers of the Nevada Attorney General.[100]

Each county elects one district attorney.[101] Other than in Esmeralda County, the district attorney is prohibited from engaging in the private practice of law (for compensation) while in office.[102] The salary of the district attorney is set by the state legislature, but it is paid by the county.[103] Compensation of a district attorney varies depending on the class assigned by the legislature to the county he serves.[104]

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99 Nev. Rev. Stat. §§ 245.043 (district attorney), 252.050 (office and branch offices), 252.070 (deputies and support staff) (2017).

100 Nev. Rev. Stat. § 228.120 (2017).

101 Nev. Rev. Stat. § 252.020 (2017).

102 Nev. Rev. Stat. § 245.0435 (2017); *see* Nev. Rev. Stat. § 245.043(2) (2017).

103 Nev. Rev. Stat. § 245.043 (2017).

104 Nev. Rev. Stat. § 245.043 (2017).

Table: Annual salary of rural county district attorneys

	Class 3	Class 4	Class 5	Class 6
County	Carson City Churchill Douglas Elko Humboldt Lyon Nye	Lander Storey White Pine	Eureka Lincoln Mineral Pershing	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).

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.[105] In the 15 rural counties, deputy district attorneys are expressly allowed to maintain a private law practice.[106]

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.[107] 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.[108] 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,"[109] in effect creating a part-time district attorney's office.

The district attorney's role is as the public prosecutor throughout the county.[110] In that capacity, the district attorney's primary duty is to attend every criminal court session of

105 Nev. Rev. Stat. § 252.070 (2017).
106 Nev. Rev. Stat. § 252.070(4) (2017).
107 Nev. Rev. Stat. § 252.050(1)-(2) (2017).
108 Nev. Rev. Stat. § 252.050(1),(4) (2017).
109 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.
110 Nev. Rev. Stat. § 252.080 (2017).

the district courts in the county and those criminal court sessions of the county's justice courts "when required by justices of the peace."[111] 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 21.) 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."[112] (*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.[113] 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
> (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.[114]

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."[115]

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

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111 Nev. Rev. Stat. § 252.090 (2017).
112 Nev. Rev. Stat. § 252.110 (2017).
113 Nev. Rev. Stat. § 252.170(1) (2017).
114 Nev. Rev. Stat. § 252.170(2) (2017).
115 Nev. Rev. Stat. § 252.160(1) (2017).

Table: Prosecutors in the rural counties

DISTRICT COURTS			JUSTICE COURTS MUNICIPAL COURTS		
Judicial District	# of Dist Judges	County	* Combined Justice & Municipal Court	# of Prosecutors	
1st	2	Carson City	Carson City Justice & Municipal *	1 admin 7 crim 3 civl	
		Storey	Virginia City Justice	1 ½	
3rd	2	Lyon	Canal Justice	2	
			Fernley Municipal		2
			Dayton Justice	2 ½	
			Walker River Justice	1 ½	
			Yerington Municipal		1 K
4th	2	Elko	Carlin Justice & Municipal *	7 crim 1 juv 2 civil	
			Eastline Justice & West Wendover Municipal *		
			Elko Justice & Municipal *		
			Wells Justice & Municipal *		
5th	2	Esmeralda	Esmeralda Justice	1	
		Nye	Beatty Justice	4 Pahrump 1 Beatty/Tonopah & juv	
			Pahrump Justice		
			Tonopah Justice	1	
6th	1	Humboldt	Union Justice	6	
7th	2	Eureka	Eureka Justice	1	
		Lincoln	Meadow Valley Justice & Caliente Municipal *	2	
			Pahranagat Valley Justice		
		White Pine	Ely Justice	3 crim 1 juv 1 dom viol (for 7th JDC)	
			Ely Municipal		?
9th	2	Douglas	East Fork Justice	6 crim 1 juv 1 432B	
			Tahoe Justice		
10th	1	Churchill	New River Justice	3 crim 1 juv 2 civil	
			Fallon Municipal		1
11th	1	Lander	Argenta Justice	2	
			Austin Justice *		
		Mineral	Hawthorne Justice	1 ½	
		Pershing	Lake Justice	1	

counsel, all national standards recommend that prosecutors not be involved in the oversight of indigent defense services and providers,[116] "to remove any implication that defenders are subject to the control of those who appear as their adversaries."[117]

2. 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.[118] The city's governing body sets the compensation for and pays the city attorney.[119] The city attorney must be licensed to practice law[120] 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.[121]

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116 *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).

117 ABA, Standards for Criminal Justice, Providing Defense Services 5-1.3(b) commentary at 19 (3d ed. 1992).

118 Nev. Rev. Stat. § 266.405 (2017).

119 Nev. Rev. Stat. § 266.450 (2017).

120 Nev. Rev. Stat. § 266.465 (2017).

121 Nev. Rev. Stat. § 266.470 (2017).

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."[122] Judges did, though, from time to time appoint an attorney to represent a defendant in a criminal case.

a. 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.[123] The statute required that "[s]uch compensation shall be paid by the County Treasurer out of any moneys in the Treasure, not otherwise appropriated, upon the certification of the Judge of the Court, that such attorney has performed the services required."[124] 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.[125] Again the funds were to be paid by the county treasurer.[126]

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.[127]

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122 *In re* Wixom, 12 Nev. 224 (Nev. 1877).
123 1875 Nev. Stat. 142, AB 122 (now codified at Nev. Rev. Stat. § 7.125 (2017)).
124 1875 Nev. Stat. 142, AB 122 § 1.
125 1945 Nev. Stat. 104, AB 15 (now codified at Nev. Rev. Stat. § 7.125 (2017)).
126 1945 Nev. Stat. 104, AB 15 § 1.
127 State v. Eighth Judicial District Court, 396 P.2d 680 (Nev. 1964).

b. County public defender offices

In 1965, on the heels of the U.S. Supreme Court decision in *Gideon v. Wainwright*,[128] Nevada enacted its first county public defender law.[129] 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.[130] 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.[131] 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.[132] 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."[133]

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.[134]

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.[135]

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.[136] 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."[137] 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

128 372 U.S. 335 (1963).
129 1965 Nev. Stat. 597, AB 199 (now codified at Nev. Rev. Stat. §§ 260.010 et seq. (2017)).
130 1965 Nev. Stat. 597, AB 199 §§ 2, 3.
131 1965 Nev. Stat. 597-98, AB 199 § 5.
132 1965 Nev. Stat. 598, AB 199 § 6.
133 1965 Nev. Stat. 598, AB 199 § 9 (now codified at Nev. Rev. Stat. §§ 260.080 (2017)).
134 1965 Nev. Stat. 598-99, AB 199 § 10 (now codified at Nev. Rev. Stat. § 7.125 (2017)).
135 1969 Nev. Stat. 1475-76, AB 804 (amending Nev. Rev. Stat. § 260.010(1)).
136 State v. Second Jud. Dist. Ct., 453 P.2d 421 (Nev. 1969).
137 State v. Second Jud. Dist. Ct., 453 P.2d 421, 421-22 (Nev. 1969).

court may not require payment by the state . . ., it may require payment by the various counties."[138] 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.
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> . . . Society must assume the cost of providing a constitutionally adequate indigent defense system. The legislature has assigned that obligation to the counties.
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> 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.[139]

2. The era of the State Public Defender

In the next legislative session of 1971, Nevada created the Office of State Public Defender[140] and, for the first time in Nevada's history, appropriated some state funds[141] toward the provision of the Sixth Amendment right to counsel. The legislation created a seven-member commission to select the state public defender.[142] The state public defender was authorized to employ deputies and support staff and also to contract with private attorneys if needed.[143] The main office was located in Carson City, and the state public defender was allowed to establish branch offices, each to be supervised by a deputy state public defender.[144] 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

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138 State v. Second Jud. Dist. Ct., 453 P.2d 421, 423-24 (Nev. 1969).
139 State v. Second Jud. Dist. Ct., 453 P.2d 421, 424 (Nev. 1969).
140 1971 Nev. Stat. 1410-12, AB 720 §§ 1-11 (now codified at Nev. Rev. Stat. §§ 180.010 et seq. (2017)).
141 1971 Nev. Stat. 1413, AB 720 § 15.
142 1971 Nev. Stat. 1410-11, AB 720 § 3.
143 1971 Nev. Stat. 1411, AB 720 §§ 4, 6.
144 1971 Nev. Stat. 1411, AB 720 §§ 4, 5.

all 17 counties.[145] 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.[146]

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.[147] 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,[148] authorized the state public defender office and the county public defender offices to represent defendants charged with misdemeanors,[149] and it mandated a serious 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.[150] Second, the state public defender was authorized to contract with county public defender offices if needed to provide services[151] – 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.[152] 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.[153]

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.[154] The same year, the legislature authorized the state public defender office and county public defender offices to

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145 1971 Nev. Stat. 1411-12, AB 720 §§ 7, 10.
146 1971 Nev. Stat. 1413, AB 720 §§ 14-15.
147 Argersinger v. Hamlin, 407 U.S. 25 (1972).
148 1973 Nev. Stat. 357, SB 266 § 1 (amending Nev. Rev. Stat. § 171.188).
149 1973 Nev. Stat. 358, SB 266 §§ 2-4 (amending Nev. Rev. Stat. §§ 180.060, 260.030, 260.050).
150 1973 Nev. Stat. 357-58, SB 266 § 1 (amending Nev. Rev. Stat. § 171.188(4)).
151 1973 Nev. Stat. 706, AB 921 (amending Nev. Rev. Stat. § 180.050(1)).
152 *See* County of Douglas, Nevada, Ord. 157 (Mar. 6, 1967) (creating a county public defender office, effective Mar. 16, 1967).
153 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)).
154 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).

represent children in delinquency proceedings.[155] At the same time, it authorized the state public defender office to contract with counties to provide conflict services to those counties that had established a county public defender office[156] (none of the rural counties had a county public defender office at that time,[157] as Douglas abolished their local public defender office in 1975[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

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155 1977 Nev. Stat. 338-39, AB 36 §§ 4, 7 (amending Nev. Rev. Stat. §§ 180.060(2), 260.050(2)).

156 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. Clark County then established the county's Special Public Defender's Office to handle conflict cases. Email from Phil Kohn, Clark County Public Defender Office, to David Carroll, Sixth Amendment Center (Aug. 14, 2018).

157 1977 Nev. Stat. 338-39, AB 36 §§ 4, 6 (enacting Nev. Rev. Stat. §§ 180.060(5), 260.065).

158 *See* County of Douglas, Nevada, Ord. 229 (April 21, 1975) (repealing chapter 2.12 of the Douglas County Code, effective May 2, 1975).

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).

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]

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]

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[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).

[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/agnvgov/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 Lander, 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).

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]
- 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

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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).

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).

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 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

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).
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).

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 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;

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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).

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 Executive 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.

- 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 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]

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[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." National Legal Aid & Defender Association, 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 Executive Director David Carroll was Research Director for NLADA at the time of the report.

[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

- 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]
- 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]

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).

[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).

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
- established a permanent statewide commission for the oversight of indigent defense[212] (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,

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[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).

[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).

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]
- 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

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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% to73%)."

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.").

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

[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).

totally flat fee contract."[224] Based in part on that 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]

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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).

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).

B. THIS EVALUATION

1. Nevada Right to Counsel Commission

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.
- 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.

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[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.

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 Center[233] 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 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.

2. Study 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

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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.

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. Cronic*[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. *Cronic* 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_ten-principlesbooklet.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 - OVERSIGHT, ADMINISTRATION, AND FUNDING

Providing the Sixth Amendment right to effective counsel is an obligation of the states under the due process clause of the Fourteenth Amendment.[236] 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.[237]

Nationally, there are only two models for the delivery of indigent defense services. Jurisdictions either employ government staff attorneys and/or they compensate private attorneys to provide representation.

Government employees are either full-time or part-time employees. Full-time government attorneys are generally barred from carrying private cases[238] 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

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[236] Gideon v. Wainwright, 372 U.S. 335, 343-45 (1963).

[237] *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.

[238] Excluding the occasional case for a relative or friend.

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.

Private attorneys can be paid either a fixed fee or an hourly rate, and they may or may not receive additional funds for overhead and for case related expenses. Fixed fees may be paid:

- per defendant (a lawyer earns a set fee to represent a single defendant on all charges pending against that defendant, regardless of the number of charging instruments);
- per case (a lawyer earns a set fee to represent a single defendant against all charges presented in a single prosecution charging instrument);
- per case event (a lawyer earns a set fee for completing an initial hearing, and a separate fee for other proceedings such as an arraignment, preliminary hearing, trial, or direct appeal, etc.); or
- per week, month, or year regardless of the number of defendants, cases, or case events represented.

Hourly rates may be set by case type (e.g., one rate for felony representation, and different rates for misdemeanor, delinquency, direct appeal, etc.) and may or may not differ depending on whether the lawyer is working in court or out of court. Total compensation may or may not be capped at a determined limit (regardless of 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.

Nevada's government employee systems. A Nevada county's board of county commissioners "may," if they so choose, create a county "office of public defender."[239] 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.[240] 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."[241]

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

[239] Nev. Rev. Stat. § 260.010(2) (2017).
[240] Nev. Rev. Stat. § 260.040(1)-(3) (2017).
[241] Nev. Rev. Stat. § 260.040(5) (2007).

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."[242] The legislature identifies these counties as a "participating county."[243] 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.)

Nevada's private attorney systems. 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, 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."[244]

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."[245] 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

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242 Nev. Rev. Stat. § 180.110 (2017).

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

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

245 Nev. Rev. Stat. § 7.115 (2017).

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.[246]

Nevada's municipal court indigent defense systems. 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,[247] 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 counties[248] 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.

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.

A. STATE GOVERNMENT EMPLOYEE SYSTEMS (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.[249]

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246 NEV. REV. STAT. § 7.155 (2017).

247 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 14.)

248 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 14.)

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

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 Chief Public Defender occasionally takes cases when needed.

1. Carson City (1st JDC)

There are two courts within Carson City: the 1st Judicial District Court, and the Carson City Justice & Municipal Court. The state public defender assigns four staff attorneys to represent indigent defendants in the Carson City trial courts.

For conflict cases, Carson City has identical fixed fee contracts with each of three private attorneys to each handle every conflict case to which they are appointed.[250] The current contracts are for the three-year term of July 1, 2017 through June 30, 2020.[251] In exchange, the attorney is paid a fixed annual rate of $120,000 (increasing by 2% in each subsequent year of the contract).[252] The contract attorneys are responsible for paying all costs of doing business[253] 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).[254] The contract may be terminated without cause upon written notice by either Carson City or the attorney.[255]

The three contract conflict attorneys are John Malone,[256] Robert Walker,[257] and Noel Waters.[258] "[W]hen the court for cause is required to disqualify the State Public Defender," the contract conflict attorneys are responsible for representing indigent adults charged with a public offense, children alleged to be delinquent or in need

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250 Independent Contractor Agreement, Contract No. 1718-006, Title Conflict Counsel, John E. Malone; Attorney at Law (July 1, 2017 through June 30, 2020); Independent Contractor Agreement, Contract No. 1718-004, Title Conflict Counsel, Robert B. Walker; Attorney at Law (July 1, 2017 through June 30, 2020); Independent Contractor Agreement, Contract No. 1718-005, Title Conflict Counsel, Noel S. Waters; Attorney at Law (July 1, 2017 through June 30, 2020).

251 *See, e.g.*, Independent Contractor Agreement, Contract No. 1718-006, Title Conflict Counsel, John E. Malone; Attorney at Law, ¶ 3.1, Exh. A ¶¶ a-c (July 1, 2017 through June 30, 2020).

252 *See, e.g.*, Independent Contractor Agreement, Contract No. 1718-006, Title Conflict Counsel, John E. Malone; Attorney at Law, ¶ 5.1, Exh. A ¶¶ a-c (July 1, 2017 through June 30, 2020).

253 *See, e.g.*, Independent Contractor Agreement, Contract No. 1718-006, Title Conflict Counsel, John E. Malone; Attorney at Law, ¶¶ 5.3, 2.1, Exh. A ¶ m (July 1, 2017 through June 30, 2020).

254 *See, e.g.*, Independent Contractor Agreement, Contract No. 1718-006, Title Conflict Counsel, John E. Malone; Attorney at Law, ¶¶ 13.20, 13.21.2, 13.22.2, 13.23 (July 1, 2017 through June 30, 2020).

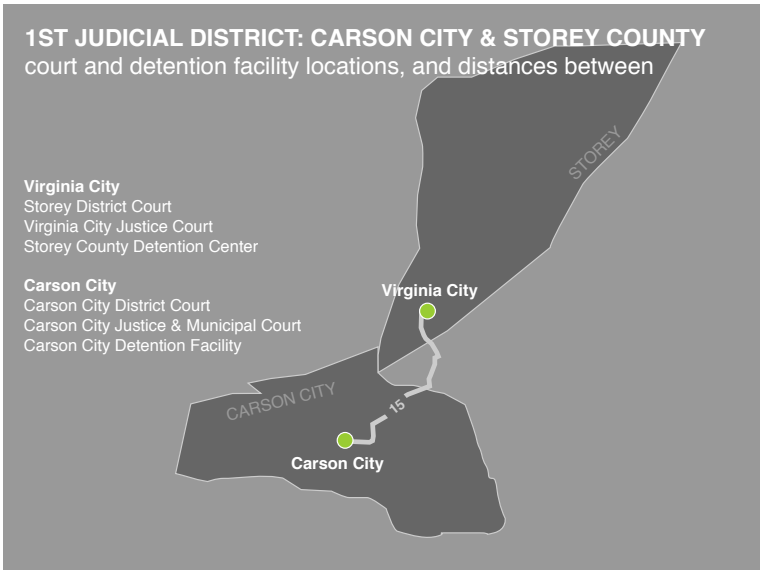
255 *See, e.g.*, Independent Contractor Agreement, Contract No. 1718-006, Title Conflict Counsel, John E. Malone; Attorney at Law, ¶¶ 7.1.1, 7.1.2 (July 1, 2017 through June 30, 2020).

256 Malone also is on conflict lists in Churchill, Douglas, Esmeralda, Pershing and Lyon County (the Canal Township Justice Court).

257 He is also on the conflict list in Storey County.

258 The attorney appears on no other conflict lists in Nevada.

of supervision, defendants in probation revocation proceedings, parents alleged to have abused or neglected a child, and children or parents in TPR proceedings.[259]



If additional conflict attorneys are needed beyond the three contract conflict attorneys, the Carson City judges maintain a list of 17 private attorneys who are available to be appointed on a case by case basis and who are paid hourly at the statutory rate:[260] Kay Ellen Armstrong,[261] Lauren Berkich,[262] Kirk Brennen,[263] Karla Butko,[264] Cotter Conway,[265] Richard Davies,[266] Troy Jordan,[267] Anne Laughlin,[268] Joel Locke,[269] Alison Joffee,[270] Derek Lopez,[271] Kaitlyn Miller,[272] John Oakes,[273] Justin Oakes,[274] Maria Pence,[275] Theresa Ristenpart,[276] and Daniel Spence.[277]

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259 *See, e.g.*, Independent Contractor Agreement, Contract No. 1718-006, Title Conflict Counsel, John E. Malone; Attorney at Law, ¶¶ 2.1, Exh A ¶¶ 1, 2, 3, 5, 7 (July 1, 2017 through June 30, 2020).

260 Email from Maxine Cortes, Court Administrator, First Judicial District Court and Carson City Justice/Municipal Court Administrator to 6AC Executive Director David Carroll (Mar. 19, 2018).

261 The attorney appears on no other conflict lists in Nevada.

262 The attorney appears on no other conflict lists in Nevada.

263 The attorney appears on no other conflict lists in Nevada.

264 Also on the conflict list in Lyon County.

265 Conway is a part-time government employed defender in the Reno Municipal Court.

266 He is also on the conflict lists in Lyon and Mineral counties.

267 Also on conflict lists for Churchill, Lyon, and Washoe counties.

268 Also on conflict lists in Lyon and Storey counties.

269 The attorney appears on no other conflict lists in Nevada.

270 The attorney appears on no other conflict lists in Nevada.

271 Until May 2018, Lopez was a primary contractor in Douglas County until he was replaced by Matthew Work. The attorney appears on no other conflict lists in Nevada.

272 Miller is the primary contractor for 432B case in Churchill County. The attorney appears on no other conflict lists in Nevada.

273 Oakes is the primary contract defender in Mineral County. He is also on conflict lists in Churchill and Pershing counties. He is a sub-contractor in the Sparks Municipal Court. Oakes also serves as a judge pro tem in Reno Justice Court, the Sparks Justice Court, and in the Reno Municipal Court.

274 Justin Oakes is the contract conflict defender in Mineral County. He is also on conflict lists in Churchill, Lyon, Storey, and Washoe counties.

275 Pence is one of the primary contractors in Douglas County. The attorney appears on no other conflict lists in Nevada.

276 Ristenpart is a conflict contractor in Clark County and on the conflict list in Washoe County.

277 Also on conflict lists in Douglas, Lyon, and Storey counties.

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.[278] Carson City 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."[279]

Though requested, Carson City did not provide information about its total annual receipts from assessments imposed on indigent defendants to partially reimburse Carson City for the attorney appointed to represent them, and there is no line item in Carson City's 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.

Table: Carson City expenditures

	FY2013	FY2014	FY2015	FY2016	FY2017	5 YR Total
PD Expenditure	$1,366,126	$1,517,055	$1,478,073	$1,558,341	$1,546,150	$7,465,745

ANALYSIS	
% +/- (FY13-FY17)	13.18%
2018 (Budget)	$1,559,609
% +/- (FY17-FY18)	0.87%

2. Storey County (1st JDC)

There are two courts within Storey County: the 1st Judicial District Court, and the Virginia City Justice Court. The state public defender assigns the SPD Chief Deputy part-time to represent indigent defendants in the Storey County trial courts.

There are very few conflict cases in Storey County; conflict attorneys were appointed only three times during FY2017.[280] For when the need arises, the Storey County judges maintain a list of seven private attorneys who are available to be appointed on a case

[278] 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.

[279] Carson City, Nevada, Comprehensive Annual Financial Report (FY2013, FY2014, FY2015, FY2016, FY2017) (in Expenditures under "General Government > Other > Public Defender" line item); Carson City, Nevada, Final Budget (FY2018).

[280] Email from Virginia Township Court Judge Eileen Herrington to 6AC Executive Director David Carroll (Apr. 24, 2018).

by case basis and who are paid hourly at the statutory rate:[281] John Kadlic,[282] Anne Laughlin,[283] Justin Oakes,[284] Daniel Spence,[285] Laurie Trotter,[286] Robert Walker,[287] and Mary Lou Wilson.[288]

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.[289] 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.

Similarly, Storey County did not provide information about its total annual receipts from assessments imposed on indigent defendants to partially reimburse the county for the attorney appointed to represent them, and there is no line item in the county's 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.

Table: Storey County expenditures & recoupment

	FY2013	FY2014	FY2015	FY2016	FY2017	5 YR Total
PD Expenditure	$1,366,126	$1,517,055	$1,478,073	$1,558,341	$1,546,150	$7,465,745
% Recouped	2.06%	4.24%	5.11%	3.82%	3.94%	3.75%

ANALYSIS	
% +/- (FY13-FY17)	-30.07%
2018 (Budget)	$76,888
% +/- (FY17-FY18)	94.82%

[281] Email from Virginia Township Court Judge Eileen Herrington to 6AC Executive Director David Carroll (Apr. 2, 2018); Email from 1st Judicial District Court Administrator Max Cortes to 6AC Executive Director David Carroll (Apr. 17, 2018).

[282] The attorney appears on no other conflict lists in Nevada.

[283] Also on conflict lists in Carson City and Lyon County.

[284] Justin Oakes is the contract conflict defender in Mineral County. He is also on conflict lists in Carson City and Churchill, Lyon, and Washoe counties.

[285] Also on conflict lists in Carson City and Douglas and Lyon counties.

[286] The attorney appears on no other conflict lists in Nevada.

[287] Also on the conflict list in Carson City.

[288] The attorney appears on no other conflict lists in Nevada.

[289] 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.

B. COUNTY GOVERNMENT EMPLOYEE SYSTEMS

1. Elko County (4th JDC)

Elko County is the only county within the 4th Judicial District. There are five courts within Elko County: the 4th Judicial District Court, the Carlin Justice & Municipal Court, the Eastline Justice & West Wendover Municipal Court, the Elko Justice & Municipal Court, and the Wells Justice & Municipal Court.

Elko County has the oldest continually operating and largest county government employee public defender office among the rural counties. Elko County established its county public defender office in 1979.[290] The public defender office is responsible for representing "each indigent person who is under arrest and held for a public defense" and for fulfilling "all those duties set forth by Chapter 260 of the Nevada Revised Statutes,"[291] which includes adult criminal cases, juvenile delinquency proceedings, and representation of parents and children in abuse and neglect proceedings. The public defender office also represents defendants on municipal misdemeanors, who would be appointed counsel in municipal court for each of the four population centers. None of the public defender office attorneys are capital case qualified, so all capital cases must be assigned to other attorneys.

The county provides all overhead for the public defender office. The public defender office is located across the street from the Elko County Courthouse in 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 attorney 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.

The board of county commissioners determines the staffing and compensation for the office.[292] The only qualification required for the chief public defender is that the person be licensed to practice law in Nevada.[293] The public defender position is described in the county's code as a part-time position, and so may have a private caseload "insofar

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[290] County of Elko, Nevada, County Code 1-10-1 *et seq*. (current through Jan. 17, 2018; originally enacted June 28, 1979).

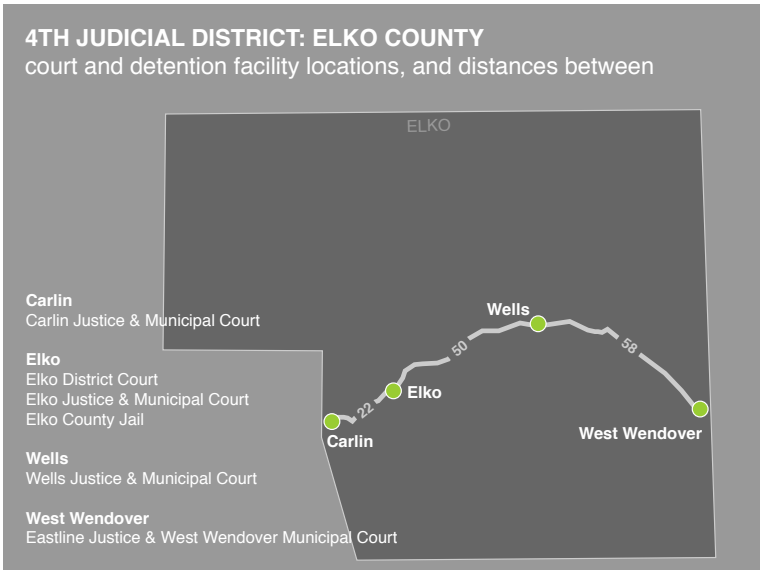
[291] County of Elko, Nevada, County Code 1-10-2 (current through Jan. 17, 2018; originally enacted June 28, 1979).

[292] County of Elko, Nevada, County Code 1-10-3 (current through Jan. 17, 2018; originally enacted June 28, 1979).

[293] County of Elko, Nevada, County Code 1-10-2 (current through Jan. 17, 2018; originally enacted June 28, 1979).

as such practice does not create an unreasonable time conflict with his duties."[294] In practice, though, the chief public defender and all deputy public defenders work full-time and do not maintain private law practices.

The office currently has seven attorneys, including the chief public defender and deputy chief public defender. There are five full-time "caseworkers;" positions that include some combination of filing and administrative support. The public defender office caseworkers maintain contact with clients and witnesses and file and prepare paperwork. The caseworkers also collect discovery from the district attorney's office in most cases. The office receives a jail list each day, and the caseworkers block out time on the attorneys' calendars to meet clients in jail. During school months, the office has three part-time social work interns (undergraduate students) who are unpaid but receive college credits for the internship.[295]



The chief public defender's salary is set by the Assistant County Manager/CFO at $110,000,[296] compared to the District Attorney's salary of $129,895 set by statute.[297] All deputy public defender salaries are the same as the assistant district attorneys; the deputy public defenders and assistant district attorneys are members of the Elko County Public Attorney's Association, which has a collective bargaining agreement with the county.[298]

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294 County of Elko, Nevada, County Code 1-10-4 (current through Jan. 17, 2018; originally enacted June 28, 1979).

295 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.

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

297 Nev. Rev. Stat. § 245.043 (2017).

298 The compensation schedule for both deputy public defenders and assistant district attorneys provides a range of $71,644 - $107,464. However, the salaries were frozen for two years, and compensation for at least one of the deputy public defenders has not kept pace with his experience level. The agreement contains provisions mutually relating to benefits, salary, leave, and termination.

Table: Elko County public defender salaries

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

Public defender staff receive the same benefits as other county employees, including medical insurance and retirement.[299]

Unlike all other counties involved in this study, the public defender office in Elko has a dedicated line item within its 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 public defender to expend investigator funds in a case. Once approved, the deputy public defenders choose the investigator to be hired and nearly all report using the same local private investigator.[300] The public defender office attorneys report using the investigator regularly in serious felony cases, but none of them report using him on more than about five cases each year; the investigator reports being hired by the office for about 8 to10 cases each month.

In cases where the public defender office has a conflict of interest, the Elko County judges maintain lists of private attorneys who are available to be appointed on a case by case basis and who are paid hourly at the statutory rate:

- 4th Judicial District Court and Elko Justice & Municipal Court:[301] Denise Bradshaw,[302] Julie Cavanaugh-Bill,[303] Diana Hillewaert,[304] Jeff Kump,[305] Tony

[299] The county pays 100% of the premiums for attorneys; the attorneys pay the premiums for family members.

[300] Mike Kolsch 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 Elko public defender office since 2013. He spends about 70% of his time working for the Elko public defenders.

[301] Email from Elko Justice & Municipal Court Administrator Randall Soderquist to 6AC Executive Director David Carroll (Apr. 25, 2018); Survey response from 4th Judicial District Judge Al Kacin. Elko Justice Simons reports that he considers the attorney's expertise when assigning cases to private counsel and would not assign A-level felonies to one attorney in particular.

[302] Except for other courts in Elko County, this attorney appears on no other conflict lists in Nevada.

[303] Also on the Ely Justice Court conflict list.

[304] Except for other courts in Elko County, this attorney appears on no other conflict lists in Nevada.

[305] Except for other courts in Elko County, this attorney appears on no other conflict lists in Nevada.

Liker,[306] David Lockie,[307] David Loreman,[308] Sherburne Macfarlan,[309] Patrick McGinnis,[310] William Schaeffer,[311] Michael Shurtz,[312] and Gary Woodbury.[313]

- Carlin Justice & Municipal Court:[314] Denise Bradshaw, Julie Cavanaugh-Bill, Diana Hillewaert, Jeff Kump, Tony Liker (misdemeanors only), David Lockie, David Loreman, Sherburne Macfarlan, Patrick McGinnis, William Schaeffer, Michael Shurtz, and Gary Woodbury (felonies only).
- Eastline Justice & West Wendover Municipal Court:[315] Primarily David Lockie, Sherburne McFarlan, and Michael Shurtz. Rarely called upon are Julie Cavanaugh-Bill, Gregory Corn,[316] Barbara Gallagher,[317] Diana Hillewaert, Jeff Kump, and Daniel Page.[318]
- Wells Justice & Municipal Court:[319] Denise Bradshaw, Julie Cavanaugh-Bill, Lorien Barrett Cole,[320] Barbara Gallagher, Diana Hillewaert, Jeff Kump, Tony Liker, David Lockie, David Loreman, and Sherburne Macfarlan.

Funding for indigent defense services in the courts within Elko County is by far the most complex of any of the rural county 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 funds the operations of the Elko Public Defender Office, including overhead and investigative/expert costs in cases represented by the office's attorneys.

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306 Except for other courts in Elko County, this attorney appears on no other conflict lists in Nevada.

307 Also on conflict lists in Eureka, Lander, Lincoln and White Pine counties. Also on the Ely Municipal conflict list.

308 Except for other courts in Elko County, this attorney appears on no other conflict lists in Nevada.

309 Also on conflict lists in Eureka, Lander, Lincoln and White Pine counties. Also on the Ely Municipal conflict list.

310 McGinnis served as a contract conflict attorney in Mineral County until July 1, 2018. He also is on the conflict lists in Pershing County and Washoe County. He is a contract attorney in the Reno Municipal Court.

311 Except for other courts in Elko County, this attorney appears on no other conflict lists in Nevada.

312 Also on conflict lists in Eureka, Lander, Lincoln and White Pine counties. Also on the Ely Municipal conflict list.

313 Except for other courts in Elko County, this attorney appears on no other conflict lists in Nevada.

314 Email from Carlin Justice & Municipal Judge Teri Feasel to 6AC Executive Director David Carroll (Mar. 15, 2018).

315 Email from Eastline Justice & West Wendover Municipal Court Administrator Teresa Naranjo to 6AC Executive Director David Carroll (Apr. 10, 2018).

316 Except for other courts in Elko County, this attorney appears on no other conflict lists in the state of Nevada.

317 Except for other courts in Elko County, this attorney appears on no other conflict lists in the state of Nevada.

318 Also is a conflict contractor in Clark County.

319 Email from Wells Justice & Municipal Judge Patricia Calton to 6AC Executive Director David Carroll (Apr. 25, 2018).

320 Except for other courts in Elko County, this attorney appears on no other conflict lists in the state of Nevada.

This cost is shown in the county table below as "PD Expen (gross)."[321] 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,[322] pursuant to state law.[323] 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.[324] The combined total that the four cities reimbursed to Elko County is shown in the county table as "Reimb from Cities." After deducting the amounts that the four cities reimburse to the county, the county's actual annual expenditure is shown in the county table as "PD Expen (net)." This sum does not include funds expended by the county for case by case appointments of private attorneys who are paid hourly or for case related expenses in the cases to which they are assigned.

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 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 county ordinance or state law (credited to the county). Elko County's annual financial documents show the amounts it collects annually from the assessments,[325] as shown in the county table "PD Recoupment (county)." Though recoupment information was requested from all four of the cities, only the City of Wells provided it.[326]

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321 Elko County, Nevada, Audited Financial Statements (FY2013, FY2014, FY2015, FY 2016, FY2017) (in Expenditures under "Judicial > Public Defender" line item). Elko County, Nevada, Final Budget (FY2018).

322 Telephone interview of Elko County Public Defender Kriston Hill (June 26, 2018).

323 Nev. Rev. Stat. § 171.188(4) (2017). It appears that only the City of Elko has formalized this agreement with the county in writing.

324 Email from Elko County Public Defender Kriston Hill to 6AC Executive Director David Carroll (June 26 & 27, 2018).

325 Elko County, Nevada, Audited Financial Statements (FY2013, FY2014, FY2015, FY 2016, FY2017) (in Revenues under "Charges for Services > Judicial > Public defender fees" line item).

326 Email from Wells Justice & Municipal Judge Patricia Calton to 6AC Executive Director David Carroll (July 3, 2018).

Table: Elko County expenditures & recoupment

	FY2013	FY2014	FY2015	FY2016	FY2017	5 YR Total
PD Expen (gross)	$1,031,638	$1,164,408	$1,374,100	$1,353,813	$1,367,600	$6,291,559
Reimb from Cities	$8,025	$6,000	$7,275	$7,650	$9,675	$38,625
PD Expenditure (net)	$1,023,613	$1,158,408	$1,366,825	$1,346,163	$1,357,925	$6,252,934
PD Recoup (county)	$27,659	$27,939	$14,187	$15,042	$6,701	$91,528
% Recouped	2.70%	2.41%	1.04%	1.12%	0.49%	1.46%

ANALYSIS	
% +/- (FY13-FY17)	32.57%
2018 (Budget - gross)	$1,438,145
2018 (County Reimb)	$11,550
2018 (Budget - net)	$1,426,595
% +/- (FY17-FY18)	5.16%

Table: City of Carlin expenditures

	FY2013	FY2014	FY2015	FY2016	FY2017	5 YR Total
PD Expenditure	$150	$375	$450	$225	$0	$1,200

ANALYSIS	
% +/- (FY13-FY17)	-100.00%
2018 (Actual)	$225
% +/- (FY17-FY18)	

Table: City of West Wendover expenditures

	FY2013	FY2014	FY2015	FY2016	FY2017	5 YR Total
PD Expenditure	$2,250	$1,350	$2,175	$2,175	$3,525	$11,475

ANALYSIS	
% +/- (FY13-FY17)	56.67%
2018 (Actual)	$3,900
% +/- (FY17-FY18)	10.64%

Table: City of Elko expenditures

	FY2013	FY2014	FY2015	FY2016	FY2017	5 YR Total
PD Expenditure	$5,100	$4,125	$4,275	$5,175	$6,150	$24,825

ANALYSIS	
% +/- (FY13-FY17)	20.59%
2018 (Actual)	$7,200
% +/- (FY17-FY18)	17.07%

Table: City of Wells expenditures & recoupment

	FY2013	FY2014	FY2015	FY2016	FY2017	5 YR Total
PD Expenditure	$525	$150	$375	$75	$0	$1,125
PD Recoup (muni)	$250	$600	$280	$150	$0	$1,280
% Recouped	47.62%	400.00%	74.67%	200.00%		113.78%

ANALYSIS	
% +/- (FY13-FY17)	-10.71%
2018 (Actual)	$225
% +/- (FY17-FY18)	-78.92%

2. Humboldt County (6th JDC)

Humboldt County is the only county within the 6th Judicial District. There are two courts within Humboldt County: the 6th Judicial District Court, and the Union Justice Court.

The Humboldt County board of county commissioners has established two separate county government employee public defender offices though each have only one attorney: the office of the public defender, and the office of the alternate public defender. Each office is appointed first in certain types of cases and is appointed as conflict counsel in other types of cases.

In 2007, Humboldt County created the public defender office.[327] Today, the public defender office represents, at every stage of the proceedings following appointment including on appeal and in post-conviction habeas corpus: all indigent persons who are appointed counsel; all persons admitted into the drug court program; and persons alleged to be incompetent, of limited capacity, or otherwise mentally ill.[328] Where the alternate public defender office has a conflict of interest, the public defender office represents: juveniles in delinquency cases; parents and/or children in abuse and neglect cases; parole revocation proceedings; and participants in adult diversion court and juvenile opportunity court.[329]

In February 2017, Humboldt County created the alternate public defender office.[330] The alternate public defender office represents: juveniles in delinquency cases; parents and/

[327] County of Humboldt, Nevada, County Code 2.44.010 *et seq*. (current through Apr. 23, 2018; originally enacted Apr. 23, 2007). Originally, the office was a regional office providing representation in Humboldt and Pershing counties. The two counties separated their indigent defense services in 2010.
[328] County of Humboldt, Nevada, County Code 2.44.050.B-E (current through Apr. 23, 2018; originally enacted Apr. 23, 2007).
[329] County of Humboldt, Nevada, County Code 2.44.120.C (current through Apr. 23, 2018; originally enacted Apr. 23, 2007).
[330] County of Humboldt, Nevada, County Code 2.44.110 et seq. (current through Apr. 23, 2018; originally enacted Feb. 6, 2017).

or children in abuse and neglect cases; parole revocation proceedings; and participants in adult diversion court and juvenile opportunity court.[331] Where the public defender office has a "conflict, unavailability or scheduling necessities," the alternate public defender office represents, at every stage of the proceedings following appointment including on appeal and in post-conviction habeas corpus, indigent persons in felony and gross misdemeanor proceedings who are under arrest and held for a public offense.[332]

The county provides all overhead for both the public defender office[333] and the alternate public defender office.[334] The two offices are located in the basement of the Humboldt County Courthouse, and they are difficult to find (although the county recently added the public defender office to the court directory in the lobby of the building). There are no signs in the basement showing the way and one must walk past storage lockers and utility rooms before reaching a plain door with a "public defender" sign attached. Inside that door is a small vestibule. To the immediate right is a single office for the alternate defender, where she must shut her office door to create an ethical screen from the public defender office. The alternate public defender does not have a secretary. To the left is the public defender's legal secretary, whose office is the only one with windows and connects to a conference room and the public defender's office. The look of the office is grey cinder block with low ceilings and fluorescent lighting.

The board of county commissioners appoints the public defender and the alternate public defender,[335] both of whom serve at the pleasure of the commissioners.[336] Alone among the rural counties with government employee public defender offices, Humboldt County establishes a hiring committee of one county commissioner, one district judge, the county administrator, and one private attorney – all appointed by the board of county commissioners – to make a recommendation to the commissioners for the person to be appointed as public defender[337] (but not as alternate public defender).

The board of county commissioners determines the staffing and compensation for both the public defender office and the alternate public defender office.[338] The only qualification required for the public defender is that the person be licensed to practice

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331 County of Humboldt, Nevada, County Code 2.44.120.B (current through Apr. 23, 2018; originally enacted Feb. 6, 2017).

332 County of Humboldt, Nevada, County Code 2.44.140.B (current through Apr. 23, 2018; originally enacted Feb. 6, 2017).

333 County of Humboldt, Nevada, County Code 2.44.030.F-G (current through Apr. 23, 2018).

334 County of Humboldt, Nevada, County Code 2.44.130.E-F (current through Apr. 23, 2018).

335 County of Humboldt, Nevada, County Code 2.44.010.B (public defender), 2.44.110.B (alternate public defender) (current through Apr. 23, 2018).

336 County of Humboldt, Nevada, County Code 2.44.010.C (public defender), 2.44.110.C (alternate public defender) (current through Apr. 23, 2018).

337 County of Humboldt, Nevada, County Code 2.44.010.B (current through Apr. 23, 2018).

338 County of Humboldt, Nevada, County Code 2.44.030.E (public defender), 2.44.130.D (alternate public defender) (current through Apr. 23, 2018).

law in Nevada and become a resident of Humboldt County "as soon as practicable after appointment."[339] The alternate public defender is required to be a resident of the county.[340] All attorneys in both offices (if there were ever to be more than one attorney in each office) are prohibited from carrying a private caseload.[341]

Matthew Stermitz has been the only public defender since the office was created in 2007. For FY2018, he is paid an annual salary of $122,420, plus standard county medical and retirement benefits.[342] There is one legal secretary Maureen Macdonald in the public defender office. For FY2018, she earns $53,090, plus benefits.[343] Ms. Macdonald has been the only legal secretary in the public defender office since she was hired in 2007 at the creation of the office.[344] She is the sister of the current Humboldt County District Attorney who was elected in approximately 2012. The budget of the public defender office is $264,040 for FY2018, including $2,500 as a line item for investigation.[345]

Maureen McQuillan is the only alternate public defender appointed since the office was created in 2017. For FY2018, she is paid an annual salary of $85,850, plus benefits.[346] There is no other staff in the alternate public defender office. The budget of the alternate public defender office is $129,700 for FY2018, including $1,250 as a line item for investigation.[347]

Since opening the alternate public defender office, the Humboldt County courts have only had one case that required more than two attorneys or where both the public defender and alternate public defender had a conflict of interest.[348] If such a situation should arise, the Union County Justice Court maintains a list of private attorneys who are available to be appointed on a case by case basis and who are paid hourly at the

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339 County of Humboldt, Nevada, County Code 2.44.030.A (current through Apr. 23, 2018).
340 County of Humboldt, Nevada, County Code 2.44.120.A (current through Apr. 23, 2018).
341 County of Humboldt, Nevada, County Code 2.44.030.B (public defender), 2.44.130.A-C (alternate public defender) (current through Apr. 23, 2018).
342 Email from Humboldt County Administrator Dave Mendiola to 6AC Executive Director David Carroll (Apr. 11, 2018).
343 Email from Humboldt County Administrator Dave Mendiola to 6AC Executive Director David Carroll (Apr. 11, 2018).
344 Email from Humboldt County Public Defender Matt Stermitz to 6AC Executive Director David Carroll (June 12, 2018).
345 Email from Humboldt County Administrator Dave Mendiola to 6AC Executive Director David Carroll (Apr. 11, 2018).
346 Email from Humboldt County Alternate Public Defender Maureen McQuillan to 6AC Executive Director David Carroll (May 3, 2018).
347 Email from Humboldt County Alternate Public Defender Maureen McQuillan to 6AC Executive Director David Carroll (May 3, 2018).
348 Email from 6th Judicial District Judge Mike Montero to 6AC Executive Director David Carroll (May 10, 2018); Email from Union Justice Judge Letty Norcutt to 6AC Executive Director David Carroll (Mar. 19, 2018).

statutory rate:[349] Rendal Miller[350] and Dolan Law[351] (consisting of attorneys Robert Dolan and Massey Mayo).

Funding for all indigent defense services in the courts located within Humboldt County comes from the county. The county funds the operations of the Humboldt County Public Defender Office and the Humboldt County Alternate Public Defender Office, including overhead and investigative costs in cases represented by the two offices' attorneys. This cost is shown in the table below as "PD Expenditure."[352] This sum does not include funds expended by the county for case by case appointments of private attorneys who are paid hourly or for case related expenses in the cases to which they are assigned, although as noted there has only been one such case since February 2017.

Humboldt County's annual financial documents show the amounts it collects annually from assessments imposed on indigent defendants requiring them to partially reimburse the county for the attorney appointed to represent them. This is shown in the table below as "PD Recoupment."[353]

Table: Humboldt County expenditures & recoupment

	FY2013	FY2014	FY2015	FY2016	FY2017	5 YR Total
PD Expenditure	$206,019	$214,582	$225,559	$243,762	$278,558	$1,168,480
PD Recoupment	$9,821	$13,270	$13,172	$10,251	$8,413	$54,927
% Recouped	4.77%	6.18%	5.84%	4.21%	3.02%	4.70%

ANALYSIS	
% +/- (FY13-FY17)	35.21%
2018 (Budget)	$393,740
% +/- (FY17-FY18)	41.35%

3. Pershing County (11th JDC)

Pershing County is one of three counties in the 11th Judicial District, along with Mineral and Lander, and it is the only one of the three that uses a county government employee public defender office, though it has only one attorney. There are two courts within Pershing County: the 11th Judicial District Court, and the Lake Justice Court.

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349 Email from Union Justice Judge Letty Norcutt to 6AC Executive Director David Carroll (Mar. 19, 2018).

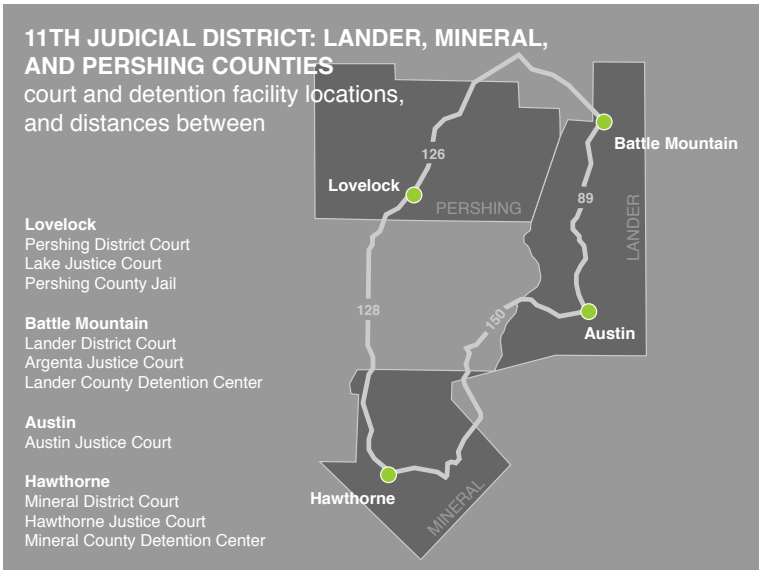
350 Also on the conflict list in Pershing County.

351 The two Dolan Law attorneys appear on no other conflict list in Nevada.

352 Humboldt County, Nevada, Audited Financial Statements (FY2013, FY2014, FY2015, FY 2016, FY2017) (in Expenditures under "Judicial > Public Defender" line item; and for 2018 also in Expenditures under "Judicial > Alt Public Defender" line item). Humboldt County, Nevada, Final Budget (FY2018).

353 Humboldt County, Nevada, Audited Financial Statements (FY2013, FY2014, FY2015, FY 2016, FY2017) (in Revenues under "Judicial > Public defender fees" line item).

Pershing County passed the current version of its county public defender office ordinance in 2013.[354] The public defender office represents, at every stage of the proceedings following appointment including on appeal and in post-conviction habeas corpus: all indigent persons who are appointed counsel; all persons admitted into the drug court program; parents and/or children in abuse and neglect cases; parents in termination of parental rights proceedings; and persons alleged to be mentally ill.[355]



The county provides all overhead for the public defender office.[356] The public defender office is located in the basement of the Pershing County Courthouse. There is no directory visible in the courthouse lobby, and the public defender office is difficult to find. There are no signs in the basement showing the way along the hallway that encircles the commissioners' meeting chambers. Inside the door to the office is a small vestibule. Immediately ahead is the public defender's legal secretary, whose office connects to a small conference room. To the left and through a door and small hallway with a copy machine is the public defender's office, with one window that lets in some natural light. The office is grey cinder block with low ceilings and fluorescent lighting, and the public defender keeps his desk and file space orderly.

The board of county commissioners determines the staffing and compensation for the office.[357] The public defender serves at the pleasure of the commissioners.[358] The only qualification required for the public defender is that the person be a resident of

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354 County of Pershing, Nevada, County Code 2.80.010 *et seq*. (current through Mar. 15, 2017; originally enacted 2013). On July 1, 2007, Pershing County left the SPD system and formed a regional county public defender office with Humboldt County. The two counties separated their indigent defense services in 2010.

355 County of Pershing, Nevada, County Code 2.80.020.B, 2.80.050, 2.80.060 (current through Mar. 15, 2017).

356 County of Pershing, Nevada, County Code 2.80.030.E-F (current through Mar. 15, 2017).

357 County of Pershing, Nevada, County Code 2.80.030.A-B (current through Mar. 15, 2017)."

358 County of Pershing, Nevada, County Code 2.80.010.B (current through Mar. 15, 2017).

Pershing County.[359] The public defender and any deputy public defenders (if there were ever to be more than one attorney in the office) are expressly authorized to have a private law practice outside the hours they work in the public defender office, defined as Monday through Friday, 8:00 am to 5:00 pm.[360] In practice, though, the public defender works full-time and does not maintain a private law practice.

Steve Cochran has been the only public defender for over 10 years. For FY2018, he is paid an annual salary of $107,566, plus standard county medical and retirement benefits.[361] Cochran says his compensation is "adequate" and that in 10 years he has never asked for a raise. There is one legal secretary in the public defender office, who earns for FY2018 $40,789, plus benefits.[362]

For cases where the public defender office has a conflict or more than one attorney is needed in a single case, Pershing County has a fixed fee contract with one private attorney to handle every conflict case to which he is appointed,[363] excluding death penalty cases and petitions for post-conviction relief.[364] The contract in place at the time of this evaluation was for the one-year term of August 1, 2017 through July 31, 2018.[365] In exchange, the attorney is paid a fixed annual rate of $50,000, payable in monthly installments.[366]

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[359] County of Pershing, Nevada, County Code 2.80.020.A (current through Mar. 15, 2017).

[360] County of Pershing, Nevada, County Code 2.80.010.C-D, 2.80.030.D (current through Mar. 15, 2017).

[361] Email from Pershing County Board of Commissioners Administrative Assistant Karen Wesner to 6AC Executive Director David Carroll (Apr. 12, 2018).

[362] Email from Pershing County Board of Commissioners Administrative Assistant Karen Wesner to 6AC Executive Director David Carroll (Apr. 12, 2018).

[363] Contract for Legal Services ¶ 2 (Aug. 1, 2004 through July 31, 2006) (between Pershing County Board of County Commissioners and Kyle Swanson); Letter from Board of County Commissioners, Pershing County, to Kyle Swanson (Aug. 2, 2017) (renewing contract for 2017-2018 budget year). "[W]hen the Court, for cause, disqualifies the State [sic] Public Defender or when the State [sic] Public Defender is otherwise unable to provide representation," the conflict contract attorney is responsible for representing: indigent adults charged with a public offense, children alleged to be delinquent or in need of supervision, probation revocation proceedings, appeals, and parents and/or children in abuse and neglect proceedings. Contract for Legal Services ¶¶ 1-5 (Aug. 1, 2004 through July 31, 2006) (between Pershing County Board of County Commissioners and Kyle Swanson; renewed for 2017-2018 budget year by Letter from Board of County Commissioners, Pershing County, to Kyle Swanson (Aug. 2, 2017)).

[364] Contract for Legal Services ¶ 11 (Aug. 1, 2004 through July 31, 2006) (between Pershing County Board of County Commissioners and Kyle Swanson; as renewed for 2017-2018 budget year by Letter from Board of County Commissioners, Pershing County, to Kyle Swanson (Aug. 2, 2017)).

[365] Letter from Board of County Commissioners, Pershing County, to Kyle Swanson (Aug. 2, 2017) (renewing contract for 2017-2018 budget year).

[366] Contract for Legal Services ¶ 8 (Aug. 1, 2004 through July 31, 2006) (between Pershing County Board of County Commissioners and Kyle Swanson; as renewed for 2017-2018 budget year by Letter from Board of County Commissioners, Pershing County, to Kyle Swanson (Aug. 2, 2017)).

The contract conflict attorney is responsible for paying all of the "expense of office space, furniture, equipment, supplies and secretarial service suitable for the conduct of Attorney's practice as required by this contract,"[367] including maintaining "adequate professional malpractice insurance, including errors and omissions coverage, in the policy limits of $500,000.00 during the term of this contract with the County."[368] In addition to paying overhead costs, the contract conflict attorney is responsible for paying out of his own pocket any attorney whom he has cover court for him in any appointed case.[369] The contract conflict attorney also bears the cost of mileage and travel expenses incurred in defending his appointed cases.[370] For other case related expenses such as investigation or experts, the attorney must seek funding from the court as prescribed by statute.[371]

The contract conflict attorney is expressly authorized to have a private law practice.[372] The contract may be terminated without cause upon 60 days advance written notice by either Pershing County or the attorney.[373] Kyle Swanson[374] has held the conflict contract in Pershing County since August 2004.[375]

If both the public defender and the contract conflict attorney have a conflict of interest, or if more than two attorneys are needed in a single case, the Pershing County judges maintain a list of seven private attorneys who are available to be appointed on a case

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[367] Contract for Legal Services ¶ 7 (Aug. 1, 2004 through July 31, 2006) (between Pershing County Board of County Commissioners and Kyle Swanson; as renewed for 2017-2018 budget year by Letter from Board of County Commissioners, Pershing County, to Kyle Swanson (Aug. 2, 2017)).

[368] Contract for Legal Services ¶ 15 (Aug. 1, 2004 through July 31, 2006) (between Pershing County Board of County Commissioners and Kyle Swanson; as renewed for 2017-2018 budget year by Letter from Board of County Commissioners, Pershing County, to Kyle Swanson (Aug. 2, 2017)).

[369] Contract for Legal Services ¶ 13 (Aug. 1, 2004 through July 31, 2006) (between Pershing County Board of County Commissioners and Kyle Swanson; as renewed for 2017-2018 budget year by Letter from Board of County Commissioners, Pershing County, to Kyle Swanson (Aug. 2, 2017)).

[370] Contract for Legal Services ¶ 10 (Aug. 1, 2004 through July 31, 2006) (between Pershing County Board of County Commissioners and Kyle Swanson; as renewed for 2017-2018 budget year by Letter from Board of County Commissioners, Pershing County, to Kyle Swanson (Aug. 2, 2017)).

[371] Contract for Legal Services ¶ 9 (Aug. 1, 2004 through July 31, 2006) (between Pershing County Board of County Commissioners and Kyle Swanson; as renewed for 2017-2018 budget year by Letter from Board of County Commissioners, Pershing County, to Kyle Swanson (Aug. 2, 2017)), citing Nev. Rev. Stat. § 7.135 (2017).

[372] Contract for Legal Services ¶ 12 (Aug. 1, 2004 through July 31, 2006) (between Pershing County Board of County Commissioners and Kyle Swanson; as renewed for 2017-2018 budget year by Letter from Board of County Commissioners, Pershing County, to Kyle Swanson (Aug. 2, 2017)).

[373] Contract for Legal Services ¶ 17 (Aug. 1, 2004 through July 31, 2006) (between Pershing County Board of County Commissioners and Kyle Swanson; as renewed for 2017-2018 budget year by Letter from Board of County Commissioners, Pershing County, to Kyle Swanson (Aug. 2, 2017)).

[374] Swanson is also on the conflict appointment list for Lander County.

[375] *See* Contract for Legal Services (Aug. 1, 2004 through July 31, 2006) (between Pershing County Board of County Commissioners and Kyle Swanson).

by case basis and who are paid hourly at the statutory rate:[376] Steve Evenson,[377] John Malone,[378] Patrick McGinnis,[379] Rendal Miller,[380] David Neidert,[381] John Oakes,[382] and Todd Plimpton.[383]

Funding for all indigent defense services in the courts located within Pershing County comes from the county. The county funds the operations of the Pershing County Public Defender Office, including overhead. The county also funds the compensation of the contract conflict attorney and of private attorneys who are appointed case by case and paid hourly. These combined costs to the county are shown in the table below as "PD Expenditure."[384] This sum does not include funds expended by the county for case related expenses on behalf of any indigent defendant.

Pershing County's annual financial documents show the amounts it collects annually from assessments imposed on indigent defendants requiring them to partially reimburse the county for the attorney appointed to represent them. This is shown in the table below as "PD Recoupment."[385]

Table: Pershing County expenditures & recoupment

	FY2013	FY2014	FY2015	FY2016	FY2017	5 YR Total
PD Expenditure	$154,182	$161,903	$171,299	$188,051	$183,939	$859,374
PD Recoupment	$1,165	$1,987	$2,367	$1,497	$1,555	$8,571
% Recouped	0.76%	1.23%	1.38%	0.80%	0.85%	1.00%

ANALYSIS	
% +/- (FY13-FY17)	19.30%
2018 (Budget)	$214,018
% +/- (FY17-FY18)	16.35%

[376] Email from Lake Justice Court Judge Karen Stephens to 6AC Executive Director David Carroll (Apr. 30, 2018); Survey response from 11th Judicial District Judge Jim Shirley (Apr. 16, 2018).

[377] Also on conflicts lists in Esmeralda, Lander and Nye counties.

[378] Malone is one of the conflict contractors in Carson City. He also is on conflict lists in Churchill, Douglas, Esmeralda, and the Canal Justice Court in Lyon County.

[379] McGinnis served as a contract conflict attorney in Mineral County until July 1, 2018. He also is on the conflict lists in Elko and Washoe counties. He is a contract attorney in the Reno Municipal Court.

[380] Also on conflict list in Humboldt County.

[381] Neidert is a contract defender in Fallon Municipal Court. He is also on the conflict list in Washoe County.

[382] Oakes is the primary contract defender in Mineral County. He is also on conflict lists in Carson City and Churchill County. He is a sub-contractor in the Sparks Municipal Court. Oakes also serves as a judge pro tem in Reno Justice Court, the Sparks Justice Court, and in the Reno Municipal Court.

[383] Plimpton is the primary contractor in Lander County.

[384] Pershing County, Nevada, Audited Financial Statements (FY2013, FY2014, FY2015, FY 2016, FY2017) (in Expenditures under "Judicial > Public Defender" line item). Pershing County, Nevada, Final Budget (FY2018).

[385] Pershing County, Nevada, Audited Financial Statements (FY2013, FY2014, FY2015, FY 2016, FY2017) (in Revenues under "Charges for Services > Judicial > Public defender fees" line item).

C. PRIVATE ATTORNEY SYSTEMS

1. Mineral County (11th JDC)

Mineral County is one of three counties in the 11th Judicial District, along with Pershing and Lander. There are two courts within Mineral County: the 11th Judicial District Court, and the Hawthorne Justice Court.

Since July 1, 2016, Mineral County has a single fixed fee contract with two private attorneys to between them represent, at all stages of criminal proceedings including post-conviction and habeas corpus and parole and probation revocation hearings, every person who receives appointment of counsel in a criminal case, delinquency proceeding, and parents and/or children in abuse and neglect cases.[386] There was a two-year contract in place for July 1, 2016 through June 30, 2018, paying a fixed annual rate of $80,0000, payable in monthly installments.[387] That was replaced by a one-year contract for July 1, 2018 through June 30, 2019, paying a fixed annual rate of $105,000, payable in monthly installments.[388] Under each of these contracts, the contract attorneys are additionally paid "the statutory hourly rate for any portion of a non-capital jury trial longer than three regular working days."[389] Additionally, the two contract attorneys together agree to "provide the County with an attorney qualified pursuant to Nevada Supreme Court Rule 250 to act as defense counsel in any capital case arising in the County,"[390] for which they can petition the court to pay additional attorney fees.[391]

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386 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.). John Oakes in January 2016 assumed the then-existing contract from Wayne Pederson. See Letter from John Oakes to Mineral County Commissioners (Apr. 12, 2016).

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

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

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

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

391 Contract for Services of Independent Contractor County Public Defender ¶ 7.a (July 1, 2018

The two contract attorneys are responsible for paying all overhead costs, including any support staff and continuing legal education.[392] For case related expenses such as investigation, experts, and transcripts, the attorneys must seek funding from the court as prescribed by statute.[393] The contract may be "renewed, extended or limited" at the pleasure of the board of county commissioners.[394]

John Oakes,[395] whose law office is located in Reno, actively solicited the Mineral County board of county commissioners to obtain the contract.[396] He urged that he would "save the County money from having to appoint outside legal counsel when legal conflicts arise," because he "enlisted the services" of a second attorney to "divide[]d the contract between us. In so doing, if I had a conflict, I would transfer the matter to [the second attorney] and if he had a conflict he would transfer the case to me."[397] John Oakes is one of the two attorneys for both the 2016-2018 and the 2018-2019 contracts.[398] The second attorney for 2016-2018 was Patrick McGinnis,[399] and the second attorney for 2018-2019 is Justin Oakes,[400] who is the son of John Oakes.

There is nothing in the contract that controls how the two attorneys divide the appointed cases, and similarly there is nothing in the contract that controls how the two attorneys divide the contract compensation. In practice, though, the entire compensation under the contract, both for the 2016-2018 term and for the current 2018-2019 term, is paid to John Oakes. John Oakes explains that, for 2016-2018,

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through June 30, 2019) (between Mineral County Board of County Commissioners and John E. Oakes, Esq. and Justin E. Oakes, Esq.).

392 Contract for Services of Independent Contractor County Public Defender ¶¶ 7, 9 (July 1, 2018 through June 30, 2019) (between Mineral County Board of County Commissioners and John E. Oakes, Esq. and Justin E. Oakes, Esq.).

393 Contract for Services of Independent Contractor County Public Defender ¶¶ 7.a, 8 (July 1, 2018 through June 30, 2019) (between Mineral County Board of County Commissioners and John E. Oakes, Esq. and Justin E. Oakes, Esq.).

394 Contract for Services of Independent Contractor County Public Defender ¶ 2.a (July 1, 2018 through June 30, 2019) (between Mineral County Board of County Commissioners and John E. Oakes, Esq. and Justin E. Oakes, Esq.).

395 John Oakes is also on conflict lists in Carson City, Churchill County, and Pershing County. He is a sub-contractor in the Sparks Municipal Court. Oakes also serves as a judge pro tem in Reno Justice Court, the Sparks Justice Court, and in the Reno Municipal Court.

396 *See* Letter from John Oakes to Mineral County Commissioners (Apr. 12, 2016).

397 Letter from John Oakes to Mineral County Commissioners (Apr. 12, 2016).

398 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.).

399 McGinnis served as a contract conflict attorney in Mineral County until July 1, 2018. He also is also on the conflict lists in Elko, Pershing, and Washoe counties. He is a contract attorney in the Reno Municipal Court.

400 Justin Oakes is also on conflict lists in Carson City, Churchill, Lyon, Storey, and Washoe.

"when there is a conflict Justin [Oakes] is appointed by the Justice Court and is paid by the court at the Statutory Rate."[401] But of course that makes no sense, because for the 2016-2018 contract term, Patrick McGinnis was already under contract with the county to provide representation as part of the contract compensation paid to John Oakes – indeed that is how John Oakes suggested the county would save money by contracting with him. And, the Hawthorne Justice Court advised that they rarely need conflict attorneys and did not makes any conflict appointments in FY2017,[402] a fact confirmed by the county's general ledger sheets showing payments made for indigent defense services during FY2017.[403] For the contract beginning July 1, 2018, John Oakes explains that "Justin [Oakes] has signed on with me to administer the contract. That may change in that he is very busy and may just want to stay status quo."[404] It is unclear what role John Oakes would play to "administer the contract."

If both of the two contract attorneys have a conflict of interest, or if more than two attorneys are needed in a single case, the Mineral County judges maintain a list of two or three private attorneys who are available to be appointed on a case by case basis and who are paid hourly at the statutory rate: Carl Hylin[405] is appointed by both the district and justice courts, and Richard Davies[406] is also appointed by the district court.[407] Prior to July 1, 2018, both courts also listed Justin Oakes as available for appointment on a case by case basis in conflict cases payable at the hourly rate, but since signing the contract with Mineral County, he *should* no longer be eligible for these hourly rate case by case conflict appointments.

Funding for all indigent defense services in the courts located within Mineral County comes from the county. The county funds the compensation of the two attorneys under the contract and of private attorneys who are appointed case by case and paid hourly. These costs to the county are shown in the table below as "PD Expenditure."[408] These figures do not include funds expended by the county for case related expenses approved by a court on behalf of any indigent defendant.

Mineral County's annual financial documents show the amounts it collects annually from assessments imposed on indigent defendants requiring them to partially

401 Email from John Oakes to 6AC Executive Director David Carroll (July 19, 2018).
402 Telephone interview of Hawthorne Justice Court Clerk Ruby Hamrey (May 14, 2018).
403 Email from Christine Hoferer to 6AC Executive Director David Carroll (May 14, 2018).
404 Email from John Oakes to 6AC Executive Director David Carroll (July 19, 2018).
405 This attorney appears on no other conflict lists in Nevada.
406 Also on the Carson City and Lyon County conflict lists.
407 Email from Mineral County Commissioner Jerrie Tipton to 6AC Executive Director David Carroll (Mar. 15, 2018).
408 Email from Christine Hoferer to 6AC Executive Director David Carroll (May 14, 2018) (providing Mineral County general ledger sheets of payments made to indigent defense attorneys for FY2014 through FY2017); Email from Mineral County Recorder-Auditor Executive Administrative Hillary Pellett to 6AC Executive Director David Carroll (July 10, 2018 (providing Mineral County general ledger sheets of payments made to indigent defense attorneys for FY2013 and FY2018).

reimburse the county for the attorney appointed to represent them. This is shown in the table below as "PD Recoupment."[409]

Table: Mineral County expenditures & recoupment

	FY2013	FY2014	FY2015	FY2016	FY2017	5 YR Total
PD Expenditure	$73,698	$66,861	$65,000	$65,600	$81,422	$352,580
PD Recoupment	$2,883	$1,570	$2,283	$1,873	$3,472	$12,081
% Recouped	3.91%	2.35%	3.51%	2.86%	4.26%	3.43%

ANALYSIS	
% +/- (FY13-FY17)	10.48%
2018 (Actual)	$80,000
% +/- (FY17-FY18)	-1.75%

2. Lander County (11th JDC)

Lander County is one of three counties in the 11th Judicial District, along with Pershing and Mineral. There are three courts within Lander County: the 11th Judicial District Court, the Argenta Justice Court, and the Austin Justice Court.

Lander County has a fixed fee contract with one private attorney to represent every person who receives appointed counsel in a criminal case or delinquency proceeding, including in probation revocation proceedings and appeals, and parents and/or children in abuse and neglect cases.[410] The current contract began for the two-year term of January 5, 2015 through December 31, 2016, and it automatically renewed by its terms for the two-year term of January 1, 2017 through December 31, 2018.[411] In exchange, the contract attorney is paid a fixed annual rate of $89,760 for calendar year 2017 and $91,555.20 for calendar year 2018, payable in quarterly installments.[412] The compensation increases by 2% for each subsequent year to which the contract is extended.[413]

The contract attorney must pay for all overhead expenses, as the contract explicitly states that the county will not pay for "office space, furniture, equipment and supplies,

[409] Mineral County, Nevada, Audited Financial Statements (FY2013, FY2014, FY2015, FY 2016, FY2017) (in Revenues under "Miscellaneous > Other > Public Defender reimbursements" line item).
[410] Public Defender Agreement ¶ 2 (Jan. 5, 2015 through Dec. 31, 2016) (between Lander County Board of County Commissioners and Belanger & Plimpton).
[411] Public Defender Agreement ¶ 1 (Jan. 5, 2015 through Dec. 31, 2016) (between Lander County Board of County Commissioners and Belanger & Plimpton).
[412] Public Defender Agreement ¶ 3 (Jan. 5, 2015 through Dec. 31, 2016) (between Lander County Board of County Commissioners and Belanger & Plimpton).
[413] Public Defender Agreement ¶ 3 (Jan. 5, 2015 through Dec. 31, 2016) (between Lander County Board of County Commissioners and Belanger & Plimpton).

and secretarial assistance required to perform" the contract.[414] The attorney is required to have and pay for a toll-free telephone line and to carry a $1,000,000 minimum per single occurrence liability insurance policy.[415] The only overhead cost paid by the county is that the county provides for the use of the attorney "a complete set of Nevada Revised Statutes with updates."[416] The contract explicitly states that if the contract attorney 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.[417] For case related expenses such as investigation or experts, the attorney must seek funding from the court as prescribed by statute.[418]

The attorney is expressly authorized to have a private law practice.[419] The contract automatically renews for successive two-year terms unless the county or the attorney give written notice of their intention to not renew by October 1 of the existing contract's final year.[420] The contract can be terminated at any time without cause upon 90 days advance written notice by either party.[421]

The contract is held by Todd Plimpton. He is the sole attorney at the law firm of Belanger and Plimpton located in Lovelock (Pershing County), Nevada.[422] He does maintain an office in Battle Mountain, located about a mile away from the courthouse. He employs two legal secretaries (one in Pershing and one in Lander), an office administrator, and a former client who he exonerated does legal research for him.

If the contract attorney has a conflict of interest, or if more than one attorney is needed in a single case, the Lander County judges maintain a list of six attorneys who are available to be appointed on a case by case basis and who are paid hourly

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

415 Public Defender Agreement ¶¶ 6, 7 (Jan. 5, 2015 through Dec. 31, 2016) (between Lander County Board of County Commissioners and Belanger & Plimpton).

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

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

418 Public Defender Agreement ¶ 10 (Jan. 5, 2015 through Dec. 31, 2016) (between Lander County Board of County Commissioners and Belanger & Plimpton).

419 Public Defender Agreement ¶ 8 (Jan. 5, 2015 through Dec. 31, 2016) (between Lander County Board of County Commissioners and Belanger & Plimpton).

420 Public Defender Agreement ¶ 1 (Jan. 5, 2015 through Dec. 31, 2016) (between Lander County Board of County Commissioners and Belanger & Plimpton).

421 Public Defender Agreement ¶ 4 (Jan. 5, 2015 through Dec. 31, 2016) (between Lander County Board of County Commissioners and Belanger & Plimpton).

422 "Doc" Belanger is the founder of the law firm and a long-time respected lawyer in northern Nevada who passed away in 2011. Out of respect, Plimpton kept the name on the law firm. See, https://www.belangerplimpton.com.

at the statutory rate: Debra Amens,[423] Steve Evenson,[424] Dave Lockie,[425] Sherborn McFarlan,[426] Michael Shurtz,[427] and Kyle Swanson.[428]

Funding for all indigent defense services in the courts located within Lander County comes from the county. The county funds the compensation of the contract attorney and of private attorneys who are appointed case by case and paid hourly. These combined costs to the county are shown in the table below as "PD Expenditure."[429] These figures do not include funds expended by the county for case related expenses on behalf of any indigent defendant.

Though requested, Lander County did not provide information about its total annual receipts from 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.

Table: Lander County expenditures

	FY2013	FY2014	FY2015	FY2016	FY2017	5 YR Total
PD Expenditure	$96,246	$85,616	$87,043	$111,170	$91,106	$471,181

ANALYSIS	
% +/- (FY13-FY17)	-5.34%
2018 (Budget)	$128,500
% +/- (FY17-FY18)	41.04%

423 This is the only conflict list this attorney appears on in Nevada.

424 Also on the conflicts list in Esmeralda, Nye and Pershing counties.

425 Also on conflict lists in Elko, Eureka, Lincoln, and White Pine counties. Also on the Ely Municipal conflict list.

426 Also on conflict lists in Elko, Eureka, Lincoln, and White Pine counties. Also on the Ely Municipal conflict list.

427 Also on conflict lists in Elko, Eureka, Lincoln, and White Pine counties. Also on the Ely Municipal conflict list.

428 Swanson is also a conflict contractor in Pershing County.

429 Lander County, Nevada, Audited Financial Statements (FY2013, FY2014, FY2015, FY 2016, FY2017) (in Expenditures under "Judicial > Public Defender" line item). Lander County, Nevada, Final Budget (FY2018).

3. Churchill County (10th JDC)

Churchill County is the only county within the 10th Judicial District. There are three courts within Churchill County: the 10th Judicial District Court, the New River Justice Court, and the Fallon Municipal Court. The provision of counsel in the Fallon Municipal Court is addressed separately in the final section of this Chapter. Churchill County has separate fixed fee contracts with three private attorneys to provide representation to indigent defendants in the justice and district courts.[430]

One contract – referred to as the "432B contract" – is for a one-year term of October 1, 2017 through September 30, 2018,[431] for one private attorney to represent all children at all stages of abuse and neglect cases, including "one (1) evidentiary hearing and three (3) mediations."[432] For the current contract term, this 432B contract attorney is paid a fixed annual rate of $33,000, payable in monthly installments, plus $100/hour for any additional evidentiary hearings or medications and termination of parent rights hearings.[433] The 432B contract automatically renews for three additional one-year terms unless cancelled by one of the parties,[434] and the contract may be terminated without cause upon 60 days advance written notice by either Churchill County or the attorney.[435]

Churchill County has separate but identical fixed fee contracts with two private attorneys each to represent indigent adult criminal defendants at all stages of the case but expressly excluding capital cases, and to represent children in delinquency proceedings, and to represent parents in abuse and neglect and termination of parental rights proceedings.[436] The current contracts are for a three-and-a-half year term of December 1, 2017 through June 30, 2021.[437] In exchange, each attorney is paid a fixed

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[430] Contract for Professional Services between Churchill County, Nevada and Jacob Sommer, Esq. for Indigent Legal Services (Dec. 1, 2017 through June 30, 2021); Contract for Professional Services between Churchill County, Nevada and Charles B. Woodman, Esq. for Indigent Legal Services (Dec. 1, 2017 through June 30, 2021); Contract for Professional Services between Churchill County, Nevada and Kaitlyn Miller Law, PLLC, for 432B Cases (Oct. 1, 2017 through Sept. 30, 2018).

[431] Contract for Professional Services between Churchill County, Nevada and Kaitlyn Miller Law, PLLC, for 432B Cases (Oct. 1, 2017 through Sept. 30, 2018).

[432] Contract for Professional Services between Churchill County, Nevada and Kaitlyn Miller Law, PLLC, for 432B Cases ¶¶ 2.A, 5.A (Oct. 1, 2017 through Sept. 30, 2018).

[433] Contract for Professional Services between Churchill County, Nevada and Kaitlyn Miller Law, PLLC, for 432B Cases ¶ 5.A (Oct. 1, 2017 through Sept. 30, 2018).

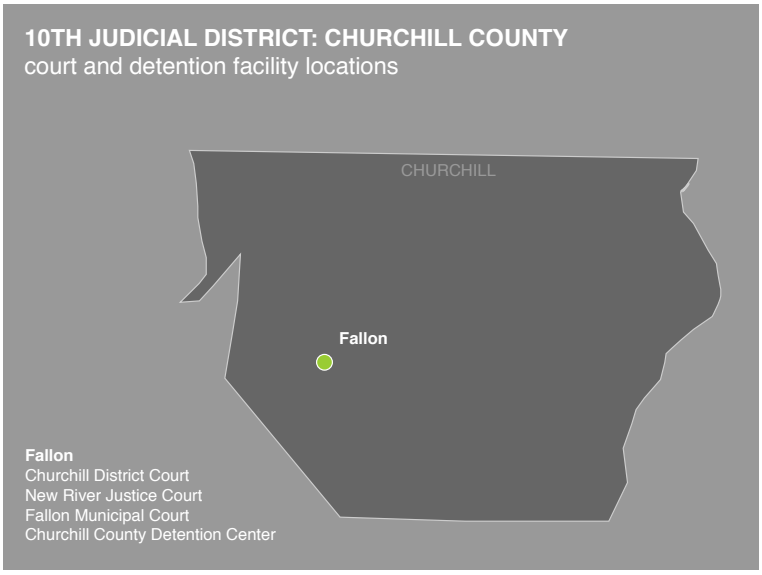
[434] Contract for Professional Services between Churchill County, Nevada and Kaitlyn Miller Law, PLLC, for 432B Cases ¶ 1 (Oct. 1, 2017 through Sept. 30, 2018).

[435] Contract for Professional Services between Churchill County, Nevada and Kaitlyn Miller Law, PLLC, for 432B Cases ¶ 8 (Oct. 1, 2017 through Sept. 30, 2018).

[436] Contract for Professional Services between Churchill County, Nevada and Jacob Sommer, Esq. for Indigent Legal Services ¶¶ 2.A, 2.B, 2.C, 2.D (Dec. 1, 2017 through June 30, 2021); Contract for Professional Services between Churchill County, Nevada and Charles B. Woodman, Esq. for Indigent Legal Services ¶¶ 2.A, 2.B, 2.C, 2.D (Dec. 1, 2017 through June 30, 2021).

[437] *See, e.g.*, Contract for Professional Services between Churchill County, Nevada and Jacob Sommer,

annual rate of $168,300 for December 2017 through June 2019 (increasing to $172,508 for FY2020 and to $176,820 for FY 2021), payable in monthly installments,[438] plus $100/hour for preparing for and attending mediations.[439] The contracts expressly provide that "[t]he Court may, for the reasons specified in NRS 7.125(4)(a)(d), award extraordinary fees to Contractor in a particular matter, which are over and above the compensation specified provided that the statutorily prescribed procedures contained in NRS 7.125(4) are complied with."[440]



The contract attorneys are responsible for paying for all overhead, and the contracts expressly state that the compensation under the contracts is intended to include "an allowance for office space, furniture, equipment, and supplies, pursuant to NRS 260.040. The cost of . . . secretarial services, and any other necessary expense for the Contractor's practice as required by this Contract is the sole responsibility of the Contractor."[441] The contract attorneys are contractually required to "staff and maintain an office in Churchill County . . . and to hold regular office hours," as well has maintain "professional liability insurance, including errors and omissions coverage, in the minimum amount of $500,000.00 per claim and $1,000,000.00 aggregate" during the contract.[442] For case related expenses such as investigation or experts, the attorneys must seek funding from the court as prescribed by statute.[443]

Esq. for Indigent Legal Services ¶ 1 (Dec. 1, 2017 through June 30, 2021).

438 *See, e.g.*, Contract for Professional Services between Churchill County, Nevada and Jacob Sommer, Esq. for Indigent Legal Services ¶ 6.A (Dec. 1, 2017 through June 30, 2021).

439 *See, e.g.*, Contract for Professional Services between Churchill County, Nevada and Jacob Sommer, Esq. for Indigent Legal Services ¶ 6.B (Dec. 1, 2017 through June 30, 2021).

440 *See, e.g.*, Contract for Professional Services between Churchill County, Nevada and Jacob Sommer, Esq. for Indigent Legal Services ¶ 6.E (Dec. 1, 2017 through June 30, 2021).

441 *See, e.g.*, Contract for Professional Services between Churchill County, Nevada and Jacob Sommer, Esq. for Indigent Legal Services ¶ 4.A (Dec. 1, 2017 through June 30, 2021).

442 *See, e.g.*, Contract for Professional Services between Churchill County, Nevada and Jacob Sommer, Esq. for Indigent Legal Services ¶¶ 4.A, 8.B (Dec. 1, 2017 through June 30, 2021).

443 *See, e.g.*, Contract for Professional Services between Churchill County, Nevada and Jacob Sommer, Esq. for Indigent Legal Services ¶ 6.C (Dec. 1, 2017 through June 30, 2021).

The contract attorneys are expressly authorized to have a private law practice.[444] The contracts may be terminated without cause upon 90 days advance written notice by either Churchill County or the attorney.[445]

The two non-432B contract attorneys are Jacob Sommer[446] and Charlie Woodman.[447] Sommer's law office is located in an office building in downtown Fallon, and 1 ½ blocks from the courthouses. Woodman's office is in Reno (Washoe County), Nevada, and he does not have an office in Churchill County despite the contract requirement that he do so, however he obtained approval for this from the board of county commissioners. When Woodman first received a contract in 2014, he advised the commissioners that he would "shar[e] office space with Jacob Sommer [in Fallon] but will establish policies and procedures to protect against any conflict of interest with their cases."[448] On that basis, he was awarded the contract, to be performed by him and his associate Peter Smith.[449]

For cases where the contract attorneys have a conflict of interest, or where additional attorneys are needed in a single case, the Churchill County judges maintain lists of private attorneys who are available to be appointed on a case by case basis and who are paid hourly at the statutory rate:

- 10th Judicial District Court:[450] Troy Jordan,[451] Kaitlyn Miller (who holds the Churchill County 432B contract), John Oakes,[452] and Wayne Pederson.[453]
- New River Justice Court:[454] Jack Fox,[455] Troy Jordan, John Malone,[456] Matthew

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444 *See, e.g.*, Contract for Professional Services between Churchill County, Nevada and Jacob Sommer, Esq. for Indigent Legal Services ¶ 4.C (Dec. 1, 2017 through June 30, 2021).

445 *See, e.g.*, Contract for Professional Services between Churchill County, Nevada and Jacob Sommer, Esq. for Indigent Legal Services ¶ 9 (Dec. 1, 2017 through June 30, 2021).

446 Sommer is also the primary contractor in Fallon Municipal Court and is on the conflict list in Lyon County.

447 Woodman appears on no conflict lists in Nevada.

448 *See* Memorandum from County Manager Eleanor Lockwood to Churchill County Commissioners (June 3, 2014).

449 Peter Smith appears on no conflict lists in Nevada.

450 Survey response from 10th Judicial District Court Administrator Sue Sevon.

451 Also on conflict lists in Carson City and Lyon and Washoe counties.

452 The attorney is the primary contractor in Mineral County. He is also on conflict lists in Carson City, and in Pershing County. He is a sub-contractor in the Sparks Municipal Court. Oakes also serves as a judge pro tem in Reno Justice Court, the Sparks Justice Court, and in the Reno Municipal Court.

453 Pederson holds one of three contracts in Lyon County. He is also the conflict list in the Fernley Municipal Court in Lyon County.

454 Email from New River Justice Chief Court Clerk Sarah Tracy to 6AC Executive Director David Carroll (Mar. 26, 2018).

455 This attorney is the only conflict list this attorney is on in Nevada.

456 Malone also is on conflict lists in Carson City and Douglas, Esmeralda, Pershing and Lyon County (the Canal Township Justice Court).

Merrill,[457] Michael Novi,[458] John Oakes, and Justin Oakes.[459]

Funding for indigent defense services in the district and justice courts located within Churchill County comes from the county. (Funding of indigent defense services in the Fallon Municipal Court is addressed separately in the final section of this Chapter.) The county funds the compensation of the three contract attorneys and of private attorneys who are appointed case by case and paid hourly. These combined costs to the county are available for some but not all years from the county's annual financial documents, and where available, are shown in the table below as "PD Expenditure."[460] The figures shown are not believed to include funds expended by the county for case related expenses on behalf of any indigent defendant.

Similarly, Churchill County's annual financial documents show for some years the amounts it collects annually from assessments imposed on indigent defendants requiring them to partially reimburse the county for the attorney appointed to represent them. For the available years, this is shown in the table below as "PD Recoupment."[461]

Table: Churchill County expenditures & recoupment

	FY2013	FY2014	FY2015	FY2016	FY2017	5 YR Total
PD Expenditure			$483,253	$480,082	$484,149	$1,447,484
PD Recoupment	$13,446	$11,254	$13,608	$15,414		$53,722
% Recouped			2.82%	3.21%		3.71%

ANALYSIS	
% +/- (FY13-FY17)	
FY2018 (Budget)	$487,000
% +/- (FY17-FY18)	0.59%

4. Lyon County (3rd JDC)

Lyon County is the only county within the 3rd Judicial District. There are six courts within Lyon County: the 3rd Judicial District Court, the Canal Justice Court, the Dayton Justice Court, the Walker River Justice Court, the Fernley Municipal Court, and the Yerington Municipal Court. The provision of counsel in the Fernley Municipal

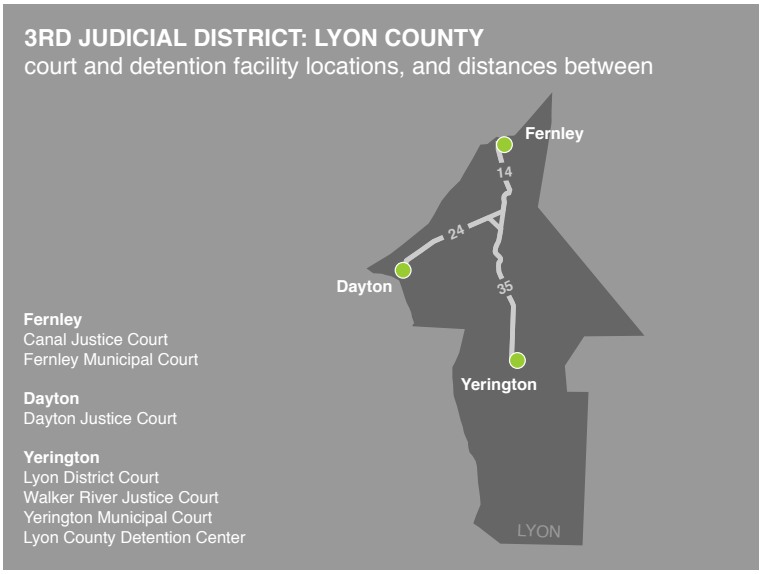
457 Merrill is the primary contractor in the Dayton Justice Court (Lyon County).

458 The attorney is also on the conflict list for the East Fork Justice Court in Douglas County.

459 Justin Oakes is the primary conflict attorney in Mineral County. He also is on conflict lists in Carson City and Lyon, Storey and Washoe counties.

460 Churchill County, Nevada, Comprehensive Annual Financial Report (FY2013, FY2014, FY2015, FY 2016, FY2017) (in Expenditures under "Judicial > Indigent defense" line item). Churchill County, Nevada, Final Budget (FY2018).

461 Churchill County, Nevada, Comprehensive Annual Financial Report (FY2013, FY2014, FY2015, FY 2016, FY2017) (in Revenues under "Charges for services > Public defender fees" line item).



Court and the Yerington Municipal Court is addressed separately in the final section of this Chapter.

Lyon County has separate but identical fixed fee contracts with three private attorneys to provide representation to indigent defendants in the justice and district courts.[462] Each contract attorney is responsible for representing indigent adults in criminal cases at all stages including sentencing and on appeal and all matters in any Lyon County or regional drug court, children in delinquency proceedings including at disposition and on appeal, probation/parole revocation proceedings at all stages including on appeal, parents and/or children in abuse and neglect cases at all stages including on appeal, and to assist an SCR 25 qualified attorney in one capital case each contract year.[463] The current contracts are each for a three-year term of July 1, 2017 through June 30, 2020.[464] In exchange, each attorney is paid a fixed annual rate of $185,400, for July 1, 2017 through June 30, 2018, payable in monthly installments, and the "parties may increase the contract amount for the subsequent two fiscal years by mutual agreement of the parties" or the compensation will remain the same.[465] Each attorney is also paid $125/hour for additional capital cases beyond one in each contract year.[466]

The contract attorneys are responsible for paying for all overhead, expressly including "office space, telephone, fax, computer, furniture, equipment, supplies, and secretarial

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462 Agreement for Public Defender Services (July 1, 2017 through June 30, 2020) (between Lyon County and Aaron Mouritsen); Agreement for Public Defender Services (July 1, 2017 through June 30, 2020) (between Lyon County and Wayne Pederson); Agreement for Public Defender Services (July 1, 2017 through June 30, 2020) (between Lyon County and Kenneth Ward), replaced on Apr. 5, 2018 by Agreement for Public Defender Services (July 1, 2017 through June 30, 2020) (between Lyon County and Matthew Merrill).

463 *See, e.g.*, Agreement for Public Defender Services ¶¶ B.1-4, C.1, D.1-3, E.1-3 (July 1, 2017 through June 30, 2020) (between Lyon County and Aaron Mouritsen).

464 *See, e.g.*, Agreement for Public Defender Services ¶ A.1 (July 1, 2017 through June 30, 2020) (between Lyon County and Aaron Mouritsen).

465 *See, e.g.*, Agreement for Public Defender Services ¶ J.1-2 (July 1, 2017 through June 30, 2020) (between Lyon County and Aaron Mouritsen).

466 *See, e.g.*, Agreement for Public Defender Services ¶ C.1 (July 1, 2017 through June 30, 2020) (between Lyon County and Aaron Mouritsen).

services" necessary to carry out the duties of the contract.[467] The contract attorneys are contractually required to "staff and maintain an office in Lyon County" and to maintain "liability insurance, including errors and omissions coverage and general liability coverage, in the policy limits of at least $500,000 during the contract.[468] The contract attorneys also bear the cost of mileage and travel expenses incurred in defending their appointed cases.[469] For other case related expenses such as investigation or experts, the attorneys must seek funding from the court as prescribed by statute.[470]

The contract attorneys are expressly authorized to have a private law practice.[471] The contracts are renewable for additional terms of one, two, or three years by agreement of the parties, and the contracts may be terminated without cause upon 90 days advance written notice by either Lyon County or the attorney.[472]

Indigent defense work under the contracts may not be sub-contracted out to other attorneys, but the contract attorneys are specifically allowed to employ assistant attorneys to help cover the court appointed representation.[473] This means that an attorney may enter into a contract with the county and then assign the majority of the appointed 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.

As of April 5, 2018, the three contract attorneys are: Aaron Mouritsen,[474] Wayne Pederson[475] (and his associate Patrick Mansfield[476]), and Matthew Merrill.[477] The contracts do not specify how the three contract attorneys are to divide the county's caseload. The contracts each state: "Attorney realizes that there will be two other attorneys who will have executed a similar agreement and agrees to cooperate with

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467 *See, e.g.*, Agreement for Public Defender Services ¶ F.1-2 (July 1, 2017 through June 30, 2020) (between Lyon County and Aaron Mouritsen).

468 *See, e.g.*, Agreement for Public Defender Services ¶¶ F.1-2, H.1 (July 1, 2017 through June 30, 2020) (between Lyon County and Aaron Mouritsen).

469 *See, e.g.*, Agreement for Public Defender Services ¶ J.6 (July 1, 2017 through June 30, 2020) (between Lyon County and Aaron Mouritsen).

470 *See, e.g.*, Agreement for Public Defender Services ¶ J.3 (July 1, 2017 through June 30, 2020) (between Lyon County and Aaron Mouritsen) (citing Nev. Rev. Stat. §§ 7.135, 7.145, 7.155 (2017)).

471 *See, e.g.*, Agreement for Public Defender Services ¶ I.1 (July 1, 2017 through June 30, 2020) (between Lyon County and Aaron Mouritsen).

472 *See, e.g.*, Agreement for Public Defender Services ¶¶ L.2-3 (July 1, 2017 through June 30, 2020) (between Lyon County and Aaron Mouritsen).

473 *See, e.g.*, Agreement for Public Defender Services ¶¶ M.1-2 (July 1, 2017 through June 30, 2020) (between Lyon County and Aaron Mouritsen).

474 Attorney does not appear on any conflict lists in Nevada.

475 Attorney is on conflict lists in Churchill County and in the Fernley Municipal Court.

476 Attorney does not appear on any conflict lists in Nevada.

477 Attorney is on the conflict list in Churchill County.

the other attorneys to ensure that all courts are adequately covered by one or more of the attorneys. Attorney shall cooperate with the other two public defenders to ensure, to the extent possible under ethical considerations, that all cases are covered and that any conflicts are resolved by the three Public Defenders. Attorney is not entitled to additional compensation for conflict cases."[478] Over the years, a *de facto* system has developed where each contract attorney takes the cases that arise out of a single justice court and takes conflicts arising out of one of the other justice courts. Under the loose framework in place, Mouritsen takes primary appointments out of Canal Justice Court and conflicts out of Walker River Justice Court, Pederson takes primary appointments out of Walker River Justice Court and conflicts out of Dayton Justice Court, and Merrill takes primary appointments out of Dayton Justice Court and conflicts out of Canal Justice Court. That said, the court might "skip the line" so to speak, and appoint the other contract attorney if the case warrants it.

If all three of the contract attorneys have a conflict of interest, or if more than three attorneys are needed in a single case, the Lyon County judges maintain lists of private attorneys who are available to be appointed on a case by case basis and who are paid hourly at the statutory rate:

- 3rd Judicial District Court:[479] Aaron Bushur, Karla Butko, Richard Davies,[480] Brad Johnston,[481] Troy Jordan,[482] Jesse Kalter, John Malone,[483] Justin Oakes,[484] Leanne Schumann, Kelly Vandeburgt, Mario Walther, and Stephen Young.[485]
- Canal Township Justice Court:[486] Troy Jordan, John Malone, and Justin Oakes.
- Dayton Justice Court:[487] Richard Davies, Laura Grant,[488] Anne Laughlin,[489] Thomas Luria,[490] Justin Oakes, and Daniel Spence.[491]

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478 *See, e.g.*, Agreement for Public Defender Services ¶¶ N.1-2 (July 1, 2017 through June 30, 2020) (between Lyon County and Aaron Mouritsen).

479 Survey response from 3rd Judicial District Court Judge John Schlegelmilch.

480 Attorney is on conflict list in Carson City and Mineral County.

481 Attorney holds the primary contract in the Yerington Municipal Court.

482 Also on conflict lists in Carson City and Churchill and Washoe counties.

483 Malone is a contract conflict defender in Carson City. He is also on conflict lists in Churchill, Douglas, Esmerelda, and Pershing counties.

484 Justin Oakes is the primary conflict attorney in Mineral County. He also is on conflict lists in Carson City and Churchill, Storey and Washoe counties.

485 Attorney does not appear on any other conflict list in Nevada.

486 Email from Lisa Grigg to 6AC Executive Director David Carroll (May 7, 2018).

487 Letter from Dayton Justice Court Judge Camille Vecchiarelli to 6AC Executive Director David Carroll (Mar. 15, 2018).

488 Attorney does not appear on any other conflict list in Nevada.

489 Attorney appears on conflict lists in Carson City and Storey counties.

490 Attorney does not appear on any other conflict list in Nevada.

491 Also on conflict lists in Carson City and Churchill and Storey counties.

- Walker River Justice Court:[492] Brad Johnston, Jacob Sommer,[493] Adam Wynott,[494] and Stephen Young.

Funding for indigent defense services in the district and justice courts located within Lyon County comes from the county. (Funding of indigent defense services in the Fernley Municipal Court and the Yerington Municipal Court is addressed separately in the final section of this Chapter.) The county funds the compensation of the three contract attorneys and of private attorneys who are appointed case by case and paid hourly. These combined costs to the county are shown in the table below as "PD Expenditure."[495] The figures shown do not include funds expended by the county for case related expenses on behalf of any indigent defendant.

Lyon County's annual financial documents reflect the amounts it collects annually from assessments imposed on indigent defendants requiring them to partially reimburse the county for the attorney appointed to represent them. This is shown in the table below as "PD Recoupment."[496]

Table: Lyon County expenditures & recoupment

	FY2013	FY2014	FY2015	FY2016	FY2017	5 YR Total
PD Expenditure	$406,517	$406,517	$406,517	$406,517	$495,000	$2,121,068
PD Recoupment	$19,526	$13,550	$15,937	$17,573	$18,905	$85,491
% Recouped	4.80%	3.33%	3.92%	4.32%	3.82%	4.03%

ANALYSIS	
% +/- (FY13-FY17)	21.77%
2018 (Budget)	$556,200
% +/- (FY17-FY18)	12.36%

5. Nye County (5th JDC)

Nye County is one of the two counties making up the 5th Judicial District, along with Esmeralda. There are four courts within Nye County: the 5th Judicial District Court, the Beatty Justice Court, the Pahrump Justice Court, and the Tonopah Justice Court.

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492 Letter from Walker River Justice Court Judge Michael Fletcher to 6AC Executive Director David Carroll (Mar. 19, 2018).

493 Attorney holds the primary contract in the Fallon Municipal Court.

494 Attorney does not appear on any other conflict list in Nevada.

495 Lyon County, Nevada, Comprehensive Annual Financial Report (FY2013, FY2014, FY2015, FY 2016, FY2017) (in Expenditures under "Judicial > Public Defender" line item). Lyon County, Nevada, Final Budget (FY2018).

496 Lyon County, Nevada, Comprehensive Annual Financial Report (FY2013, FY2014, FY2015, FY 2016, FY2017) (in Revenues under "Fines & forfeituress > Public defender reimbursement" line item).

Nye County has separate fixed fee contracts with five private attorneys to provide representation to indigent defendants in the district and three justice courts.[497] Each contract attorney is responsible for providing primary representation for cases arising out of one or more justice courts and for providing conflict representation for case arising out of the other justice court(s).[498] Each contract attorney is responsible for representing indigent adults in non-capital criminal cases at all stages including probation/parole revocation and specialty courts and direct appeals, "provid[ing] legal services to Drug Court of Nye County, representing children in delinquency proceedings, representing parents and/or children in abuse and neglect and termination of parental rights cases, and to "attend Justice Court 72-hour in-custody hearings on a rotating basis with other consortium counsel as scheduled."[499] Capital cases are expressly excluded from the contracts.[500] At the time of this evaluation, the contracts were for a one-year term of July 1, 2017 through June 30, 2018.[501] In exchange, each attorney is paid a fixed annual rate of $155,00, payable in quarterly installments.[502]

The contract attorneys are responsible for paying for all overhead costs necessary for performance of the contract, and they are required to carry "professional liability insurance, including errors and omissions coverage, in the minimum amount of $250,000 per claim and $500,000 aggregate" during the contract.[503] The contract attorneys also bear the cost of mileage and travel expenses and "routine investigative costs" incurred in defending their appointed cases.[504] For other case related expenses

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497 Contract for Professional Services between Nye County, Nevada and Jason L. Earnest, Esq. for Public Defender Services (July 1, 2017 through June 30, 2018); Contract for Professional Services between Nye County, Nevada and Harry R. Gensler, Esq. for Public Defender Services (July 1, 2017 through June 30, 2018), and Addendum to Contract for Professional Services (Appointment as Program Coordinator); Contract for Professional Services between Nye County, Nevada and Nathan Gent for Public Defender Services (July 1, 2017 through June 30, 2018); Contract for Professional Services between Nye County, Nevada and The Law office of David Rickert, LLC for Public Defender Services (July 1, 2017 through June 30, 2018); Contract for Professional Services between Nye County, Nevada and Jonathan K. Nelson, Esq. for Public Defender Services (Tonopah and Beatty) (July 1, 2017 through June 30, 2018).

498 *See, e.g.*, Contract for Professional Services between Nye County, Nevada and Jonathan K. Nelson, Esq. for Public Defender Services (Tonopah and Beatty) ¶¶ 1.A, 3.B, 3.D (July 1, 2017 through June 30, 2018).

499 *See, e.g.*, Contract for Professional Services between Nye County, Nevada and Jonathan K. Nelson, Esq. for Public Defender Services (Tonopah and Beatty) ¶ 2.A-F (July 1, 2017 through June 30, 2018).

500 *See, e.g.*, Contract for Professional Services between Nye County, Nevada and Jonathan K. Nelson, Esq. for Public Defender Services (Tonopah and Beatty) ¶ 2.A (July 1, 2017 through June 30, 2018).

501 *See, e.g.*, Contract for Professional Services between Nye County, Nevada and Jonathan K. Nelson, Esq. for Public Defender Services (Tonopah and Beatty) ¶ 1 (July 1, 2017 through June 30, 2018).

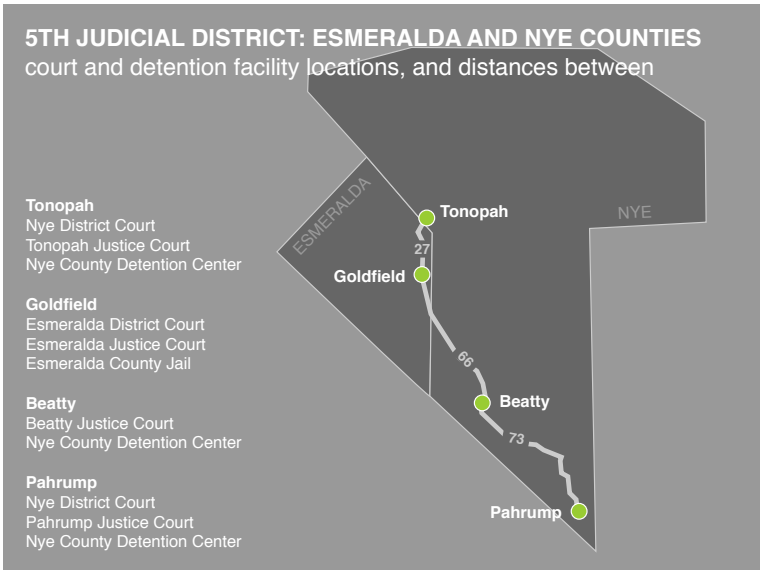
502 *See, e.g.*, Contract for Professional Services between Nye County, Nevada and Jonathan K. Nelson, Esq. for Public Defender Services (Tonopah and Beatty) ¶ 4.A (July 1, 2017 through June 30, 2018).

503 *See, e.g.*, Contract for Professional Services between Nye County, Nevada and Jonathan K. Nelson, Esq. for Public Defender Services (Tonopah and Beatty) ¶¶ 3.C, 7.B (July 1, 2017 through June 30, 2018).

504 *See, e.g.*, Contract for Professional Services between Nye County, Nevada and Jonathan K. Nelson, Esq. for Public Defender Services (Tonopah and Beatty) ¶¶ 3.C, 4.B (July 1, 2017 through June 30,

such as "extraordinary investigative costs" or experts, the attorneys must seek funding from the court as prescribed by statute.[505]

The contract attorneys are expressly authorized to have a private law practice.[506] The contracts may be terminated without cause upon 90 days advance written notice by either Nye County or the attorney.[507]



Through June 30, 2018, the five contract attorneys are: Jason Earnest,[508] Harry Gensler,[509] Nathan Gent,[510] and David Rickert, all providing primary services in Pahrump Justice Court and conflict services in Beatty and Tonopah Justice Courts; and Jonathan Nelson[511] providing primary services in Beatty and Tonopah Justice Courts and conflict services in Pahrump Justice Court. Harry Gensler has an addendum to his contract, in which he agrees to "oversee the program including assigning cases on a rotating basis among the contract Attorneys to ensure an equitable distribution; monitor[] case reporting requirements from attorneys; approv[e] of and oversee[] the use of substitute attorneys for the contract Attorneys" and carry out other indigent defense program duties as are delegated to him by the county manager.[512] For these additional duties, Gensler is paid a fixed annual fee of $25,000, paid quarterly.[513]

2018).

505 *See, e.g.*, Contract for Professional Services between Nye County, Nevada and Jonathan K. Nelson, Esq. for Public Defender Services (Tonopah and Beatty) ¶ 4.B (July 1, 2017 through June 30, 2018).

506 *See, e.g.*, Contract for Professional Services between Nye County, Nevada and Jonathan K. Nelson, Esq. for Public Defender Services (Tonopah and Beatty) ¶¶ 3.D, 5.B (July 1, 2017 through June 30, 2018).

507 *See, e.g.*, Contract for Professional Services between Nye County, Nevada and Jonathan K. Nelson, Esq. for Public Defender Services (Tonopah and Beatty) ¶ 8.A (July 1, 2017 through June 30, 2018).

508 This attorney does not appear on any conflict lists in Nevada.

509 Gensler has been a public defender in Nye County for 25 years. He does not appear on any conflict lists in Nevada.

510 Also on conflict list in Esmeralda County.

511 This attorney does not appear on any conflict lists in Nevada.

512 Contract for Professional Services between Nye County, Nevada and Harry R. Gensler, Esq. for Public Defender Services ¶ 12 (July 1, 2017 through June 30, 2018), and Addendum to Contract for Professional Services (Appointment as Program Coordinator) ¶ 1.

513 Contract for Professional Services between Nye County, Nevada and Harry R. Gensler, Esq.

If all five of the contract attorneys have a conflict of interest, or if more than five attorneys are needed in a single case, the Nye County judges maintain lists of private attorneys who are available to be appointed on a case by case basis and who are paid hourly at the statutory rate:

- 5th Judicial District Court and Tonopah Justice Court:[514] Paul Adras,[515] Thomas Burns,[516] Andrew Fritz,[517] David Neely, and Michael Printy.[518]
- Beatty Justice Court: Chris Arabia,[519] Forest Cahlan,[520] Lisa Chamlee,[521] Jeffery Cogan,[522] Ralph Dawson,[523] Steve Evenson,[524] David Fischer,[525] Andrew Fritz, Robert Glennen,[526] Robert Handfuss,[527] Carl Joerger,[528] David Neely III,[529] David Polley,[530] Michael Printy, Frank Stapleton,[531] Sean Sullivan,[532] Andrew Wentworth,[533] and Nathan Todd Young.
- Pahrump Justice Court: Tony Abbatangelo,[534] Paul Adras,[535] Chris Arabia, Alan Buttell,[536] Gregory Cortese,[537] George Cromer,[538] Alex DeCastroverde,[539] David

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for Public Defender Services (July 1, 2017 through June 30, 2018), and Addendum to Contract for Professional Services (Appointment as Program Coordinator) ¶ 3.

514 Email from Administrative Legal Secretary Gerie Clifford to 6AC Executive Director David Carroll (May 7, 2018). The Tonopah Justice Court reports that they rarely, if ever, need more than the available contract attorneys. Email from Tonopah Justice Court Administrator Patti Galvin to 6AC Executive Director David Carroll.

515 Attorney is a primary contractor in the Las Vegas Municipal Court and a conflict contractor in Clark County.

516 This attorney does not appear on any conflict lists in Nevada.

517 Also on conflicts list in Esmerelda County and in the Boulder City and Henderson municipal courts.

518 Also on conflicts list in Esmerelda County and in the Boulder City and Henderson municipal courts.

519 Attorney is the primary contract defender in Esmerelda County and a conflict contractor in Clark County.

520 This attorney does not appear on any conflict lists in Nevada.

521 This attorney does not appear on any conflict lists in Nevada.

522 This attorney does not appear on any conflict lists in Nevada.

523 This attorney does not appear on any conflict lists in Nevada.

524 Also on conflicts lists in Esmerelda, Lander and Pershing counties.

525 Also is a conflict contractor in Clark County.

526 This attorney does not appear on any conflict lists in Nevada.

527 This attorney does not appear on any conflict lists in Nevada.

528 Also on the conflict list in Esmerelda County.

529 Also on the conflict list in Esmerelda County.

530 This attorney does not appear on any conflict lists in Nevada.

531 This attorney does not appear on any conflict lists in Nevada.

532 This attorney does not appear on any conflict lists in Nevada.

533 Also is a conflict contractor in Clark County.

534 Also is a conflict contractor in Clark County.

535 Attorney is a primary contractor in the Las Vegas Municipal Court and a conflict contractor in Clark County.

536 Also is a conflict contractor in Clark County.

537 This attorney does not appear on any conflict lists in Nevada.

538 This attorney does not appear on any conflict lists in Nevada.

539 This attorney does not appear on any conflict lists in Nevada.

Fischer,[540] Andrew Fritz, Osvaldo Fumo,[541] Robert Glennen, James Hartsell,[542] Carl Joerger, Stephanie Kice,[543] Frank Kocka,[544] Kent Kozal,[545] James Krah,[546] Kristian Lavigne,[547] Gerald Neal,[548] David Neely, Garrett Ogata,[549] Michael Printy, Lisa Rasmussen,[550] Molly Rosenblum,[551] and Paul Wommer.[552]

Funding for indigent defense services in the district and justice courts located within Nye County comes from the county. The county funds the compensation of the five contract attorneys and of private attorneys who are appointed case by case and paid hourly. The county also funds case related expenses on behalf of indigent defendants. 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.

Nye County's annual financial documents reflect the amounts it collects annually from assessments imposed on indigent defendants requiring them to partially reimburse the county for the attorney appointed to represent them. This is shown in the table below as "PD Recoupment."[553]

Table: Nye County recoupment

	FY2013	FY2014	FY2015	FY2016	FY2017	5 YR Total
PD Recoupment	$1,955	$2,037	$3,782	$7,103	$13,718	$28,595

[540] Also a conflict contractor in Clark County.
[541] This attorney does not appear on any conflict lists in Nevada.
[542] This attorney does not appear on any conflict lists in Nevada.
[543] This attorney does not appear on any conflict lists in Nevada.
[544] Attorney is a primary contractor in the Las Vegas Municipal Court and a conflict contractor in Clark County.
[545] This attorney does not appear on any conflict lists in Nevada.
[546] This attorney does not appear on any conflict lists in Nevada.
[547] This attorney does not appear on any conflict lists in Nevada.
[548] This attorney does not appear on any conflict lists in Nevada.
[549] This attorney does not appear on any conflict lists in Nevada.
[550] This attorney does not appear on any conflict lists in Nevada.
[551] Also is a conflict contractor in Clark County.
[552] This attorney does not appear on any conflict lists in Nevada.
[553] Nye County, Nevada, Audited Financial Statements (FY2013, FY2014, FY2015, FY 2016, FY2017) (in Revenues under "Charges for services > Public defender and discovery fees" line item).

6. Esmeralda County (5th JDC)

Esmeralda County is one of the two counties making up the 5th Judicial District, along with Nye. There are two courts within Esmeralda County: the 5th Judicial District Court and the Esmeralda Justice Court.

Esmeralda County has a single fixed fee contract with one private attorney to provide all indigent representation including in capital cases in the justice and district courts.[554] The current contract is for a one-year term of July 1, 2018 through June 30, 2019.[555] In exchange, the contract attorney is paid a fixed annual rate of $52,000, payable monthly.[556] The attorney "may assign other attorneys to take his place on an as-needed basis while maintaining overall responsibility for performance under this contract."[557] The contract is silent as to whether the attorney or the county is responsible for payment of overhead costs and case related expenses. The contract may be terminated without cause upon 60 days advance written notice by either Esmeralda County or the attorney.[558] This contract is held by Chris Arabia.

When the sole contract attorney has a conflict of interest, or when more than one attorney is needed in a single case – a highly unlikely event, since there were only three district court indigent defense cases in FY2017 – the Esmeralda County Justice Court maintains a list of private attorneys who are available to be appointed on a case by case basis and who are paid hourly at the statutory rate: Steve Evenson, Andrew Fritz, Nathan Gent, Carl Joerger, John Malone, and David Neely. Neely is usually appointed first if he is available.

Funding for indigent defense services in the district and justice courts located within Esmeralda County comes from the county. The county funds the compensation of the contract attorney and of private attorneys who are appointed case by case and paid hourly. The county also funds case related expenses on behalf of indigent defendants. Though requested, Esmeralda County did not provide information about its annual expenditures for indigent defense services, and there is not line item in Esmeralda County's annual financial documents from which the information can be obtained.

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

555 Contract for Services of Independent Contractor between Esmeralda County & Law Offices of Chris Arabia, PC ¶ 3 (July 1, 2018 through June 30, 2019).

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

557 Contract for Services of Independent Contractor between Esmeralda County & Law Offices of Chris Arabia, PC ¶ 5 (July 1, 2018 through June 30, 2019).

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

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

7. Douglas County (9th JDC)

Douglas County is the only county within the 9th Judicial District. There are three courts within Douglas County: the 9th Judicial District Court, the East Fork Justice Court, and the Tahoe Justice Court.

Douglas County has separate but nearly identical fixed fee contracts with four private attorneys to provide representation to indigent defendants in the district and justice courts.[559] Each contract attorney is responsible for representing indigent adult criminal defendants at all stages of the case, children in delinquency proceedings, and parents and/or children in abuse and neglect and in termination of parental rights cases.[560] At the time of this evaluation, the contracts were each for a one-year term of July 1, 2017 through June 30, 2018.[561] In exchange, each attorney is paid a fixed annual rate of $195,833.33, paid quarterly, plus "supplemental fees at the statutory rate for any work performed beyond ten (10) hours, per case" in a termination of parental rights proceeding.[562]

The contract attorneys are responsible for paying for all overhead costs necessary for performance of the contract, and they are required to carry "professional liability insurance, including errors and omissions coverage, in the minimum amount of $250,000 per claim and $500,000 aggregate" during the contract.[563] The attorneys are contractually required to staff and maintain an office in Douglas County.[564] The

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[559] Contract for Professional Services between Douglas County, Nevada and Kristine L. Brown, Esq. for Indigent Legal Services (July 1, 2017 through June 30, 2018); Contract for Professional Services between Douglas County, Nevada and Matthew Ence, Esq. for Indigent Legal Services (July 1, 2017 through June 30, 2018) (replaced Henry part-way through contract); Contract for Professional Services between Douglas County, Nevada and Derrick M. Lopez, Esq. for Indigent Legal Services (July 1, 2017 through June 30, 2018), replaced by contract with Matthew Work in May 2018; Contract for Professional Services between Douglas County, Nevada and Maria Pence, Esq. for Indigent Legal Services (July 1, 2017 through June 30, 2018).

[560] *See, e.g.*, Contract for Professional Services between Douglas County, Nevada and Maria Pence, Esq. for Indigent Legal Services ¶¶ 2.A, 2.B, 2.C (July 1, 2017 through June 30, 2018).

[561] *See, e.g.*, Contract for Professional Services between Douglas County, Nevada and Maria Pence, Esq. for Indigent Legal Services ¶ 1 (July 1, 2017 through June 30, 2018).

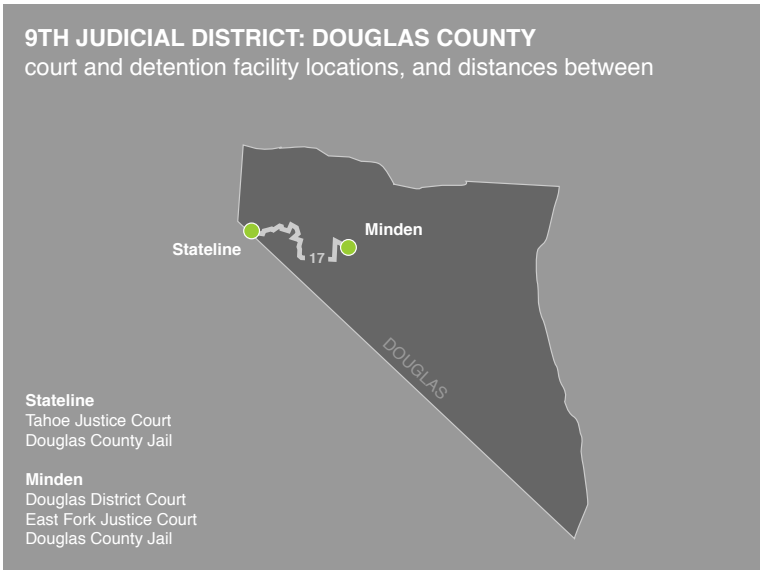
[562] *See, e.g.*, Contract for Professional Services between Douglas County, Nevada and Maria Pence, Esq. for Indigent Legal Services ¶¶ 2.C, 4.A (July 1, 2017 through June 30, 2018).

[563] *See, e.g.*, Contract for Professional Services between Douglas County, Nevada and Maria Pence, Esq. for Indigent Legal Services ¶¶ 4.B, 7.B (July 1, 2017 through June 30, 2018).

[564] *See, e.g.*, Contract for Professional Services between Douglas County, Nevada and Maria Pence, Esq. for Indigent Legal Services ¶ 4.B (July 1, 2017 through June 30, 2018).

contract attorneys also bear the cost of mileage and travel expenses and "routine investigative costs" incurred in defending their appointed cases.[565] For other case related expenses such as "extraordinary investigative costs" or experts, the attorneys must seek funding from the court as prescribed by statute.[566]

The contract attorneys are expressly authorized to have a private law practice.[567] The contracts may be terminated without cause upon 45 days (for three of the contracts, and 30 days for the contract with Matthew Ence) advance written notice by either Douglas County or the attorney.[568] The Douglas County contracts expressly delegate authority to the judges "to oversee and implement the provisions of this contract. . . . However, the County reserves the right to maintain ultimate control over the terms and provisions of this Contract."[569]



As of May 2018, the four contract attorneys are: Kristine Brown,[570] Matthew Ence,[571] Maria Pence,[572] and Matthew Work.[573] The contract attorneys note that, despite their relatively high compensation (compared to other rural counties), their take-home pay from the 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, the contract attorneys pay their own withholding and social security taxes on their contract compensation, with nearly 40% of the contract amount

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565 *See, e.g.*, Contract for Professional Services between Douglas County, Nevada and Maria Pence, Esq. for Indigent Legal Services ¶¶ 4.A, 4.B (July 1, 2017 through June 30, 2018).

566 *See, e.g.*, Contract for Professional Services between Douglas County, Nevada and Maria Pence, Esq. for Indigent Legal Services ¶ 4.A (July 1, 2017 through June 30, 2018).

567 *See, e.g.*, Contract for Professional Services between Douglas County, Nevada and Maria Pence, Esq. for Indigent Legal Services ¶ 3.C (July 1, 2017 through June 30, 2018).

568 *See, e.g.*, Contract for Professional Services between Douglas County, Nevada and Maria Pence, Esq. for Indigent Legal Services ¶ 8.A (July 1, 2017 through June 30, 2018).

569 *See, e.g.*, Contract for Professional Services between Douglas County, Nevada and Maria Pence, Esq. for Indigent Legal Services ¶ 11 (July 1, 2017 through June 30, 2018).

570 The attorney does not appear on any other contract lists in Nevada.

571 The attorney does not appear on any other contract lists in Nevada.

572 Also on conflict list in Carson City.

573 Work took over in May 2018 for Derek Lopez, who had been a public defender in Douglas County for more than 15 years. The attorney does not appear on any other contract lists in Nevada.

taken off the top. Douglas County has not increased the compensation for the contracts in at least 10 years, even to adjust for the cost of living. The contract attorneys cannot afford to live in Douglas County.

If all four of the contract attorneys have a conflict of interest, or if more than four attorneys are needed in a single case, the Douglas County judges maintain lists of private attorneys who are available to be appointed on a case by case basis and who are paid hourly at the statutory rate:

- 9th Judicial District Court:[574] Justin Clouser,[575] Loren Graham,[576] John Malone,[577] Robert Morris,[578] and Daniel Spence.[579]
- East Fork Justice Court:[580] Justin Clouser, Alan Erb[581] (misdemeanors only), Loren Graham, John Malone, Robert Morris (felonies only), Michael Novi, and Daniel Spence.
- Tahoe Justice Court:[582] Justin Clouse or Alan Erb.

Funding for indigent defense services in the district and justice courts located within Douglas County comes from the county. The county funds the compensation of the four contract attorneys and of private attorneys who are appointed case by case and paid hourly. These combined costs to the county are shown in the table below as "PD Expenditure."[583] The figures shown do not include funds expended by the county for case related expenses on behalf of indigent defendants.

Douglas County's annual financial documents reflect, for some years, the amounts it collects annually from assessments imposed on indigent defendants requiring them to partially reimburse the county for the attorney appointed to represent them. This is shown, for the available years, in the table below as "PD Recoupment."[584]

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574 Email from 9th Judicial District Court Administrator Bobbie Williams to 6AC Executive Director David Carroll (Apr. 9, 2018).

575 The attorney does not appear on any other contract lists in Nevada.

576 The attorney does not appear on any other contract lists in Nevada.

577 Malone is a contract conflict defender in Carson City. He is also on conflict lists in Douglas, Esmerelda, Lyon and Pershing counties.

578 The attorney does not appear on any other contract lists in Nevada.

579 Also on conflict lists in Carson City and Lyon and Storey counties.

580 Email from 9th Judicial District Court Administrator Bobbie Williams to 6AC Executive Director David Carroll (May 30, 2018).

581 Attorney does not appear on any other conflict lists in Nevada.

582 Email from Tahoe Justice Court Judge Richard Glasson to 6AC Executive Director David Carroll (Mar. 15, 2018).

583 Douglas County, Nevada, Comprehensive Annual Financial Report (FY2013, FY2014, FY2015, FY 2016, FY2017) (in Expenses under "Judicial > Public defender" line item). Douglas County, Nevada, Final Budget (FY2018).

584 Douglas County, Nevada, Comprehensive Annual Financial Report (FY2013, FY2014, FY2015, FY 2016, FY2017) (in Revenues under "Fines and Forfeits > Judicial > Public Defender Restitution" line item).

Table: Douglas County expenditures & recoupment

	FY2013	FY2014	FY2015	FY2016	FY2017	5 YR Total
PD Expenditure	$642,837	$631,324	$800,631	$802,452	$798,982	$3,676,226
PD Recoupment			$5,910	$3,610	$4,962	$14,482
% Recouped	$0	$0	0.74%	0.45%	0.62%	0.39%

ANALYSIS	
% +/- (FY13-FY17)	24.29%
2018 (Budget)	$828,334
% +/- (FY17-FY18)	3.67%

8. Lincoln County (7th JDC)

Lincoln County is one of three counties in the 7th Judicial District, along with White Pine and Eureka. There are three courts within Lincoln County: the 7th Judicial District Court, the Meadow Valley Justice & Caliente Municipal Court, and the Pahranagat Valley Justice Court.

Lincoln Valley has a contract with one private attorney to handle "lawyer services required in the representation, administration of indigent cases assigned, appropriate support staff services, investigation and appropriate sentencing advocacy and social work services, and other legal services."[585] There is a provision in the contract that is supposed to set out the types of cases for which the attorney is contracted to provide representation, but that provision of the contract is blank.[586] The current contract is for a two-year term of July 1, 2017 through June 30, 2019, and it automatically renews for one and only one two-year term.[587] The terms of the contract are exceedingly complex. In short, the contract attorney agrees to provide at least 1250 attorney/investigator hours for all cases assigned.[588] In exchange, the attorney is paid annual compensation of $125,000 (calculated at $100 per hour), paid in quarterly installments.[589] The attorney is required by the contract to reimburse Lincoln County at the rate of $100 per hour for every hour the attorney falls below the required 1250 hours, and the attorney may request additional compensation if he exceeds the 1250 hours required.[590]

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585 Contract for Public Defense Services (July 1, 2017 through June 30, 2019) (between County of Lincoln and Dylan V. Frehner).

586 Contract for Public Defense Services ¶ VII (July 1, 2017 through June 30, 2019) (between County of Lincoln and Dylan V. Frehner).

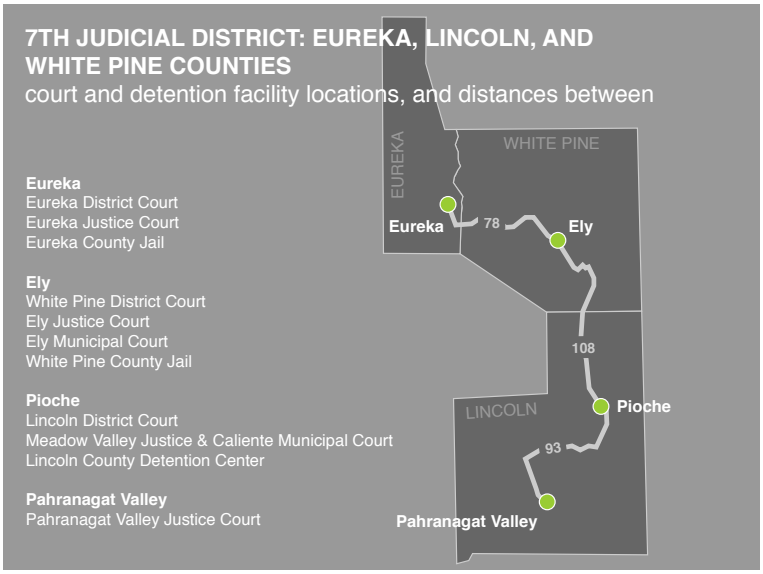
587 Contract for Public Defense Services ¶ I (July 1, 2017 through June 30, 2019) (between County of Lincoln and Dylan V. Frehner).

588 Contract for Public Defense Services ¶ VII (July 1, 2017 through June 30, 2019) (between County of Lincoln and Dylan V. Frehner).

589 Contract for Public Defense Services ¶ XII.A (July 1, 2017 through June 30, 2019) (between County of Lincoln and Dylan V. Frehner).

590 Contract for Public Defense Services ¶ VIII (July 1, 2017 through June 30, 2019) (between County of Lincoln and Dylan V. Frehner).

The contract contains detailed requirements for the qualifications the attorney must have to be appointed to the various classes of felony cases and in particular those with a juvenile defendant.[591] It requires the contract attorney to employ support staff including investigators and mental health evaluations and legal assistants based on the number of cases handled of various types.[592] The contract imposes a maximum average annual caseload to be handled by "full time attorney or full time equivalent" for various types of cases.[593] The contract also has supervision and training requirements.[594] The contract attorney is responsible for the costs of meeting all of these requirements, and failure to comply with the requirements is a material breach of the contract.



Since 2011, this contract for primary representation in Lincoln County has been held by Dylan Frehner,[595] a solo practitioner with a law office in Pioche. He has two assistants: one is part-time, and the other is full-time with a paralegal degree. 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; the furniture is old and worn, as is the building itself. No permanent signs indicate that the building contains a law office. This year Frehner, for the first time, billed Lincoln County because his hours exceeded the 1,250 hours contemplated under the contract. By May 2018, he had billed 350 hours over the 1,250 hours negotiated in the contract, and he submitted an invoice to

591 Contract for Public Defense Services ¶¶ VI.A-F (July 1, 2017 through June 30, 2019) (between County of Lincoln and Dylan V. Frehner).

592 Contract for Public Defense Services ¶ VI.E (July 1, 2017 through June 30, 2019) (between County of Lincoln and Dylan V. Frehner).

593 Contract for Public Defense Services ¶ VII.D (July 1, 2017 through June 30, 2019) (between County of Lincoln and Dylan V. Frehner).

594 Contract for Public Defense Services ¶¶ IV, X, XI (July 1, 2017 through June 30, 2019) (between County of Lincoln and Dylan V. Frehner).

595 This attorney appears on no conflict lists in Nevada. Frehner reports that, when he first got the contract, Lincoln County had just finished a year in which it paid the state public defender office $115,000, plus an additional $65,000-$90,000 to private attorneys for conflict representation.

the county. He planned to submit another invoice for his hours in June 2018. The hours were so high because he had tried a murder case.[596]

Lincoln County has a very similar contract with one private attorney to handle all cases for which the primary contract attorney has a conflict of interest.[597] There is a provision in the contract that is supposed to set out the types of cases for which the attorney is contracted to provide representation, but that provision of the contract is blank.[598] The current contract is for a two-year term of July 1, 2017 through June 30, 2019, and it automatically renews for one and only one two-year term.[599] The terms of this contract are also exceedingly complex. In short, the contract conflict attorney agrees to provide at least 200 hours.[600] In exchange, the attorney is paid "at a flat rate of $20,000/year" (calculated at $100 per hour), paid in quarterly installments.[601] Shain Manuele[602] holds this conflict contract, and he reports receiving only seven appointments during the first nine months of the contract.

In the rare instance that both the contract attorney and the contract conflict attorney have a conflict of interest, or if more than two attorneys are needed in a single case, the Lincoln County judges maintain lists of private attorneys who are available to be appointed on a case by case basis and who are paid hourly at the statutory rate:

- 7th Judicial District Court:[603] Kelly Brown, David Lockie, Sherburne McFarlan, and Michael Shurtz.
- both justice courts:[604] Gregory Barlow (Caliente, NV),[605] Matthew Carling (Cedar City, UT),[606] and Richard Sears (Ely, NV).[607]

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596 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 sought reimbursement from him. Only if the difference in hours approaches 20% of the total contract will Frehner seek to renegotiate payment.

597 Contract for Conflict Counsel for Public Defense Services ¶ VII (July 1, 2017 through June 30, 2019) (between County of Lincoln and Shain Manuele).

598 Contract for Conflict Counsel for Public Defense Services ¶ VII (July 1, 2017 through June 30, 2019) (between County of Lincoln and Shain Manuele).

599 Contract for Conflict Counsel for Public Defense Services ¶ I (July 1, 2017 through June 30, 2019) (between County of Lincoln and Shain Manuele).

600 Contract for Conflict Counsel for Public Defense Services ¶ VIII (July 1, 2017 through June 30, 2019) (between County of Lincoln and Shain Manuele).

601 Contract for Conflict Counsel for Public Defense Services ¶¶ VIII, XII.A (July 1, 2017 through June 30, 2019) (between County of Lincoln and Shain Manuele).

602 The attorney is also a conflict contractor in Eureka and White Pine Counties.

603 Survey responses of 7th Judicial District Court Judges Steve Dobrescu and Gary Fairman.

604 Email from Meadow Valley Justice Court Judge Mike Cowley to 6AC Executive Director David Carroll (Mar. 16, 2018); Telephone interview of Pahranagat Valley Justice Court Judge Nola Holton (May 14, 2018).

605 The attorney appears on no other conflict lists in Nevada.

606 Carling is a conflict contractor in Clark County and lives in Cedar City, Utah.

607 Sears is one of the primary contractors in White Pine County and is on the conflict list in Eureka County.

Funding for indigent defense services in the district and justice courts located within Lincoln County comes from the county. The county funds the compensation of the primary contract attorney, of the conflict contract attorney, and of private attorneys who are appointed case by case and paid hourly. The county also funds case related expenses on behalf of indigent defendants. Though requested, Lincoln County did not provide information about its annual expenditures for indigent defense services, and there is no line item in Lincoln County's annual financial documents from which the information can be obtained.

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

9. White Pine County (7th JDC)

White Pine County is one of three counties in the 7th Judicial District, along with Lincoln and Eureka. There are three courts within White Pine County: the 7th Judicial District Court, the Ely Justice Court, and the Ely Municipal Court. The provision of counsel in the Ely Municipal Court is addressed separately in the final section of this Chapter.

White Pine County has separate but identical contracts with three private attorneys to provide "lawyer services and appropriate support staff services, investigation and appropriate sentencing advocacy and social work services, and legal services . . .."[608] The contracts are an almost exact duplicate of the Lincoln County contracts, save for the number of hours of work required of the attorneys and the compensation paid, and so we will not reiterate the detailed terms of the contracts here. The current contracts are for a two-year term of July 1, 2017 through June 30, 2019.[609] Each contract attorney agrees to provide at least 1450 hours for all cases assigned.[610] In exchange, each contract attorney is paid annual compensation of $145,000 (calculated at $100 per hour), paid in quarterly installments.[611] Each attorney is required by the contract to reimburse White Pine County at the rate of $100 per hour for every hour the

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608 Contract for Public Defense Services ¶ II.D (July 1, 2017 through June 30, 2019) (between County of White Pine and Jane Eberhardy); Contract for Public Defense Services ¶ II.D (July 1, 2017 through June 30, 2019) (between County of White Pine and Shain Manuele); Contract for Public Defense Services ¶ II.D (July 1, 2017 through June 30, 2019) (between County of White Pine and Richard W. Sears).

609 *See, e.g.*, Contract for Public Defense Services ¶ I (July 1, 2017 through June 30, 2019) (between County of White Pine and Jane Eberhardy).

610 *See, e.g.*, Contract for Public Defense Services ¶ VIII (July 1, 2017 through June 30, 2019) (between County of White Pine and Jane Eberhardy).

611 *See, e.g.*, Contract for Public Defense Services ¶ XII.A (July 1, 2017 through June 30, 2019) (between County of White Pine and Jane Eberhardy).

attorney falls below the required 1450 hours, and the attorney may request additional compensation if he exceeds the 1450 hours required.[612]

The three contract attorneys are Jane Eberhardy,[613] Shain Manuele,[614] and Richard Sears.[615] Each of the three contract attorneys technically operates their own independent law practice, but all three law offices are housed in a single office building located less than a quarter mile from the courthouse. 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. The office has one general receptionist who answers the phone as the "Ely independent conflicts office of Sears, Eberhardy, and Manuele." Each attorney has an assistant for help with filing. 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.

In the rare instance that all three of the contract attorneys have a conflict of interest, or if more than three attorneys are needed in a single case, the White Pine County judges maintain lists of private attorneys who are available to be appointed on a case by case basis and who are paid hourly at the statutory rate:

- 7th Judicial District Court:[616] Kelly Brown,[617] David Lockie,[618] Sherburne McFarlan,[619] and Michael Shurtz.[620]
- Ely Justice Court:[621] First the court contacts one of two Ely attorneys, Kelly Brown (who usually takes the case) or Kevin Briggs (who usually won't take a case). If necessary, the court contacts Elko lawyers: Julie Cavanaugh-Bill,[622] David Lockie, Sherburne McFarlan, and Michael Shurtz.

Funding for indigent defense services in the district and justice courts located within White Pine County comes from the county. (Funding of indigent defense services in

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612 *See, e.g.*, Contract for Public Defense Services ¶ VIII (July 1, 2017 through June 30, 2019) (between County of White Pine and Jane Eberhardy).

613 Also on conflict lists in and is on the conflict list in Lincoln County.

614 The attorney is a conflict contractor in both Eureka and Lincoln County.

615 Also on conflict lists in and is on the conflict list in Eureka and Lincoln County.

616 Survey responses of 7th Judicial District Court Judges Steve Dobrescu and Gary Fairman.

617 Brown is the primary contract attorney in Eureka County. Brown is also on the conflict lists in Lincoln County.

618 Also on conflict lists in Elko, Eureka, Lander and Lincoln counties. Also on the Ely Municipal conflict list.

619 Also on conflict lists in Elko, Eureka, Lander and Lincoln counties. Also on the Ely Municipal conflict list.

620 Also on conflict lists in Elko, Eureka, Lander and Lincoln counties. Also on the Ely Municipal conflict list.

621 Email from Ely Justice Court Judge Stephen Bishop to 6AC Executive Director David Carroll (Mar. 15, 2018).

622 Also on conflict lists in Elko, Eureka, Lander and White Pine counties. Also on the Ely Municipal conflict list.

the Ely Municipal Court is addressed separately in the final section of this Chapter.) The county funds the compensation of the three contract attorneys and of private attorneys who are appointed case by case and paid hourly. The county also funds case related expenses on behalf of indigent defendants. Though requested, White Pine County did not provide information about its 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 County's annual financial documents reflect the amounts it collects annually from assessments imposed on indigent defendants requiring them to partially reimburse the county for the attorney appointed to represent them. This is shown in the table below as "PD Recoupment."[623]

Table: White Pine County recoupment

	FY2013	FY2014	FY2015	FY2016	FY2017	5 YR Total
PD Recoupment	$2,015	($1,656)	$7,969	$7,503	$5,284	$21,115

10. Eureka County (7th JDC)

Eureka County is one of three counties in the 7th Judicial District, along with Lincoln and White Pine. There are two courts within Eureka County: the 7th Judicial District Court, and the Eureka Justice Court.

Eureka County has a single fixed fee contract with one private attorney to provide representation to indigent defendant in the justice and district courts.[624] The contract attorney is responsible for representing at trial and on appeal and in post-conviction habeas corpus: indigent defendants in misdemeanor, gross misdemeanor, and felony cases; children in juvenile delinquency proceedings; children in abuse and neglect cases; and persons subject to civil commitment and competency hearings.[625] Specifically excluded from the contract are domestic violence cases.[626] The current

[623] White Pine County, Nevada, Comprehensive Annual Financial Report (FY2013, FY2014, FY2015, FY 2016, FY2017) (in Revenues under "Charges for Services > Public Defender Fees" line item).

[624] 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).

[625] Contract for Services of Independent Contractor between Eureka County, Nevada and Kelly C. Brown, PLLC ¶ 5, Attachment C Scope of services (July 1, 2015 through June 30, 2017).

[626] Contract for Services of Independent Contractor between Eureka County, Nevada and Kelly C. Brown, PLLC ¶ 5, Attachment C Scope of services (July 1, 2015 through June 30, 2017).

contract is for a two-year term of July 1, 2017 through June 30, 2019.[627] In exchange, the attorney is paid a fixed annual rate of $40,000, payable in quarterly installments.[628]

The contract attorney is responsible for paying all overhead, and the contract expressly provides that the county "does not agree to reimburse Contractor for expenses unless otherwise specified in this Contract or the incorporated attachments."[629] The contract attorney bears the cost of mileage and travel expenses incurred in defending his appointed cases.[630] For other case related expenses such as investigation or experts, the attorney must seek funding from the court.[631]

The contract automatically renews or terminates at the end of each county appropriation period, based on the actions of the board of county commissioners.[632] The contract may be terminated without cause upon written notice by either Eureka County or the attorney.[633]

Kelly Brown[634] holds this contract. Brown has a law office in Ely (White Pine County), Nevada, about 1 ½ hours from Eureka. He does not employ any support staff.

If the contract attorney has a conflict of interest, in all domestic violence cases, and if more than one attorney is needed in a single case, the Eureka County judges maintain a list of private attorneys who are available to be appointed on a case by case basis and who are paid hourly at the statutory rate.[635] The courts first appoint from among Jane Eberhardy,[636] Shain Manuele,[637] and Richard Sears.[638] If none of those three attorneys

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627 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).

628 Contract for Services of Independent Contractor between Eureka County, Nevada and Kelly C. Brown, PLLC ¶ 6 (July 1, 2015 through June 30, 2017).

629 Contract for Services of Independent Contractor between Eureka County, Nevada and Kelly C. Brown, PLLC ¶¶ 5, 6, Attachment C Scope of services (July 1, 2015 through June 30, 2017).

630 Contract for Services of Independent Contractor between Eureka County, Nevada and Kelly C. Brown, PLLC ¶¶ 5, 6, Attachment C Scope of services (July 1, 2015 through June 30, 2017).

631 Contract for Services of Independent Contractor between Eureka County, Nevada and Kelly C. Brown, PLLC ¶¶ 5, 6, Attachment C Scope of services (July 1, 2015 through June 30, 2017).

632 Contract for Services of Independent Contractor between Eureka County, Nevada and Kelly C. Brown, PLLC ¶ 6 (July 1, 2015 through June 30, 2017).

633 Contract for Services of Independent Contractor between Eureka County, Nevada and Kelly C. Brown, PLLC ¶ 10.a (July 1, 2015 through June 30, 2017).

634 Brown is also on the conflict lists in Lincoln and White Pine counties.

635 Survey responses from 7th Judicial District Court Judges Steve Dobrescu and Gary Fairman; Letter from Eureka County Clerk Beverly Conley to 6AC Executive Director David Carroll (Apr. 11, 2018).

636 Eberhardy is a primary contractor in White Pine County.

637 Manuele is a primary contractor in White Pine County and a conflict contractor in Lincoln County.

638 Sears is a primary contractor in White Pine County and on the conflict list in Lincoln County.

were available, then they would appoint from David Lockie,[639] Sherburne McFarlan,[640] and Michael Shurtz.[641]

Funding for indigent defense services in the district and justice courts located within Eureka County comes from the county. The county funds the compensation of the contract attorney and of private attorneys who are appointed case by case and paid hourly. The county also funds case related expenses on behalf of indigent defendants. Though requested, Eureka County did not provide information about its annual expenditures for indigent defense services, and there is no line item in Eureka County's annual financial documents from which the information can be obtained.

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

[639] Also on conflict lists in Elko, Lander, Lincoln and White Pine counties. Also on the Ely Municipal conflict list.

[640] Also on conflict lists in Elko, Lander, Lincoln and White Pine counties. Also on the Ely Municipal conflict list.

[641] Also on conflict lists in Elko, Lander, Lincoln and White Pine counties. Also on the Ely Municipal conflict list.

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 looking to national standards 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*.[642]

The *Model Contract*, though, was created to assist governments in implementing NLADA's *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services*.[643] Those *Guidelines* in turn were specifically designed for governments wishing to competitively bid for public defense "programs"[644] and not for contracts with individual attorneys. As the commentary to the *Model Contract* makes explicit: "[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."[645] Both Lincoln and White Pine counties appear to have used the *Model Contract* almost wholesale, making only a variations, causing some odd results.

Attorney qualifications. As suggested in the *Model Contract*, the Lincoln and White Pine contracts have extensive qualification standards for attorneys by case type.[646] But why distinguish between qualifications for someone to handle a Felony A case from a Felony C case when there is only one person performing the contract and handling all case types? This is especially odd when suggesting that junior attorneys can handle certain case types if supervised by a senior attorney.

Attorney 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."[647] Again this requirement makes no sense when the contract is with an individual attorney as an individual cannot provide in-house training to himself.

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[642] National Legal Aid & Defender Association et al, Model Contract for Public Defense Services (Feb. 2000).

[643] National Legal Aid & Defender Association, Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services (1983).

[644] National Legal Aid & Defender Association, Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services at Introduction and 1 (1983).

[645] National Legal Aid & Defender Association et al, Model Contract for Public Defense Services at Use of this Model Contract X (Feb. 2000).

[646] *See, e.g.*, Contract for Public Defense Services ¶ VI.A-F (July 1, 2017 through June 30, 2019) (between County of Lincoln and Dylan V. Frehner).

[647] *See, e.g.*, Contract for Public Defense Services ¶ X (July 1, 2017 through June 30, 2019) (between County of Lincoln and Dylan V. Frehner).

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.]"[648] The contracts then bind the attorneys to the following support staff ratios: "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,"[649] as prescribed in the *Model Contract*. 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).[650] 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 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."[651] 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."[652]

Policy board. Lincoln and White Pine contracts suggest that the contract public defender may establish a three-person board to conduct oversight.[653] 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.[654] 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 they allow judges to serve; but that is precisely the type of interference an independent board is designed to prevent.

The Sixth Amendment Center does not fault the policymakers in Lincoln and White Pine counties for attempting to use the *Model Contract*. It simply shows the need for a state agency to set contracting standards and to serve as a help desk to county managers, and for the State of Nevada to cease abdicating its 14th Amendment obligation to provide effective Sixth Amendment services.

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[648] *See, e.g.*, Contract for Public Defense Services ¶ VI.E (July 1, 2017 through June 30, 2019) (between County of Lincoln and Dylan V. Frehner).

[649] *See, e.g.*, Contract for Public Defense Services ¶ VI.E (July 1, 2017 through June 30, 2019) (between County of Lincoln and Dylan V. Frehner).

[650] 2017 figures reflect July 1, 2017 – May 31, 2018, as reported by Dylan Frehner, the primary Lincoln County contract attorney. These figures do not include cases appointed to the conflict contract attorney or to other conflict attorneys appointed on a case by case basis.

[651] National Legal Aid & Defender Association et al, Model Contract for Public Defense Services at 26 (Feb. 2000).

[652] National Legal Aid & Defender Association et al, Model Contract for Public Defense Services at 26 (Feb. 2000).

[653] *See, e.g.*, Contract for Public Defense Services ¶ IV (July 1, 2017 through June 30, 2019) (between County of Lincoln and Dylan V. Frehner).

[654] National Legal Aid & Defender Association et al, Model Contract for Public Defense Services at 3 (Feb. 2000) ("The Policy Board shall be [appointed/designated] by the Contracting Authority and shall consist of [3-13] diverse members, a majority of which shall be practicing attorneys, and shall include representatives of organizations directly servicing the poor or concerned with the problems of the client community, provided that no single branch of government shall have a majority of votes, and the membership shall not include prosecutors, judges or law enforcement officials." "A majority of the trustees on boards should be members of the bar admitted to practice in the jurisdiction." Referencing ABA, Standards for Criminal Justice – Providing Defense Services Standard 5-1.3(b) (3d ed. 1992)).

D. CITY MUNICIPAL COURT SYSTEMS

1. 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.[655] 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.

The city does not have a formalized process to select attorneys to represent indigent defendants and has not adopted any ordinance for that purpose.[656] The judge appoints counsel on a case-by-case basis, from among three attorneys: Troy Jordan,[657] David Neidert,[658] and Jacob Sommer.[659] Once appointed, the attorney is paid by the hour as required by Nevada statutes.[660]

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:[661]

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

656 Email from City of Fallon Legal and Administrative Director Robert Erquiaga to 6AC Executive Director David Carroll (May 5, 2018).

657 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.

658 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.

659 Email from City of Fallon Legal and Administrative Director Robert Erquiaga to 6AC Executive Director David Carroll (May 5, 2018).

660 Email from City of Fallon Legal and Administrative Director Robert Erquiaga to 6AC Executive Director David Carroll (May 5, 2018).

661 Email from Roxane Cluckey, City of Fallon, on behalf of City of Fallon Legal and Administrative Director Robert Erquiaga, to 6AC Executive Director David Carroll (June 25, 2018) (providing City of Fallon, Nevada, Public Defender Expense (June 20, 2017)).

Table: City of Fallon expenditures

	FY2013	FY2014	FY2015	FY2016	FY2017	5 YR Total
PD Expenditure	$6,607	$4,141	$8,804	$17,458	$10,677	$47,687
FY2018 (Budget)	$11,000					

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

2. 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.[662] 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 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.[663] 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,[664] and only Ken Ward applied.

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662 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 Justice Court.

663 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.

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

Ward employees an associate attorney Matthew Merrill[665] 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[666] 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.[667] If Nutton is unavailable in a particular case, the court contacts Aaron Mouritsen or Wayne Pederson.[668]

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.[669] 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.

Table: City of Fernley expenditures & recoupment

	FY2013	FY2014	FY2015	FY2016	FY2017	5 YR Total
PD Expenditure	$30,000	$30,000	$30,000	$60,000	$60,000	$210,000
PD Recoupment	$1,495	$2,828	$3,469	$6,608	$11,419	$25,819
% Recouped	4.98%	9.43%	11.56%	11.01%	19.03%	12.29%

ANALYSIS	
% +/- (FY13-FY17)	100.00%
2018 (Budget)	$60,000
% +/- (FY17-FY18)	0.00%

665 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.

666 Attorney does not appear on any other conflict lists in Nevada.

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

668 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.

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

3. 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.[670] 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.[671] Brad Johnston employs Leann Schumann[672] as an associate attorney in his law office, and Schumann actually performs the indigent defense representation in the Yerington Municipal Court.

For conflict cases or multi-defendant cases, the Yerington Municipal Court appoints private attorney Aaron Mouritsen[673] on a case by case basis and pays him $250/case.

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[670] 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.

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

[672] Schumann also accepts conflict list appointments from the Lyon County district court.

[673] Mouritsen holds one of the three Lyon County contracts responsible for providing primary conflict representation in the district and justice courts.

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.[674] 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.[675]

Table: City of Yerington expenditures & recoupment

	FY2013	FY2014	FY2015	FY2016	FY2017	5 YR Total
PD Expenditure	$24,535	$17,250	$17,125	$24,250	$28,519	$111,679
PD Recoupment	$5,944	$10,284	$9,899	$12,747	$11,918	$50,792
% Recouped	24.23%	59.62%	57.80%	52.56%	41.79%	45.48%

ANALYSIS	
% +/- (FY13-FY17)	16.24%
2018 (Budget)	$27,500
% +/- (FY17-FY18)	-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.

4. 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.[676] The attorney is responsible for providing and paying for his own overhead costs.

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

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

[676] Email from Ely Municipal Court Judge Mike Coster to 6AC Executive Director David Carroll (Apr. 16, 2018).

Kevin Briggs[677] 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. The contract with Briggs is oral; it was negotiated at a city council meeting, but it not reduced to writing.[678]

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.[679] On occasion it takes as many as three phone calls to find an attorney available to be appointed.[680] Among those who have accepted conflict appointments in the recent past are: Kelly Brown,[681] David Lockie,[682] Sherburne McFarlan,[683] Shain Manuele,[684] and Richard Sears.[685] 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.

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

678 Email from Ely Municipal Court Judge Mike Coster to 6AC Executive Director David Carroll (Apr. 16, 2018).

679 Email from Ely Municipal Court Judge Mike Coster to 6AC Executive Director David Carroll (Apr. 16, 2018).

680 Email from Ely Municipal Court Judge Mike Coster to 6AC Executive Director David Carroll (Apr. 16, 2018).

681 Brown also serves as indigent defense counsel in: Eureka County (holds the primary contract for indigent defense representation in district and 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).

682 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.

683 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.

684 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).

685 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).

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.

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,[686] 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 counties[687] 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. Municipal courts have jurisdiction over misdemeanor cases and traffic/ordinance violations alleged to have occurred within a 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 misdemeanor cases no matter where they are alleged to have occurred in a county.[688]

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."[689] 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

686 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 14.)

687 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 14.)

688 Municipal courts do not have this authority.

689 Carson City, First Judicial District Court & Carson City Justice & Municipal Court, http://carson.org/government/departments-a-f/courts-6387 (last visited Aug. 22, 2018).

means that these four courts have separate locations, judges, prosecutors and defense attorneys and the municipalities pay for all associated costs.

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,[690] the court 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,[691] 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. (*See* table on next page.)

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

[690] Email from Boulder City Municipal Court Administrator Bernadette M. Graham to 6AC Executive Director David Carroll (July 31, 2018).

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

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.

Table: City of Yerington expenditures & recoupment

	FY2013	FY2014	FY2015	FY2016	FY2017	5 YR Total
PD Expenditure	$24,535	$17,250	$17,125	$24,250	$28,519	$111,679
PD Recoupment	$5,944	$10,284	$9,899	$12,747	$11,918	$50,792
% Recouped	24.23%	59.62%	57.80%	52.56%	41.79%	45.48%

STATEWIDE SPENDING ON INDIGENT DEFENSE SERVICES

The provision of Sixth Amendment right to counsel services in Clark and Washoe counties is beyond the scope of this report. As part of this study, for comparative purposes, the 6AC sought information from every county and incorporated city about its spending on indigent defense representation. The table on this and the following page show the results of those efforts.

Rural county & city public defense expenditures

	FY2013	FY2014	FY2015	FY2016	FY2017	5 YR Total (FY2013 thru FY2017)
STATE PUBLIC DEFENDER	$3,536,801.96	$2,156,921.58	$0.00	$3,208,652.00	$2,974,889.00	$11,877,264.54
CARSON CITY	$1,366,126.00	$1,517,055.00	$1,478,073.00	$1,558,341.00	$1,546,150.00	$7,465,745.00
CHURCHILL			$483,253.00	$480,082.00	$484,149.00	$1,447,484.00
Fallon	$6,606.80	$4,141.46	$8,803.87	$17,458.40	$10,676.74	$47,687.27
DOUGLAS	$642,837.00	$631,324.00	$800,631.00	$802,452.00	$798,982.00	$3,676,226.00
ELKO	$1,023,613.00	$1,158,408.00	$1,366,825.00	$1,346,163.00	$1,357,925.00	$6,252,934.00
ESMERALDA						
EUREKA						
HUMBOLDT	$206,019.00	$214,582.00	$225,559.00	$243,762.00	$278,558.00	$1,168,480.00
LANDER	$96,246.00	$85,616.00	$87,043.00	$111,170.00	$91,106.00	$471,181.00
LINCOLN						
LYON	$406,517.00	$406,517.00	$406,517.00	$406,517.00	$495,000.00	$2,121,068.00
Fernley	$30,000.00	$30,000.00	$30,000.00	$60,000.00	$60,000.00	$210,000.00
Yerington	$24,535.00	$17,250.00	$17,125.00	$24,250.00	$28,518.76	$111,678.76
MINERAL	$73,697.58	$66,860.84	$65,000.04	$65,600.04	$81,421.92	$352,580.42
NYE						
PERSHING	$154,182.00	$161,903.00	$171,299.00	$188,051.00	$183,939.00	$859,374.00
STOREY	$56,434.00	$46,875.00	$46,313.00	$39,217.00	$39,466.00	$228,305.00
WHITE PINE						
Ely						
RURAL TOTAL	$7,623,615.34	$6,497,453.88	$5,186,441.91	$8,551,715.44	$8,430,781.42	$36,290,007.99

Urban county & city public defense expenditures

	FY2013	FY2014	FY2015	FY2016	FY2017	5 YR Total (FY2013 thru FY2017)
CLARK	$37,625,963.00	$38,566,291.00	$37,940,312.00	$41,281,891.00	$42,917,910.00	$198,332,367.00
Boulder	$22,040.00	$47,773.86	$29,452.16	$29,575.00	$25,317.00	$154,158.02
Henderson	$275,835.00	$280,860.00	$280,460.00	$290,549.00	$274,250.00	$1,401,954.00
Las Vegas	$491,400.10	$491,472.00	$532,932.16	$477,904.00	$515,411.30	$2,509,119.56
Mesquite	$7,560.50	$18,112.52	$25,407.24	$34,312.28	$33,644.24	$119,036.78
North Las Vegas	$190,000.00	$190,000.00	$190,000.00	$190,000.00	$190,000.00	$950,000.00
WASHOE	$10,803,978.00	$11,089,263.00	$11,139,651.00	$11,464,028.00	$13,027,751.00	$57,524,671.00
Reno						
Sparks	$130,000.00	$140,000.00	$140,000.00	$140,000.00	$158,000.00	$708,000.00
URBAN TOTAL	$49,416,776.60	$50,683,772.38	$50,138,214.56	$53,768,259.28	$56,984,283.54	$260,991,306.36

STATE TOTAL	$57,040,391.94	$57,181,226.26	$55,324,656.47	$62,319,974.72	$65,415,064.96	$297,281,314.35

Rural county & city public defense expenditures

	% +/- (FY2013 to FY2017)	FY2018 Budget	% +/- (FY2017 to FY2018)	3 YR ave (FY2015 thru FY2017)
STATE PUBLIC DEFENDER	-15.89%	$2,065,589.00	-30.57%	$2,061,180.33
CARSON CITY	13.18%	$1,559,609.00	0.87%	$1,527,521.33
CHURCHILL		$487,000.00	0.59%	$482,494.67
Fallon		$11,000.00	0.00%	$12,313.00
DOUGLAS	24.29%	$828,334.00	3.67%	$800,688.33
ELKO	32.57%	$1,426,595.00	5.16%	$1,356,971.00
ESMERALDA				
EUREKA				
HUMBOLDT	35.21%	$393,740.00	41.35%	$249,293.00
LANDER	-5.34%	$128,500.00	41.04%	$96,439.67
LINCOLN				
LYON	21.77%	$556,200.00	12.36%	$436,011.33
Fernley	100.00%	$60,000.00	0.00%	$50,000.00
Yerington	16.24%	$27,500.00	-3.57%	$23,297.92
MINERAL	10.48%	$79,999.92	-1.75%	$70,674.00
NYE				
PERSHING	19.30%	$214,018.00	16.35%	$181,096.33
STOREY	-30.07%	$76,888.00	94.82%	$41,665.33
WHITE PINE				
Ely				
RURAL TOTAL	10.59%	$7,914,972.92	-6.12%	$7,389,646.26

Urban county & city public defense expenditures

	% +/- (FY2013 to FY2017)	FY2018 Budget	% +/- (FY2017 to FY2018)	3 YR ave (FY2015 thru FY2017)
CLARK	14.06%	$44,893,772.00	4.60%	$40,713,371.00
Boulder	14.87%			$28,114.72
Henderson	-0.57%	$258,300.00	-5.82%	$281,753.00
Las Vegas	4.89%	$550,000.00	6.71%	$508,749.15
Mesquite	345.00%	$32,000.00	-4.89%	$31,121.25
North Las Vegas	0.00%	$190,000.00	0.00%	$190,000.00
WASHOE	20.58%	$13,531,571.00	3.87%	$11,877,143.33
Reno				
Sparks	21.54%	$158,000.00	0.00%	$146,000.00
URBAN TOTAL	14.68%	$67,370,615.92	2.99%	$61,019,898.72

STATE TOTAL	14.68%	$67,370,615.92	2.99%	$61,019,898.72

CHAPTER IV

RURAL COUNTY & CITY INDIGENT DEFENSE SYSTEMS - ATTORNEYS

Every state in the nation has created some sort of system for providing an attorney to represent an indigent defendant who is 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*,[692] 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"[693] 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 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*,[694] "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.'"[695]

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692 466 U.S. 648 (1984).

693 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)).

694 766 F.2d 1071 (7th Cir. 1985).

695 Wahlberg v. Israel, 766 F.2d 1071, 1076 (7th Cir. 1985).

A. INDEPENDENCE OF THE DEFENSE FUNCTION AND SELECTION OF ATTORNEYS

In *United States v. Cronic*,[696] the U.S. Supreme Court pointed to the case of the so-called "Scottsboro Boys" – *Powell v. Alabama*[697] – as representative of the constructive denial of the right to counsel.[698] 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.[699]

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.

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."[700] Reflecting this command, the first of the American Bar Association's *Ten Principles of a Public Defense*

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696 466 U.S. 648 (1984).

697 287 U.S. 45 (1932).

698 United States v. Cronic, 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.").

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

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

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."[701] 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.

The Nevada Supreme Court attempted to deal with undue judicial interference in its January 2008 AKDT 411 Order.[702] In that order, the Court noted that the "appointment of counsel, approval of fees, and determination of indigency" should be performed by an independent agency or judge not involved with the specific case.[703] Although the initial order was modified at the recommendation of the rural subcommittee of the IDC[704] to allow leeway in rural jurisdictions where there are not many judges, the rural courts are still supposed to appoint counsel in conflict cases on a straight rotational basis and not approve requests for experts and investigators on cases over which they are presiding. Throughout the rural counties, judges readily say they are not doing a straight rotational appointment of private attorneys in conflict cases because it is difficult enough to find attorneys willing to take cases and they just have to call around until someone says "yes."

Among the rural counties, only Douglas County overtly has judicial interference written into their contracts: "The Judges of the Ninth Judicial District Court and the Justices of the two Townships are expressly designated the authority to oversee and implement the provisions of this contract."[705] In searching for contract attorneys, the Douglas County judges said they ran an ad in the Nevada Lawyer Magazine, reviewed applications, and made recommendations to the board of county commissioners, which technically made the final hiring decision.

The problem of judicial interference is perhaps most notable in the approval of experts and investigators. To be clear, virtually every judge stated that he or she always

[701] ABA, ABA Ten Principles of a Public Defense Delivery System, commentary to Principle 1, at 2 (Feb. 2002).

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

[703] 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").

[704] 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).

[705] *See, e.g.*, Contract for Professional Services between Douglas County, Nevada and Kristine L. Brown, Esq. for Indigent Legal Services ¶ 11 (July 1, 2017 through June 30, 2018).

approves expert and investigation requests whenever asked. However, outside of the jurisdictions served by government employee public defender offices, courts are rarely asked to authorize case-related expenses. The 6AC requested every rural court to provide us with the number of requests and dollar amounts approved for case-related expenses (mostly experts and investigators) for FY 2017. Of all requests for experts and investigation in the rural jurisdictions, 46% came from the five counties served by government employee public defender offices (Carson City, Elko, Humboldt, Pershing, and Storey). This appears to confirm that attorneys under contract feel less inclined to ask a judge for these services.

Table: Requests for case-related expenses

County	Court	# of Requests	Amount
Carson City	District Court	25	$47,593.00
	Justice/Muni Courts	7	$8,688.00
Churchill	District Court	N/A	$30,612.37
	Justice/Muni Courts	0	$ -
Douglas	District Court	17	$14,230.31
	Justice/Muni Courts	0	$ -
Elko	District Court	32	$5,531.65
	Justice/Muni Courts	5	$3,939.52
Esmeralda	District Court	0	$ -
	Justice/Muni Courts	0	$ -
Eureka	District Court	1	$5,141.98
	Justice/Muni Courts	0	$ -
Humboldt	District Court	10	$15,000.00
	Justice/Muni Courts	1	$1,872.42
Lander	District Court		$5,600.00
	Justice/Muni Courts	0	$ -
Lincoln	District Court	2	$10,283.97
	Justice/Muni Courts	0	$ -
Lyon	District Court	40	$77,000.00
	Justice/Muni Courts	3	$2,572.93
Mineral	District Court	N/A	$12,536.07
	Justice/Muni Courts	0	$ -
Nye	District Court	3	$8,544.00
	Justice/Muni Courts	8	$3,031.88
Pershing	District Court	2	$1,950.00
	Justice/Muni Courts	0	$ -
Storey	District Court	11	$46,674.49
	Justice/Muni Courts	8	$4,050.00
White Pine	District Court	2	$10,283.97
	Justice/Muni Courts	0	$ -
Total		177	$315,136.55

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. In the 1979 case of *Ferri v. Ackerman*, the United States Supreme Court stated that "independence" of appointed counsel to act as an adversary is an "indispensable element" of "effective representation."[706] Two years later, the Court observed in *Polk County v. Dodson* that states have a "constitutional obligation to respect the professional independence of the public defenders whom it engages."[707] 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."[708] 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.

For the most part, the jurisdictions served by government employee public defender offices have less political interference than in contract jurisdictions. For example, Elko County has a selection committee for hiring the public defender, made up of county administrators (including the director of Human Resources) and respected local attorneys. The chief public defender has authority to hire and fire deputies within the office, within the limitations of staff size and compensation set by the board of county commissioners.[709] Humboldt County too has a selection committee for hiring the public defender[710] (but not for hiring the alternate defender).

Only Lincoln and White Pine counties have contractual language that attempts to prevent undue political and judicial interference by stating that the contracting attorneys may establish an independent oversight board of no less than three people.[711] However, no counties have actually established independent oversight boards.

Elsewhere, we heard stories suggesting that the independence of public defense attorneys may be unduly interfered with. For example, in Churchill County in late 2017, the then existing three public defense contracts were coming up for renewal.

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706 444 U.S. 193, 204 (1979).

707 454 U.S. 312, 321-22 (1981).

708 454 U.S. 312, 321 (1981).

709 County of Elko, Nevada, County Code 1-10-3 (current through Jan. 17, 2018; originally enacted June 28, 1979).

710 County of Humboldt, Nevada, County Code 2.44.010.B (current through Apr. 23, 2018).

711 *See, e.g.*, Contract for Public Defense Services ¶ IV (July 1, 2017 through June 30, 2019) (between County of Lincoln and Dylan V. Frehner).

Each of the contract attorneys appeared before the board of county commissioners to argue for their budget. They tried to present evidence of the compensation attorneys in other counties got under their contracts, and that in the five years from 2012 through 2017 the Churchill County District Attorney's office received a 10% budget increase and all other county employees got a raise, but the funding for the public defense contracts remained static. One defense attorney believes the chief deputy assistant district attorney interfered with contract negotiations and convinced the county commissioners and manager to refuse to give the contract defense attorneys a raise because the deputy had lost a number of trials to the defense.

The sense of prosecutorial interference with the defense function has at least a partial basis in Nevada's statutes. As explained in Chapter I, statutory law requires the district attorney in each county to give legal advice to the board of county commissioners on "matters relating to their duties."[712] 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. Requiring the district attorney to advise the board of county commissioners about federal and state laws, contracts, and ordinances involving the qualifications, selection, compensation, and performance of indigent defense attorneys leaves more than just an implication that the defense attorneys are subject to the control of their criminal justice counterparts, in violation of national standards.[713]

Lyon County has an informal way of reducing judicial and political interference in the selection of attorneys, whereby the county manager asks the existing contract indigent defense attorneys whom they believe the county should contract with when there is an opening. There has never been an RFP for a public defense contract in Lyon County, and the county manager confirmed the county does not have an RFP process for public defense contracts. The county manager said he would prefer that the judges or the district attorney weigh in on these decisions but that they have steadfastly refused to do so out of fear of appearing to unduly infringe on the independence of the defense function. Having the existing indigent defense attorneys vet possible new contract attorneys may well cut down on interference with the defense function, but it also impedes the search for attorneys with appropriate qualifications to serve as defense counsel in all case types.

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712 Nev. Rev. Stat. § 252.170(2) (2017).

713 *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).

B. ATTORNEY QUALIFICATIONS, TRAINING, AND SUPERVISION

The trial judge overseeing the Scottsboro Boys' Alabama trial appointed a real estate lawyer from Chattanooga, who was not licensed in Alabama and was admittedly unfamiliar with the state's rules of criminal procedure.[714] The *Powell* Court concluded that defendants require the "guiding hand"[715] of counsel – i.e., attorneys must be qualified and trained to help defendants advocate for their stated legal interests.

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 be an intellectual property lawyer, a consumer protection lawyer, or an attorney specializing in estates and trusts, mergers and acquisitions, or bankruptcy.[716] Specialties must be developed. Just as you would not go to a dermatologist rather than a heart surgeon for heart surgery, despite both doctors being licensed practitioners, a real estate or divorce lawyer cannot be expected to handle a complex criminal case competently. Criminal defense is an especially complex specialty area of law.[717]

National standards declare that an attorney's ability to provide effective representation depends on his familiarity with the "substantive criminal law and the law of

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[714] A retired local attorney who had not practiced in years was also appointed to assist in the representation of all nine co-defendants.

[715] Powell v. Alabama, 287 U.S. 45, 68-69 (1932). ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.").

[716] Christopher Sabis and Daniel Webert, *Understanding the Knowledge Requirement of Attorney Competence: A Roadmap for Novice Attorneys*, 15 Geo. J. Legal Ethics 915, 915 (2001-2002) ("The American Bar Association (ABA) Model Rules of Professional Conduct (Model Rules) provide that an attorney must possess and demonstrate a certain requisite level of legal knowledge in order to be considered competent to handle a given matter. The standards are intended to protect the public as well as the image of the profession. Failure to adhere to them can result in sanctions and even disbarment. However, because legal education has long been criticized as being out of touch with the realities of legal practice and because novice attorneys often lack substantive experience, meeting the knowledge requirements of attorney competence may be particularly difficult for a lawyer who recently graduated from law school or who enters practice as a solo practitioner.").

[717] As the American Bar Association explained more than 20 years ago, "[c]riminal 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." ABA, Standards for Criminal Justice: Providing Defense Services, Standard 5-1.5 and commentary (3d ed. 1992).

criminal procedure and its application in the particular jurisdiction."[718] Yet, Nevada does not require any particular procedures for selecting the attorneys who provide public defense representation and does not mandate that they have any particular qualifications for being assigned to any cases except death penalty cases.[719] In other words, even an attorney newly graduated from law school and having just passed the bar examination could be assigned to represent an indigent defendant in a murder case where the defendant faces life in prison if convicted. To be clear, there are many highly-qualified lawyers providing indigent defense services in Nevada's rural counties. But, in many ways that result is serendipitous, and there is nothing institutionalized to prevent a future county manager or judge from choosing an attorney who offers the cheapest services without regard to his or her qualifications.

Ongoing training is necessary for attorneys to maintain their familiarity with criminal law and procedure and their competence to provide effective representation. For that reason, all national standards, including those of the National Advisory Commission on Criminal Justice Standards and Goals,[720] require that the indigent defense system provide attorneys with access to a "systematic and comprehensive" training program,[721] 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.[722]

[718] National Legal Aid & Defender Association, Performance Guidelines for Criminal Defense Representation, Guideline 1.2(a) (1995).

[719] Nev. Sup. Ct. Rules, Rule 250.

[720] 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, ch.13 (The Defense) (1973).

[721] National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts, ch.13 (The Defense), Standard 13.16 (1973) ("The training of public defenders and assigned counsel panel members should be systematic and comprehensive.").

[722] National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts, ch. 13 (The Defense), Standard 13.16 (1973); *see also* National Legal Aid & Defender Association, Performance Guidelines for Criminal Defense Representation, Guidelines 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

Ongoing training, therefore, is an active part of the job of being a public defense provider.

All Nevada attorneys are required to have 13 hours per year of continuing legal education ("CLE"), of which at least two hours must be in professional responsibility and ethics, and one hour shall be exclusively in the area of substance abuse, addictive disorders and/or mental health issues that impair professional competence.[723] There is no requirement that attorneys obtain CLE or training in any specific area of practice and, in particular, no requirement that the CLE be in the fields in which they practice. The extent to which counties' public defense systems comply with national standards in the qualifications and training of attorneys varies. Those counties with a government employee public defender office (either county or state) tend to require and offer training to the attorneys. For example, the public defender office budget in Elko County includes $4,500 for training. Each year, one or two of the deputy public defenders are sent to a national training program. One attorney travelled to Texas to participate in a mental health seminar put on by the National Association of Criminal Defense Lawyers in Austin Texas, and the office provided funds for his travel; he also received a partial scholarship. Another Elko public defender participated in a two-week training program at the National Juvenile Defender Center in Washington, DC. The idea is that the participating attorneys get materials and share the information gained with the other attorneys in the office upon return.

In Humboldt County, there is a line item for training in the budget of both the public defender and the alternate public defender, sufficient to cover between 10 to 12 continuing legal education credits each year.[724] However, there is no requirement about having to take CLE specific to criminal law.

The State Public Defender covering Carson City and Storey County has an office training budget that varies from year to year, but it is generally in the $10,000 ballpark.[725] That said, there is no training or supervision of the conflict attorneys.

Lincoln and White Pine counties' contracts state: "[o]ngoing 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," and thus requires the contracting law firm to " provide sufficient training, whether in-house or

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to withdraw.").

723 Nev. Sup. Ct. Rules, Rule 210 (amended Jan. 1, 2018).

724 Email from Humboldt County Public Defender Matt Stermitz to 6AC Executive Director David Carroll (June 6, 2018).

725 Email from State Public Defender Karin Kreizenbeck to 6AC Executive Director David Carroll (Aug. 7, 2018).

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. . . .."[726] But, of course, solo practitioners cannot create "in-house" training units and the counties provide no money for outside training. Both counties also require "[e]ight hours of (each year's required yearly) continuing legal education credits shall be spent in courses relating to criminal law practice or other areas of law in which the Firm provides legal services to eligible clients under the terms of this Contract."[727]

The public defense contracts in Nye County require attorneys "to complete the On-Line Attorney Dependency Training offered by the Nevada Court Improvement Program within sixty (60) calendar [sic] of the execution date of the contract,"[728] but there is no similar requirement about criminal training. And, no money is provided for the dependency training.

Mineral County requires the contract attorney to "guarantee the County that said attorney will remain current with all conditions and training required by law to attain and maintain capital case qualification solely at Contractor's expense."[729] The county does not provide any funding for the attorney to obtain training.

Douglas, Esmeralda, Eureka, and Lander counties have no public defender training requirements at all. One Douglas County attorney told us that she did not receive any training for family law, prior to being required to handle 432B cases. The Douglas County Bar has a monthly lunch where lawyers can earn one CLE credit, but most of the sessions are not criminal law related. Some CLE programs offer training in juvenile cases specifically, but only recently has the bar created some programs focused on family law. These cost $20 each, which comes out of the pockets of any defense attorneys who choose to attend.

Churchill and Lyon counties also do not have any formal training requirements. However, attorneys in both counties talked about how new attorneys learn under the supervision of more senior attorneys, generally shadowing them and sitting second chair on cases before getting misdemeanor cases of their own and moving up to felonies over time.

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[726] *See, e.g.*, Contract for Public Defense Services ¶ X (July 1, 2017 through June 30, 2019) (between County of Lincoln and Dylan V. Frehner).

[727] *See, e.g.*, Contract for Public Defense Services ¶ VI.A (July 1, 2017 through June 30, 2019) (between County of Lincoln and Dylan V. Frehner).

[728] *See, e.g.*, Contract for Professional Services between Nye County, Nevada and Jason L. Earnest, Esq. for Public Defender Services ¶ 2.C (July 1, 2017 through June 30, 2018).

[729] Contract for Services of Independent Contractor County Public Defender ¶ 7 (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 ¶ 7 (July 1, 2018 through June 30, 2019) (between Mineral County Board of County Commissioners and John E. Oakes, Esq. and Justin E. Oakes, Esq.).

C. CASELOADS & SUFFICIENT TIME

The Court in *Powell v. Alabama* notes that the lack of "sufficient time"[730] to consult with counsel and to prepare an adequate defense was one of the primary reasons for finding that the Scottsboro Boys were constructively denied counsel. Having been assigned unqualified counsel, the Scottsboro Boys' trials proceeded immediately that same day.[731] 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."[732] 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."[733] 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."[734] 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"[735] – 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 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, be-

730 Powell v. Alabama, 287 U.S. 45, 59 (1932).

731 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.

732 Powell v. Alabama, 287 U.S. 45, 59 (1932).

733 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.").

734 United States v. Cronic, 466 U.S. 648, 657 (1984) (citing United States *ex rel.* Williams v. Twomey, 510 F.2d 634, 640 (7th Cir. 1975)).

735 United States v. Cronic, 466 U.S. 648, 656-57 (1984).

fore 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;
- 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).[736]

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."[737]

1. National workload standards

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."[738] 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.[739] 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

[736] *See generally* National Legal Aid & Defender Association, Performance Guidelines for Criminal Defense Representation (1995).

[737] State v. Wigley, 624 So.2d 425, 428 (La. 1993).

[738] ABA, ABA Ten Principles of a Public Defense Delivery System, Principle 5 (Feb. 2002).

[739] ABA, ABA Ten Principles of a Public Defense Delivery System, commentary to Principle 5 (Feb. 2002).

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."[740]

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.[741] NAC Standard 13.12 prescribes absolute maximum numerical caseload limits of:

- 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.[742]

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.[743]

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[740] Statement of Interest of the United States at 9, Wilbur v. City of Mount Vernon, No. C11-1100RSL (W.D. Wash., filed Aug 14, 2013), *available at* http://www.justice.gov/crt/about/spl/documents/wilbursoi8-14-13.pdf. *See, e.g.*, Mary Sue Backus and 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.").

[741] 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, ch.13 (The Defense) (1973).

[742] National Advisory Commission on Criminal Justice Standards and Goals, Report of the Task Force on the Courts, ch.13 (The Defense), Standard 13.12 (1973).

[743] *See* National Study Commission on Defense Services, Guidelines for Legal Defense Systems in the United States § 4.1 (1976) ("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.").

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;[744] one social service caseworker for every three attorneys; one paralegal for every four felony attorneys;[745] and one secretary for every four felony attorneys.[746] 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."[747]

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.

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.[748]

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744 National Study Commission on Defense Services, Guidelines for Legal Defense Systems in the United States § 4.1 (1976) ("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.").

745 *See* Bureau of Justice Assistance, U.S. Dep't of Justice, Keeping Defender Workloads Manageable 10 (2001), *available at* https://www.ncjrs.gov/pdffiles1/bja/185632.pdf.

746 *Id*.

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

748 *See, e.g.*, American Council of Chief Defenders, Statement on Caseloads and Workloads

2. Lack of caseload standards & oversight

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"[749] 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."[750] 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."[751] However, as will be established under the proceeding 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

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(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.").

[749] *See, e.g.*, Contract for Public Defense Services ¶ VII.D (July 1, 2017 through June 30, 2019) (between County of Lincoln and Dylan V. Frehner).

[750] *See, e.g.*, Contract for Public Defense Services ¶ VII.D (July 1, 2017 through June 30, 2019) (between County of Lincoln and Dylan V. Frehner).

[751] *See, e.g.*, Contract for Public Defense Services ¶ VII.D (July 1, 2017 through June 30, 2019) (between County of Lincoln and Dylan V. Frehner).

> 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.[752]

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,[753] 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 counties[754] 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.

3. Lack of uniform caseload reporting

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

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752 Nev. Rev. Stat. § 180.080(1)(a) (2017).

753 The contract between Eureka County and Kelly Brown 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." Contract for Services of Independent Contractor between Eureka County, Nevada and Kelly C. Brown, PLLC ¶ 5, Attachment C - List of advantages (July 1, 2015 through June 30, 2017) (renewed for July 1, 2017 through June 30, 2019 under same terms by Letter from Kelly Brown to Board of Eureka County Commissioners (Jan. 30, 2017)). It also states that "All activities on all cases will be tracked in detail, and provided to Eureka County at your request." Contract for Services of Independent Contractor between Eureka County, Nevada and Kelly C. Brown, PLLC ¶ 5, Attachment C - Scope of services (July 1, 2015 through June 30, 2017) (renewed for July 1, 2017 through June 30, 2019 under same terms by Letter from Kelly Brown to Board of Eureka County Commissioners (Jan. 30, 2017)). However, Eureka County has never requested this information from Brown.

754 The three Carson City contracts for conflict services also require caseload reporting. *See, e.g.*, Independent Contractor Agreement, Contract No. 1718-006, Title Conflict Counsel, John E. Malone; Attorney at Law ¶ 2.1, Exhibit A - Procedural Provisions ¶ h (July 1, 2017 through June 30, 2020).

during the preceding year,"[755] 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 County[756] and Pershing County[757] require more detailed reporting, including: a) the number of new cases received during the report period;[758] 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.[759] The Lander County contract requires the attorney to submit quarterly reports indicating: a) number

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[755] County of Nye, Nevada, County Code 2.48.050(A) (current through May 15, 2018). Nye County's contracts with each of the five attorneys who provide primary and conflict services contain provisions about reporting, but they allow for so much variation in reporting that they are near meaningless. *See, e.g.*, Contract for Professional Services between Nye County, Nevada and Jason L. Earnest, Esq. for Public Defender Services ¶ 10.A (July 1, 2017 through June 30, 2018) ("Attorney shall make an annual report. . . covering all cases handled by his or her office during the preceding year . . . includ[ing] a list, by name of defendant, of all cases assigned to Attorney during the preceding fiscal year or current active cases previously assigned to Attorney indicating for each case the type of offenses involved and the manner and date of disposition."); Contract for Professional Services between Nye County, Nevada and Jason L. Earnest, Esq. for Public Defender Services ¶ 10.B (July 1, 2017 through June 30, 2018) ("Attorney shall maintain records of cases assigned and report such information . . . each month for activities during the preceding calendar month. Reports shall include, but not limited to tracking of number of cases opened and closed, type of offenses, manner of disposition and such other pertinent information as requested by the County manager.").

[756] County of Humboldt, Nevada, County Code 2.44.080.B (current through Apr. 23, 2018).

[757] County of Pershing, Nevada, County Code 2.80.070.B (current through Mar. 15, 2017).

[758] Humboldt County categorized case types as: "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, q. Miscellaneous proceedings." County of Humboldt, Nevada, County Code § 2.44.080.B.1 (current through Apr. 23, 2018). Pershing County categorized case types as: "a. Felonies. b. Gross misdemeanors. c. Misdemeanors. d. Municipal ordinance violations. e. Parole violations. f. Modifications of probation or sentence. g. Miscellaneous proceedings. h. Juvenile proceedings. i. Insanity hearings. j. Probation revocations. k. Supreme court appeals. l. District court appeals. m. Extradition proceedings. n. Postconviction proceedings. o. Child protective proceedings. p. Drug court proceedings. q. Guardianship proceedings." County of Pershing, Nevada, County Code 2.80.070.B.5 (current through Mar. 15, 2017).

[759] *See, e.g.*, Contract for Professional Services between Churchill County, Nevada and Jacob Sommer, Esq. for Indigent Legal Services ¶ 5.A (Dec. 1, 2017 through June 30, 2021) ("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.").

of appointments; b) number of conflicts; and, c) how cases are resolved.[760] 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.[761]

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" (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 Administrator."[762]

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; (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)

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760 Public Defender Agreement ¶ 11 (Jan. 5, 2015 through Dec. 31, 2016) (between Lander County Board of County Commissioners and Belanger & Plimpton) ("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.").

761 The City of Fernley and the City of Yerington use similar contract templates. The Fernley contract 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." Contract ¶ 7, Attachment A ¶ G (July 1, 2017 through June 30, 2018) (between City of Fernley and Kenneth V. Ward, Esquire). The Yerington contract is the same except reports are only to be filed quarterly and it is not necessary to report whether an appeal was filed. Contract for Services of Independent Contractor ¶ 5, Attachment A ¶ G (June 1, 2017 through May 30, 2018) (between City of yerington and Johnston Law Offices, P.C.).

762 *See, e.g.*, Contract for Public Defense Services ¶ XIV.B (July 1, 2017 through June 30, 2019) (between County of Lincoln and Dylan V. Frehner).

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. If any State statute in effect now or hereinafter enacted requires public defenders to provide certain information or reports, Attorney agrees to provide and maintain that information at no additional cost 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 case of a dispute, the Attorney should attempt to resolve the matter with the County Manager and, if necessary, the Board of County Commissioners.[763]

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 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."[764]

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[763] *See, e.g.*, Agreement for Public Defender Services ¶¶ G.1-4 (July 1, 2017 through June 30, 2020) (between Lyon County and Aaron Mouritsen).

[764] Conference of State Court Administrators and National Center for State Courts, State Court Guide to Statistical Reporting at 14 (ver. 2.1.2, Mar. 20, 2017), *available at* http://www.courtstatistics.org/~/media/Microsites/Files/CSP/State%20Court%20Guide%20to%20Statistical%20Reporting%20v%202point1point2.ashx.

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.[765]

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.

Similar issue 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

[765] 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 crosssections 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.

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"[766] at the time of filing, regardless of the severity of the case when it is disposed.[767] 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.[768]

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 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.

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[766] Conference of State Court Administrators and National Center for State Courts, State Court Guide to Statistical Reporting at 14-15 (ver. 2.1.2, Mar. 20, 2017) ("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.").

[767] Conference of State Court Administrators and National Center for State Courts, State Court Guide to Statistical Reporting at 15 (ver. 2.1.2, Mar. 20, 2017) ("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.").

[768] The NCSC/COSCA definition states that probation/parole violations should simply be denoted as "re-opened" cases. Conference of State Court Administrators and National Center for State Courts, State Court Guide to Statistical Reporting at 14 (ver. 2.1.2, Mar. 20, 2017). 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.

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.

4. Caseloads in Humboldt County

Only Humboldt County provided complete uniform caseload information in a manner consistent to conduct a caseload analysis using the NAC standards.

Table: Humboldt County indigent defense caseloads

Public Defender		2013	2014	2015	2016	2017	Alternate Public Defender		2017
Adult	Felonies	167	159	121	135	129	Adult	Felonies	53
	Gross Misdemeanors	21	25	25	15	26		Gross Misdemeanors	3
	Misdemeanors	134	156	145	154	116		Misdemeanors	29
	Probation Violations	27	22	28	22	22		Probation Violations	18
	Parole Violations	4	2	4	4	4		Parole Violations	0
	Direct Appeals	13	4	7	8	4		Direct Appeals	0
	Justice Court Appeals	4	2	1	1	2		Justice Court Appeals	0
	Others	0	2	34	28	19		Others	14
Juvenile	Felonies	13	16	7	10	6	Juvenile	Felonies	16
	Gross Misdemeanors	1	5	1	1	2		Gross Misdemeanors	5
	Misdemeanors	34	38	79	40	5		Misdemeanors	34
	Probation Violations	15	19	11	13	9		Probation Violations	21
	Parole Violations	0	0	0	2	0		Parole Violations	0
	Direct Appeals	0	3	0	0	0		Direct Appeals	0
	Other	14	43	58	32	5		Other	108
	432B Cases	N/A	N/A	N/A	7	2		432B Cases	16
Total Cases		447	496	521	472	351	Total Cases		317
Jury Trials		2	2	3	2	1	Jury Trials		1
Trial %		0.00	0.00	0.01	0.00	0.00	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."[769] 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.

[769] Conference of State Court Administrators and National Center for State Courts, State Court Guide to Statistical Reporting at 14 (ver. 2.1.2, Mar. 20, 2017).

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:

Table: NAC standards applied to Humboldt County caseloads

	Public Defender	2013	2014	2015	2016	2017		Alternate Public Defender	2017
Adult	Felonies	1.11	1.06	0.81	0.90	0.86	Adult	Felonies	0.35
	Gross Misdemeanors	0.05	0.06	0.06	0.04	0.07		Gross Misdemeanors	0.01
	Misdemeanors	0.34	0.39	0.36	0.39	0.29		Misdemeanors	0.07
	Probation Violations							Probation Violations	
	Parole Violations							Parole Violations	
	Direct Appeals	0.52	0.16	0.28	0.32	0.16		Direct Appeals	0.00
	Justice Court Appeals							Justice Court Appeals	
	Others							Others	
Juvenile	Felonies	0.07	0.08	0.04	0.05	0.03	Juvenile	Felonies	0.08
	Gross Misdemeanors	0.01	0.03	0.01	0.01	0.01		Gross Misdemeanors	0.03
	Misdemeanors	0.17	0.19	0.40	0.20	0.03		Misdemeanors	0.17
	Probation Violations							Probation Violations	
	Parole Violations							Parole Violations	
	Direct Appeals							Direct Appeals	
	Other							Other	
	432B Cases							432B Cases	
Total FTE attorneys needed		2.26	1.97	1.95	1.90	1.44	Total FTE attorneys 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.[770]

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 then they closed

[770] The alternate public defender is a full-time position begun in April 2017. Thus, she only worked three quarters of the 2017 calendar year.

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:

- Drug Court
- Drug Court, Track II (focusing on offenders aged 18-22 years)
- Family Treatment Court (certain 432 B cases where there are no guardians available)
- 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).

5. Caseloads in counties with populations under 15,000

There are eight Nevada counties with populations less than 15,000: Esmeralda, Eureka, Lander, Lincoln, Mineral, Pershing, Storey, and White Pine.

Storey County. The State Public Defender provided caseload numbers for Storey County.[771] 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.[772] Collectively, this attorney spent 688.4 hours[773] on these cases or approximately a third of an attorney work year. There appears to be no issues with excessive caseloads in Storey County.

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[771] Email from State Public Defender Karin Kreizenbeck to 6AC Executive Director David Carroll (Aug. 3, 2018).

[772] State Public Defender, Fiscal Year 2017 at 1-3 (as provided by Email from State Public Defender Karin Kreizenbeck to 6AC Executive Director David Carroll (Aug. 3, 2018)).

[773] 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. State Public Defender, Fiscal Year 2017 at 3 ¶ 11 (as provided by Email from State Public Defender Karin Kreizenbeck to 6AC Executive Director David Carroll (Aug. 3, 2018)).

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.

Lander 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,[774] as detailed below:

Table: Lander County indigent defense caseloads

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.[775] However, although there are two justice courts in Lander County, Argenta Justice Court in Battle Mountain and Austin Justice Court in Austin, that are 89 miles apart, the Austin Justice Court judgeship was vacant for the majority of this review.[776] 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.

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774 Email from Argenta Justice Court Judge Max Bunch to 6AC Executive Director David Carroll (Aug. 3, 2018). 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."

775 Slightly larger than Connecticut.

776 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.

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. Therefore, no excessive caseload concerns arose in Lander County.

Lincoln County. In Lincoln County, the contract defender reported a 2017[777] 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.

Esmeralda, Eureka, Mineral, Pershing, and White Pine counties. 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.[778] However, the Annual Report of the Nevada Judiciary includes appendix tables that detail the number of new filings by court, by county, by case type.[779] 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:[780]

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[777] 2017 figures reflect July 1, 2017 – May 31, 2018, as reported by Dylan Frehner, the primary Lincoln County contract attorney. These figures do not include cases appointed to the conflict contract attorney or to other conflict attorneys appointed on a case by case basis.

[778] To be clear, Esmeralda, Eureka, and Mineral do not contractually require public defense attorneys to track caseloads. The contract between Eureka County and Kelly Brown provides that Brown will collect data and provide it to the county at the request of the county, but Eureka County has never requested this information from Brown. Contract for Services of Independent Contractor between Eureka County, Nevada and Kelly C. Brown, PLLC ¶ 5, Attachment C – Scope of services, Attachment C - List of advantages (July 1, 2015 through June 30, 2017) (renewed for July 1, 2017 through June 30, 2019 under same terms by Letter from Kelly Brown to Board of Eureka County Commissioners (Jan. 30, 2017)).

[779] Nevada Judiciary, Annual Report of the Nevada Judiciary, Appendix Tables (FY2017), *available at* https://nvcourts.gov/Supreme/Reports/Annual_Reports/2017_Annual_Report/.

[780] Nevada Judiciary, Annual Report of the Nevada Judiciary, Appendix Tables (FY2017), *available at* https://nvcourts.gov/Supreme/Reports/Annual_Reports/2017_Annual_Report/. To calculate the number of new filings of each case type, for each county, as shown in the table, 6AC used:

- for "Felony" – the sum of Table B1-1, District Court, Felony, "New Filings" and Table B5-1, Justice Court, Felony, "New Filings"
- for "Gross Misdemeanor" – the sum of Table B1-1, District Court, Gross Misdemeanor, "New Filings" and Table B5-1, Justice Court, Gross Misdemeanor, "New Filings"
- for "Misdemeanor" – the sum of Table B5-1, Justice Court, Misdemeanor (non-traffic), "New Filings" and Table B7-1, Municipal Court, Misdemeanor (non-traffic), "New Filings"
- for "Delinquency" - Table B4, District Court Juvenile Non-Traffic Caseload, Delinquency, sum of "New Filings"

Table: New case filings in Esmeralda, Eureka, Mineral, Pershing, and White Pine

	DISTRICT COURT			JUSTICE COURT			
	Felony	Gr. Misdr.	Delinquency	Felony	Gr. Misdr.	Misdr.	Total
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.[781] Below is the estimated adjusted indigent defense caseload for the five counties:

Table: Estimated indigent defense caseloads for Esmeralda, Eureka, Mineral, Pershing, and White Pine

	Felony	Gr. Misdr.	Delinquency
Esmeralda	5	0	2
Eureka	11	4	12
Mineral	207	28	125
Pershing	145	17	108
White Pine	200	15	30

The following table shows the number of FTE's needed to meet the NAC standards and the current number of FTE's providing representation:

Table: NAC standards applied to indigent defense caseloads for Esmeralda, Eureka, Mineral, Pershing, and White Pine

	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

[781] 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 who qualify for a public attorney may be going unrepresented. However, for the sake of consistency, the authors of this report use that rate in the above analysis.

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.[782]

6. Caseloads in counties with populations over 15,000

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.[783] The State Public Defender assigns 4.75 FTE attorneys[784] 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.[785] 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.[786] More troubling, is that the number of felony and 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 cases pending at the close of the year, meaning that the backlog is increasing each year.

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[782] 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.

[783] Email from State Public Defender Karin Kreizenbeck to 6AC Executive Director David Carroll (Aug. 3, 2018).

[784] The State Public Defender has four trial level attorneys dedicated full-time to Carson City. SPD Deputy Chief Marcie Ryba covers Carson City part-time and so is included in the Carson City analysis at .5 of an FTE. Additionally, SPD Chief Public Defender Karin Kreizenbeck notes that she covers two of the four Carson City specialty courts and otherwise fills in as needed. She is counted as a .25 FTE attorney in this analysis. Email from State Public Defender Karin Kreizenbeck to 6AC Executive Director David Carroll (Apr. 4, 2018).

[785] State Public Defender, Fiscal Year 2017 at 4-6 (as provided by Email from State Public Defender Karin Kreizenbeck to 6AC Executive Director David Carroll (Aug. 3, 2018)).

[786] State Public Defender, Fiscal Year 2017 at 4-6 (as provided by Email from State Public Defender Karin Kreizenbeck to 6AC Executive Director David Carroll (Aug. 3, 2018)).

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.

Table: Churchill County indigent defense caseloads

Description		Neidert	Sommer	Woodman	Monthly Totals
Total New Cases		168	176	158	502
	% Allocation	33%	35%	31%	100%
Adult Criminal Cases					
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
Juvenile Delinquency Cases					
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
Juvenile Delinquency Cases					
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.[787] 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).

[787] 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.

Table: Elko County indigent defense caseloads[788]

Attorney	Cases	Felony	Gr. Misdr.	Misdemeanor	% of NAC	Hours / case
Hill	134	77	2	41	61.6%	14.90
Stewart	358	147	17	180	143.0%	5.59
Foster	368*				184.0%	5.43
Gaumond	303	118	16	154	117.2%	6.60
Green	264	138	9	112	120.0%	7.58
Pennell	292	83	8	188	102.3%	6.85
Leamon	386	65	5	308	120.3%	5.18

* almost all juvenile cases

Lyon County. What can be gleaned from the Lyon County caseload reports provided is 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.[789] 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).

Table: Lyon County - Pederson indigent defense caseloads

2018 (annualized on 9 months of data)

	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)

	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

[788] 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.

[789] Email from Salina Belt, Legal Assistant to Wayne A. Pederson, Esq., to 6AC Executive Director David Carroll (May 16, 2018).

FY 2016 (July 2015 to June 2016)

	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

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. And, when assessing Pederson's workload prior to 2017 it is important to note that Pederson also was contracted to 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);[790]
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).

[790] Brad Johnston indicated that he terminated the contract due to excessive caseloads during the contract year.

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.[791] 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.

Table: Lyon County - Johnston indigent defense caseloads
FY 2017 (annualized based on one quarter)

	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 required 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.[792] 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.

Table: Lyon County - Trotter indigent defense caseloads
FY 2015 (annualized based on one quarter)

	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 required 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.

[791] Brad Johnson thinks indigent defense attorneys should track their hours to be able to compare their work on private and public cases. Some Lyon County attorneys think that judges skew cases assignments to direct complex cases to more experienced lawyers.

[792] Email from Lyon County Manager's Office Administrative Assistant Erin Lopez to 6AC Executive Director David Carroll (May 11, 2018).

Table: Lyon County - Laughlin indigent defense caseloads
Calendar 2014 (annualized based on three quarters)

	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 required 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 attorney would need to dedicate approximately 11% of her time.[793] 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.

[793] Forty-four cases divided by the NAC misdemeanor standard (400) equals .11 full-time equivalent attorneys.

Cases reported in the 2017 annual judicial report:[794]

Table: New case filings in Douglas and Nye

	Felony	Gr. Misdr.	Misdr.	Delinquency	Total
Nye County	845	123	825	93	1,886
Douglas County	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.

Table: Estimated indigent defense caseloads for Douglas and Nye

	Felony	Gr. Misdr.	Misdr.	Delinquency	Total
Nye County	718	123	264	93	1,198
Douglas County	388	66	405	58	917

FTE comparison against the NAC standards:

Table: NAC standards applied to indigent defense caseloads in Douglas and Nye

	Felony	Gr. Misdr.	Misdr.	Delinquency	FTEs Needed	Current FTEs
Nye County	4.79	0.31	0.66	0.47	6.22	2.5
Douglas County	2.58	0.17	1.01	0.29	4.05	2

D. 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.[795]

[794] Nevada Judiciary, Annual Report of the Nevada Judiciary, Appendix Tables (FY2017), *available at* https://nvcourts.gov/Supreme/Reports/Annual_Reports/2017_Annual_Report/. To calculate the number of new filings of each case type, for each county, as shown in the table, 6AC used:

- for "Felony" – the sum of Table B1-1, District Court, Felony, "New Filings" and Table B5-1, Justice Court, Felony, "New Filings"
- for "Gross Misdemeanor" – the sum of Table B1-1, District Court, Gross Misdemeanor, "New Filings" and Table B5-1, Justice Court, Gross Misdemeanor, "New Filings"
- for "Misdemeanor" – the sum of Table B5-1, Justice Court, Misdemeanor (non-traffic), "New Filings" and Table B7-1, Municipal Court, Misdemeanor (non-traffic), "New Filings"
- for "Delinquency" - Table B4, District Court Juvenile Non-Traffic Caseload, Delinquency, sum of "New Filings"

[795] *See, e.g.*, ABA, ABA 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

- *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.[796]

- *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.[797]

- *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."[798] Further, "[c]ontracts with private attorneys for

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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.").

[796] "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).

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

[798] *See, e.g.*, ABA, ABA Ten Principles of a Public Defense Delivery System, commentary to

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."[799]

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.

> 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.[800]

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.[801]

Principle 8, at 3 (Feb. 2002).

[799] ABA, ABA Ten Principles of a Public Defense Delivery System, commentary to Principle 8, at 3 (Feb. 2002).

[800] ABA, Standards for Criminal Justice – Providing Defense Services, Standard 5-1.4 Commentary (3d ed. 1992).

[801] *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

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 conflict, the lawyer may triage the time and energy he puts into his cases.[802] 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."[803]

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

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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.").

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

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

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.

Most of the contracts in rural Nevada have some financial conflicts built in to them. For example, Churchill[804] and Nye[805] counties require attorneys to pay for the cost of "routine" investigations. Carson City,[806] Churchill,[807] Douglas,[808] Eureka,[809] Pershing,[810]

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[804] *See, e.g.*, Contract for Professional Services between Churchill County, Nevada and Jacob Sommer, Esq. for Indigent Legal Services ¶ 4.A (Dec. 1, 2017 through June 30, 2021).

[805] *See, e.g.*, Contract for Professional Services between Nye County, Nevada and Jason L. Earnest, Esq. for Public Defender Services ¶ 3.C (July 1, 2017 through June 30, 2018).

[806] *See, e.g.*, Independent Contractor Agreement, Contract No. 1718-006, Title Conflict Counsel, John E. Malone; Attorney at Law, Exhibit A - Monthly Payments ¶ n (July 1, 2017 through June 30, 2020).

[807] *See, e.g.*, Contract for Professional Services between Churchill County, Nevada and Jacob Sommer, Esq. for Indigent Legal Services ¶ 6.C (Dec. 1, 2017 through June 30, 2021).

[808] *See, e.g.*, Contract for Professional Services between Douglas County, Nevada and Kristine L. Brown, Esq. for Indigent Legal Services ¶ 4.A (July 1, 2017 through June 30, 2018).

[809] Contract for Services of Independent Contractor between Eureka County, Nevada and Kelly C. Brown, PLLC ¶ 5, Attachment C - Scope of services (July 1, 2015 through June 30, 2017) (renewed for July 1, 2017 through June 30, 2019 under same terms by Letter from Kelly Brown to Board of Eureka County Commissioners (Jan. 30, 2017)) ("I [Kelly Brown] will pay for my own . . . local travel expenses . . .").

[810] Contract for Legal Services ¶ 10 (Aug. 1, 2004 through July 31, 2006) (between Pershing County Board of County Commissioners and Kyle Swanson; renewed for 2017-2018 budget year by Letter from Board of County Commissioners, Pershing County, to Kyle Swanson (Aug. 2, 2017)).

Lyon,[811] and Nye[812] contracts all require the attorney to pay all mileage and travel costs.

The financial demands made on contract attorneys continue with overhead costs. Lyon County stands as an example. The contracts there require the attorneys to "staff and maintain an office in Lyon County, Nevada. . . . The expense of office space, telephone, fax, computer, furniture, equipment, supplies, and secretarial services suitable for conduct of attorney's practice as required by this Agreement are the sole responsibility of Attorney."[813] Additionally, attorneys must "maintain adequate liability insurance, including errors and omissions coverage and general liability coverage, in the policy limits of at least $500,000, during the term of this Agreement. Attorney will maintain workers compensation insurance as required by Nevada law.[814]

These are costs that are paid for in the counties with government employed public defender offices. For example, the Pershing County Code requires that: "The board of county commissioners shall provide office space, furniture, and equipment for the use of the public defender suitable for the conduct of the business of his office. The public defender shall be required to maintain a budget for office supplies, telephone lines, fax lines, and other expenses. In any case, funds for all charges, costs or cash allowances must first have been authorized pursuant to provisions within the public defender's budget, or otherwise authorized and made available by the board of Pershing County commissioners. All costs, salaries and expenses entailed in the operation of the office of the public defender shall be borne by Pershing County, subject to the prior approval of the board of county commissioners."[815]

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811 *See, e.g.*, Agreement for Public Defender Services ¶ J.6 (July 1, 2017 through June 30, 2020) (between Lyon County and Aaron Mouritsen).

812 *See, e.g.*, Contract for Professional Services between Nye County, Nevada and Jason L. Earnest, Esq. for Public Defender Services ¶¶ 3.C, 4.B (July 1, 2017 through June 30, 2018).

813 *See, e.g.*, Agreement for Public Defender Services ¶ F.1-2 (July 1, 2017 through June 30, 2020) (between Lyon County and Aaron Mouritsen).

814 *See, e.g.*, Agreement for Public Defender Services ¶ H.1 (July 1, 2017 through June 30, 2020) (between Lyon County and Aaron Mouritsen).

815 County of Pershing, Nevada, County Code 2.80.030.E-F (current through Mar. 15, 2017).

CHAPTER V
THE RIGHT TO COUNSEL OF EACH INDIGENT DEFENDANT

As explained in Chapter I, a crime in Nevada is either a felony, a gross misdemeanor, or a misdemeanor.[816] All felonies and gross misdemeanors carry the possibility of loss of liberty as a punishment, while only some misdemeanors do.[817] 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."[818] 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."[819] Similarly, all children in delinquency and in need of supervision matters are statutorily guaranteed the right to appointed counsel.[820]

A. CITATION OR ARREST

When a person is suspected of a criminal offense in Nevada, he will either be arrested or he will receive a citation telling him when and where to appear for court (only available for a misdemeanor[821]). For those accused of a misdemeanor who receive a citation, their first court appearance will be the arraignment in either a municipal or a justice court. But for those who are arrested for any crime, the process is more complex.

In all counties, a person who is arrested is brought to a detention center for processing. For misdemeanor arrests, the judges in most counties have adopted a bail schedule that allows the sheriff to release the person arrested with or without bail according to the schedule,[822] except for certain kinds of misdemeanors. Nevada law favors the release of

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816 NEV. REV. STAT. §§ 193.120, 193.170 (2017).
817 NEV. REV. STAT. §§ 193.120(2)-(4), 193.140, 193.150 (2017).
818 NEV. REV. STAT. § 178.397 (2017).
819 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).
820 NEV. REV. STAT. § 62D.030 (2017).
821 NEV. REV. STAT. § 171.1773 (2017).
822 NEV. REV. STAT. § 178.4851 (2017).

an arrested person "with the least possible delay" and before having to appear before a judge.[823]

B. "48-HOUR HEARING"

The arresting officer must bring the person before a judge "without unnecessary delay."[824] If the person was arrested on a warrant, a judge has already made a preliminary determination that probable cause exists for the arrest. When a person is arrested without a warrant, the arresting officer has to file a complaint for a judge to consider and determine whether there was probable cause for the warrantless arrest, and the officer must do so "forthwith."[825]

In *County of Riverside v. McLaughlin*,[826] the United States Supreme Court held that a judge must make a probable cause determination within 48 clock hours of a warrantless arrest or the government risks being held responsible for an illegal detention. On the basis of this case, throughout Nevada's criminal justice system this is referred to as a "48 hour hearing."

There is no actual hearing involved, and a judge can make this determination without ever seeing the defendant. Instead, the court reviews the paperwork signed under oath by the officer. If the judge finds that there was not probable cause for the arrest, the person is released from jail. If the judge finds, based on the officer's declaration, that there was probable cause for the arrest, the person remains in jail.

C. INITIAL APPEARANCE

An arrested person's first formal appearance before a judge following arrest is called the initial appearance. The initial appearance is always conducted by a justice court, other than in the few locations that operate a municipal court. (*See* discussion of the four municipal courts within the rural counties in Chapter III.)

Nevada law requires that this appearance happen within 72 hours of the arrest, but excluding weekends and holidays.[827] If a defendant is not brought to court for the initial

823 Nev. Rev. Stat. § 171.178(5) (2017).
824 Nev. Rev. Stat. § 171.178(1) (2017).
825 Nev. Rev. Stat. § 171.178(4) (2017).
826 500 U.S. 44 (1991).
827 Nev. Rev. Stat. § 171.178(3) (2017).

appearance within 72 hours of the arrest, the judge can release the defendant from jail.[828]

Elko County. Defendants sometimes wait as long as 10 days before having their initial appearance. The justice court judges say the district attorney does not always file a complaint within 72 hours of the arrest. Without a complaint being filed, there is no case file and so, the judges believe, they cannot appoint an attorney to represent a defendant. The judges might release a defendant who is willing to waive appointment of counsel, but if the defendant wants an appointed attorney, then they have to stay in jail until the complaint is filed.

White Pine County. A person arrested on a misdemeanor charge on a Wednesday, is unlikely to have their initial appearance before Thursday of the following week – eight days after their arrest. There will not be a defense attorney present at that initial appearance. One judge bemoaned the lack of attorneys saying, "We are wasting time," the court should be able to determine bail by then. The district attorney had similar concerns about the delays; often he wants to talk to defendants but cannot because they are not yet represented. He has personally filed motions to get defendants released on recognizance. As he explained: "The faster they get an attorney, the faster I can get a case moving."

At the initial appearance, the judge informs the defendant of the charges upon which he has been arrested and of the rights to which he is entitled, including his right to counsel.[829] The defendant may request the judge to appoint an attorney to represent him. The judge will also set the terms, if any, upon which the defendant can be released from custody.[830] If the defendant is arrested for a misdemeanor, he can plead guilty at this initial appearance. A defendant arrested for a gross misdemeanor or a felony cannot enter a plea at the initial appearance.[831]

This is the proceeding in Nevada that triggers the right to counsel for a person who has been arrested. In 2008, the United States Supreme Court reaffirmed in *Rothgery v. Gillespie County* that the right to counsel attaches when "formal judicial proceedings have begun."[832] For a person who is arrested, the beginning of formal judicial proceedings is at "a criminal defendant's initial appearance before a judicial officer,

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828 Nev. Rev. Stat. § 171.178(3) (2017).

829 Nev. Rev. Stat. § 171.186 (2017) ("shall inform the defendant of the complaint . . ., of the right to retain counsel, of the right to request the assignment of counsel if the defendant is unable to obtain counsel, and of the right to have a preliminary examination").

830 Nev. Rev. Stat. § 171.186 (2017) ("magistrate . . . shall admit the defendant to bail as provided in this title").

831 Nev. Rev. Stat. § 171.196(1) (2017).

832 Rothgery v. Gillespie County, 554 U.S. 191, 211 (2008); *see also* Michigan v. Jackson, 475 U.S. 625, 629 n.3 (1986); Brewer v. Williams, 430 U.S. 387, 388-89 (1977).

where he learns the charge against him and his liberty is subject to restriction,"[833] without regard to whether a prosecutor is aware of the arrest.[834]

The Court in *Rothgery* carefully explained, however, that the question of whether the right to counsel has attached is distinct from the question of whether a particular proceeding is a "critical stage" at which counsel must be present as a participant.[835] "Once attachment occurs, the accused at least is entitled to the presence of appointed counsel during any 'critical stage' of the postattachment proceedings . . .."[836] In other words, according to the Court, the Constitution does not necessarily require that defense counsel be present at the moment the right to counsel attaches, but from that moment forward, no critical stage in a criminal or juvenile delinquency case can occur unless the defendant is represented by counsel or has made an informed and intelligent waiver of counsel.

And indeed there is not a defense attorney present at the initial appearance in most of the rural counties. This is because the procedures to appoint counsel do not begin until the initial appearance takes place, so in most of the counties that use a private attorney contract system, there is no attorney who considers themselves responsible for representing an indigent defendant until after they are appointed. Nonetheless, both state public defender office attorneys and county public defender office attorneys are expressly authorized "before being designated as counsel" to "interview an indigent person when he or she has been arrested and confined for a public offense or for questioning on suspicion of having committed a public offense."[837] But even among the five counties served by government employee public defender offices, only the Elko Public Defender Office has an attorney present at every initial appearance.

Elko Public Defender Office. The initial appearances for all felony arrests are conducted by the Elko Justice Court, while all other initial appearances are conducted by the justice court within whose geography the crime is alleged to have occurred. The Elko Public Defender Office assigns a staff attorney to be present and participate in the initial appearance proceedings in all four of the county's justice courts. The district attorney is not present at initial appearances.

Humboldt Public Defender Office. After the 6AC conducted its site evaluation in Humboldt County, the public defender Matt Stermitz started attending initial appearances to see if there is an advantage in talking to defendants earlier. For now, he is observing but not participating in the proceedings.

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833 Rothgery v. Gillespie County, 554 U.S. 191, 213 (2008).
834 Rothgery v. Gillespie County, 554 U.S. 191, 194 (2008).
835 Rothgery v. Gillespie County, 554 U.S. 191, 211 (2008).
836 Rothgery v. Gillespie County, 554 U.S. 191, 212 (2008).
837 Nev. Rev. Stat. §§ 180.060(1), 260.050(1) (2017).

Pershing Public Defender Office. The Pershing Public Defender Office, which is made up of one attorney, does not attend nor participate in initial appearance proceedings.

State Public Defender Office. Neither the State Public Defender office nor the district attorney attend initial appearances in Carson City or in Storey County.

D. PROVIDING THE RIGHT TO COUNSEL FOR EACH INDIVIDUAL DEFENDANT

At the initial appearance, the judge "shall inform the defendant . . . of the right to request the assignment of counsel if the defendant is unable to obtain counsel."[838] But even should the judge fail to inform the defendant of this right, the defendant may request an appointed lawyer: "Any defendant charged with a public offense who is an indigent may, by oral statement to [the judge,] request the appointment of an attorney."[839]

A defendant's oral request for appointment of counsel "must be accompanied by the defendant's affidavit" that states "facts with some particularity, definiteness and certainty concerning the defendant's financial disability."[840] Effective January 4, 2008, the Nevada Supreme Court established the standard that judges are to use in determining whether a defendant is indigent.[841]

> 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,

838 Nev. Rev. Stat. § 171.186 (2017).
839 Nev. Rev. Stat. § 171.188(1) (2017).
840 Nev. Rev. Stat. § 171.188(2) (2017).
841 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).

> monthly expenses, and local private counsel rates, would result in a substantial hardship were they to seek to retain private counsel.[842]

State law requires that the judge appoint an attorney to represent a defendant if the judge "[f]inds that the defendant is without means of employing an attorney; and [o]therwise determines that representation is required."[843]

In many counties, the common refrain is that judges appoint indigent defense attorneys to represent defendants who are not indigent.

Douglas. One defense attorney reports having a number of clients appointed who earn more than the attorney does. This also hurts local private practice, as many people in town do not see the need to hire attorneys, because the court will appoint a public defender without investigating a person's responses to the indigency affidavit. The attorney estimates that nearly 30% of appointed clients are not indigent and could afford to hire an attorney. The attorney feels the court should "stop watering down the rights" of indigent persons by appointing public defenders to too many cases involving non-indigent clients. The Douglas County contracts require the contract attorneys to notify the court if they determine that a defendant whom they are appointed to represent is not indigent,[844] pitting the financial interests of the defense attorney against the interests of their clients. Because the court does not investigate defendants' financial situations, one of the contract attorneys feels compelled to do that investigation. Though having found that some clients were not indigent, the contract attorney has not yet reported any clients to the court. But it "creates tension in the relationship with the client."

White Pine. "I have represented people who earn more than me." At the end of the day, "it's a fairness issue;" when the indigency standard is not followed, truly indigent clients suffer.

Of far greater concern, though, are the ways in which indigent defendants are denied their right to an attorney.

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842 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).

843 Nev. Rev. Stat. § 171.188 (2017).

844 *See, e.g.*, Contract for Professional Services between Douglas County, Nevada and Kristine L. Brown, Esq. for Indigent Legal Services ¶ 3.D (July 1, 2017 through June 30, 2018). The Churchill County contracts contain the same provision. *See e.g.*, Contract for Professional Services between Churchill County, Nevada and Jacob Sommer, Esq. for Indigent Legal Services ¶ 3.D (Dec. 1, 2017 through June 30, 2021).

Elko. One of the judges typically makes indigent defendants pay $250 up to $500 in reimbursement for their appointed attorney – even if defendants are found not guilty – because he believes many defendants "think they are owed" an attorney.

Pershing. Indigent clients of the public defender are required to pay at least $250, and possibly more, for the appointment of a public defender.[845]

White Pine. Defendants are told at the outset of a case that if they qualify for the public defender's services, they may be required to reimburse some of those costs. The justice court sometimes collects money from defendants based on the number of hours the defense attorney spent on the case. This pits the interest of the attorney against that of his client; the defense attorneys feel compelled to underreport their hours so that clients do not have to pay as much. But the White Pine contracts require the defense attorneys to work on indigent defense cases a certain number of hours each year, or reimburse the county for the underage.

Churchill – misdemeanor arraignments in justice court. Indigent defense attorneys are not present in court for misdemeanor arraignments. Without attorneys present at initial appearances, the county has no idea how many people plead guilty to misdemeanors. This could create a costly pretrial detention system. However, if the defense attorneys were present, it would impact their bottom line.

Humboldt – misdemeanor arraignments in justice court. On the day of misdemeanor arraignments in the justice court, the 6AC was told that there was a "pretty full schedule." Court was supposed to start at 9:00 a.m. but what they mean locally by "starting at 9:00 AM" is that defendants are expected to arrive at 9:00 a.m. Out-of-custody defendants are met in the hallway outside the court by an assistant district attorney. He stated that he "mostly talks to people charged with traffic offense." However, the 6AC witnessed him talking to a defendant charged with driving with a suspended license and he advised the defendant to plead guilty. The Humboldt County public defender began attending arraignments just a few weeks prior to the 6AC site visit to monitor these discussions.

The court clerks take pleas at the counter from misdemeanor defendants. The clerks advised they only accept non guilty pleas and set trial dates at the counter. This process, though, means a defendant does not go before the judge to be advised of the right to counsel, be screened for indigency, and/or have an attorney appointed at arraignment. The clerks provide indigency forms to defendants who request them, but the judge will not review those forms until some point later on before the next hearing. As a result, even once an attorney is appointed to represent a defendant, the public

[845] *See* County of Pershing, Nevada, County Code 2.80.090(B)(3)-(7) (current through Mar. 15, 2017).

defense attorney may not actually meet the defendant until they both arrive at the courthouse for the next setting in the case.

The Humboldt Alternate Public Defender related a disturbing story. She was appointed to represent a man who was charged with misdemeanor petty larceny for stealing a shopping cart from Wal-Mart ($1,140 in fines and $142 in restitution). The man had not been immediately identified as the suspected shoplifter. He was only cited a significant time after the incident when his wife was caught shoplifting from the same store. The store security had video evidence of the man's incident and when he came for his wife the store security realized that he was the one on film from the earlier incident. When Carl went to court, he was greeted by an assistant district attorney. The ADA did not like Carl's attitude and amended the complaint to add potential jail time. By the time the alternate public defender was appointed, she realized that the amended complaint vacated the earlier citation and the time lapse had caused the statute of limitations to run out. The case was dismissed, but it shows that a Humboldt assistant district attorney is talking to, and causing trouble for, defendants who face jail time.

E. LACK OF COUNSEL TO ADVOCATE FOR PRETRIAL RELEASE

At the initial appearance, the judge also sets the terms, if any, upon which the defendant can be released from custody.[846] "Upon a showing of good cause, a court may release without bail any person entitled to bail if it appears to the court that it can impose conditions on the person that will adequately protect the health, safety and welfare of the community and ensure that the person will appear at all times and places ordered by the court."[847] Yet with no defense attorney present at the initial appearance, there is no one to advocate on behalf of an indigent defendant and show good cause for their release (with or without bail).

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[846] Nev. Rev. Stat. § 171.186 (2017) ("magistrate . . . shall admit the defendant to bail as provided in this title").

[847] Nev. Rev. Stat. § 178.4851(1) (2017).

F. INDEPENDENT DEFENSE INVESTIGATION & USE OF EXPERTS

The American Bar Association's *Criminal Justice Standards for the Defense Function* explain that every defense attorney has a duty to independently investigate the facts of his client's case.[848]

> Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the accused's stated desire to plead guilty.[849]

The widespread failure of indigent defense attorneys across Nevada's rural counties to conduct an independent defense investigation on behalf of indigent defendants undermines the ability of appointed counsel to provide effective representation. It calls into question the integrity of the criminal justice system itself.

Attorneys who represent indigent felony defendants do not have access to or use other support services, such as social workers, paralegals, or – in many counties – even investigators. Social work assistance can be critical to an attorney's ability to provide effective assistance of counsel both to obtain pre-trial release and to advocate for appropriate sentences.

Elko Public Defender Office. Unlike all of the other rural counties, the public defender office in Elko has a dedicated budget of $80,000 per year to use for case related expenses such as investigators and expert witnesses. It appears that the office used about $46,000 of the budget in FY2017, and about $55,000 in FY2018 (through May 15).

Attorneys submit requests to the chief defender to expend investigator or expert witness funds in a case. Chief Defender Kriston Hill reports that she has never turned down a request for investigators or experts. She believes the attorneys in her office have enough training and knowledge to know when they need one. Defenders have

[848] ABA, Standards for Criminal Justice: Prosecution Function and Defense Function, Standard 4-4.1(a) (3d ed. 1993) (now supplanted by ABA, Standards for Criminal Justice: Prosecution and Defense Function, Standard 4-4.1(a)-(e) (4th ed. 2015), which provides far more detailed requirements and explanation of the defense attorney's duty to conduct an independent investigation).

[849] ABA, Standards for Criminal Justice: Prosecution Function and Defense Function, Standard 4-4.1(a) (3d ed. 1993) (now supplanted by ABA, Standards for Criminal Justice: Prosecution and Defense Function, Standard 4-4.1(a)-(e) (4th ed. 2015), which provides far more detailed requirements and explanation of the defense attorney's duty to conduct an independent investigation).

varying reports regarding the frequency with which they use investigators and expert witnesses.

While the attorneys are free to use whatever investigator they prefer, seemingly all of them use the services of the same local private investigator. The public defender office attorneys reports using the investigator regularly in serious felony cases, but none of the attorneys report using him on more than about five cases each year, and the investigator says he is hired by the office's attorneys for about 8 to 10 cases per month. Some of the attorneys said they did not request funds for investigation because they did not think the office had enough money. The chief public defender was unaware that attorneys were limiting their requests due to budget concerns.

Conflict attorneys who are appointed on a case by case basis in Elko County must apply to the courts for case related expenses. The 6AC conducted a survey of all justice and district courts to ask how many requests for trial level expenses (investigators, experts, etc.) they received from indigent defense attorneys and approved during FY2017. From July 1, 2016 to June 30, 2017, the four municipal/justice courts in Elko County reported the following expenditures for investigators and experts requested by conflict list attorneys:

- Carlin Municipal & Justice Courts: no requests for experts or investigators in FY2017.[850]
- Eastline/Wendover Municipal & Justice Courts: no requests for experts or investigators in FY2017.[851]
- Wells Municipal & Justice Courts: no requests for experts or investigators in FY2017.[852]
- Elko Municipal & Justice Courts: One request for expert in FY2017, totaling $800. No requests for investigators in FY2017.[853]

[850] Email from Carlin Justice & Municipal Court Judge Teri Feasel to 6AC Executive Director David Carroll (May 4, 2018).
[851] Email from Eastline Justice & West Wendover Court Administrator Teresa Naranjo to 6AC Executive Director David Carroll (Apr. 24, 2018).
[852] Email from Wells Justice & Municipal Court Judge Patricia Calton to 6AC Executive Director David Carroll (Apr. 25, 2018).
[853] Email from Elko Justice & Municipal Court Administrator Randall Soderquist to 6AC Executive Director David Carroll (Apr. 25, 2018).

Douglas. From July 1, 2016 to June 30, 2017:

- East Fork Justice Court: No requests for experts or investigators in FY2017.[854]
- Tahoe Justice Court: No requests for experts or investigators in FY2017.[855]
- Ninth District Court: 8 Investigator and 9 expert witness payments made in FY2017.[856] Total payments: Investigators: $7,880.31; Experts: $6,350.00; Total: $14,230.31.

Eureka. From July 1, 2016 to June 30, 2017:

- Eureka Justice Court: 1 request for expert witness, granted: total of $4,700 for a doctor for one trial. No requests for investigators in FY2017.
- Seventh District Court: 7 requests, total of $35,993.88 in FY 2017.[857]

Lincoln. The two justice courts report no expenditures in FY2017 on experts or investigators.[858] During FY2017, the entire 7th Judicial District (including Eureka, Lincoln, and White Pine counties) expended $35,993.88 for a combined total of 7 requests for investigation and/or experts in cases of indigent defendants.[859]

Lyon. From July 1, 2016 to June 30, 2017, the justice courts and district court reported spending on experts and investigators in indigent defense cases:

- Canal Township Justice Court: only two requests for experts. Total cost: $2,032.93.[860]
- Dayton Justice Court: received no requests for experts/investigators in FY 2017.[861] Received one investigation request in FY 2016 for $540.
- Walker River Justice Court: There were no requests for trial related expenses in FY 2017.[862]

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854 Telephone interview of East Fork Justice Court Administrator Bobbie Williams (June 1, 2018).

855 Email from Tahoe Justice Court Judge Richard Glasson to 6AC Executive Director David Carroll (Apr. 24, 2018).

856 Email from 9th Judicial District Court Administrator Bobbie Williams to 6AC Executive Director David Carroll (June 1, 2018). No data was provided on the number of requests.

857 Survey response of 7th Judicial District Judges Steve Dobrescu and Gary Fairman (reporting the cumulative number and amount of requests for the entire 7th Judicial District, covering Eureka, Lincoln, and White Pine counties).

858 Telephone interview of Pahranagat Valley Justice Court Judge Nola Holton (May 14, 2018); Email from Meadow Valley Justice Court Judge Mike Cowley to 6AC Executive Director David Carroll (Apr. 26, 2018).

859 Survey response of 7th Judicial District Judges Steve Dobrescu and Gary Fairman (reporting the cumulative number and amount of requests for the entire 7th Judicial District, covering Eureka, Lincoln, and White Pine counties).

860 Email from Lisa Grigg, Canal Justice Court, to 6AC Executive Director David Carroll (May 7, 2018).

861 Email from Dayton Justice Court Judge Camille Vecchiarelli to 6AC Executive Director David Carroll (Apr. 26, 2018).

862 Email from Walker River Justice Court Office Supervisor April Neiswonger to 6AC Executive Director David Carroll (May 31, 2018).

- District Court: In FY 2017, the Court received and approved approximately 40 requests ($77,000). July 1, 2017 through April 13, 2018: $55,000.[863]

Pershing. From July 1, 2016 to June 30, 2017, the justice court and district court reported spending on experts and investigators in indigent defense cases:

- Lake Justice Court: There were no requests for trial related expenses in FY 2017.[864]
- District Court: In FY 2017, the court received and approved requests in Pershing County cases totaling $1,950, though the court could not determine how many separate requests were approved (this total included $1,500 for mental health evaluations and $450 for investigation).[865]

Nye. From July 1, 2016 to June 30, 2017, the justice courts and district court reported spending on experts and investigators in indigent defense cases:

- Beatty Justice Court: There were no requests for trial related expenses.[866]
- Pahrump Justice Court: The court received and approved eight requests for experts expenses, totaling $3,031.88. There were no requests for investigators.[867]
- Tonopah Justice Court: There were no requests for trial related expenses.[868]
- District Court: The court received and approved three requests totaling $8,544 (one request for an investigator at $2,000; two requests for experts at $4,294 and $2,250).[869]

White Pine. For case-related expenses (such as experts, translators, forensic testing, mitigation specialists), the contract attorneys must request funding from the court on a case-by-case basis.[870] Funding for these case-related expenses is in the court's budget. The justice court reports no expenditures in FY2017 on experts or investigators.[871] During FY2017, the entire 7th Judicial District (including Eureka, Lincoln, and

[863] Survey response of 3rd Judicial District Judge John Schlegelmilch.

[864] Email from Lake Justice Court Judge Karen Stephens to 6AC Executive Director David Carroll (Apr. 25, 2018).

[865] Email from 11th Judicial District Judge Jim Shirley to 6AC Executive Director David Carroll (July 5, 2018).

[866] Email from Beatty Justice Court Administrator Nancy Kearns to 6AC Executive Director David Carroll (May 2, 2018).

[867] Email from Pahrump Justice Court Administrator Kathy Ivey to 6AC Executive Director David Carroll (June 7, 2018).

[868] Email from Tonopah Justice Court Administrator Patricia Galvin to 6AC Executive Director David Carroll (May 15, 2018).

[869] Email from 5th Judicial District Court Dept. 1 Administrative Legal Secretary Gerie Clifford to 6AC Executive Director David Carroll (May 7, 2018).

[870] *See, e.g.*, Contract for Public Defense Services ¶¶ 2.D, 2.F (July 1, 2017 through June 30, 2019) (between County of White Pine and Jane Eberhardy).

[871] Email from Ely Justice Court Judge Stephen Bishop to 6AC Executive Director David Carroll (Apr. 24, 2018).

White Pine counties) expended $35,993.88 for a combined total of 7 requests for investigation and/or experts in cases of indigent defendants.[872]

[872] Survey response of 7th Judicial District Judges Steve Dobrescu and Gary Fairman (reporting the cumulative number and amount of requests for the entire 7th Judicial District, covering Eureka, Lincoln, and White Pine counties).

CHAPTER VI
FINDINGS & RECOMMENDATIONS

A. FINDINGS

1. 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. Cronic*. No such entity currently exists.

2. The State of Nevada has only very limited oversight of primary representation (not conflict representation) in just two jurisdictions (Carson City and Storey County) that use the State Public Defender. However, the State Public Defender system suffers from undue political interference and inadequate funding.

3. The State of Nevada does not require uniform indigent defense data collection and reporting. Without objective and reliable data, right to counsel funding and policy decisions are subject to speculation, anecdotes and, potentially, even bias.

4. The majority of rural counties stepped into the void created by the State of Nevada to fund and administer local indigent defense structures that fit the uniqueness of each individual jurisdiction. However, without guidance from the State of Nevada on how to create local structures that meet the parameters of the Sixth Amendment the local indigent defense systems suffer, to various degrees, with:
   - a pervasive lack of independence from judges, prosecutors, and county/city governance;
   - a pervasive lack of institutionalized attorney supervision and training;
   - a pervasive lack of attorneys at initial appearance to advocate for pretrial release of defendants;
   - a pervasive lack of independent defense investigations in all but the most serious felony cases;
   - a pervasive lack of support services including: social workers; legal secretaries/ paraprofessionals; mental health services; and, translation services for non-English-speaking indigent defendants;
   - fixed fee contracts that pay the same no matter how few or how many cases the

attorney handles, and that require the attorney to pay for overhead out of the fixed compensation, and that in some instances require the attorney to pay for conflict counsel out of the fixed compensation;
- excessive caseloads in those rural counties with populations greater than 15,000.

5. Despite most rural cities and counties requiring attorneys to report caseload information, in many places the attorneys simply do not do so. In places where attorneys do report this information, most cities and counties do not make any use of the data because the data is not maintained uniformly, even among attorneys providing representation in the same jurisdiction.

6. Without the State of Nevada tracking which attorneys are providing representation in which courts and/or which public defense attorneys are employed in other court functions (e.g., magistrates, prosecutors) it is impossible for local policymakers to gauge workloads even in those jurisdictions trying to review excessive caseloads.

7. Rural counties administering and funding their own local indigent defense systems, for the most part, do not have standards for the selection of qualified attorneys with the experience to match the complexity of the cases to which they are assigned. While most rural attorneys appear to be qualified to handle the criminal cases to which they are appointed, this is serendipitous. There is nothing to prevent future local policymakers from hiring non-qualified lawyers offering the lowest costs to cover the greatest number of cases.

8. The vast geographical distances, the paucity of attorneys in many areas of the state, the structure of Nevada's courts and its procedures layered on top of all that seems to render it nearly impossible for the individual counties and cities alone to provide public defense systems that can ensure effective assistance of counsel. All of this results in:
   - delays for indigent defendants in receiving appointed counsel and in the timely conclusion of the criminal proceedings against them;
   - judges not adhering to Court ordered indigency determination procedures, resulting in over-appointment and under-appointment (depending on jurisdiction);
   - imposition of recoupment of public defense costs on indigent defendants (along with other fines and fees) without determining a defendant's ability to pay;
   - judges refusing to appoint counsel to misdemeanor defendants facing jail time where the judge predicts a suspended sentence;
   - uncounselled defendants negotiating directly with prosecutors and then pleading guilty to misdemeanors with a suspended sentence, and doing so at initial appearance/arraignment;
   - judges sentencing convicted indigent defendants to pay fines & fees without

determining their ability to pay, and attorneys failing to advocate on behalf of indigent defendants against imposition of these fines & fees.

9. Although defendants have a right to appeal misdemeanor convictions from non-lawyer judge courts (justice courts and municipal courts) and to take that appeal to a district court where the judge is a lawyer, these misdemeanor convictions most often result from cases where the defendant did not have a lawyer in the non-lawyer court to begin with. As a result, the defendant is on their own and incapable of making a defense and of making an appropriate record in the non-lawyer court and of taking the necessary steps to obtain review by a court where the judge is a lawyer. And the appellate review is based solely on the record made in the court of the non-lawyer judge.

B. RECOMMENDATIONS

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.

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 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."[873] 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.[874] 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).[875]

[873] ABA, ABA Ten Principles of a Public Defense Delivery System at 1 (Feb. 2002).

[874] ABA, ABA Ten Principles of a Public Defense Delivery System, commentary to Principle 1 (Feb. 2002).

[875] National Study Commission on Defense Services, Guidelines for Legal Defense Systems in the

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."[876]

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 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."[877]

In practice, jurisdictions with indigent defense commissions generally give an equal number of appointments to the executive, legislative, and judicial branches of government.[878] 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.).[879] Appointments by such non-governmental organizations generally must go through a confirmation process by an official branch of state government.

United States (1976).

[876] National Study Commission on Defense Services, Guidelines for Legal Defense Systems in the United States 2.10 (1976).

[877] National Study Commission on Defense Services, Guidelines for Legal Defense Systems in the United States 2.10 (1976).

[878] 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.

[879] For example, Kentucky and New Mexico.

Examples of indigent defense commission appointments from other states include:[880]

- **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.[881]

- **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 organizations representing: (a) indigent persons, (b) Native American interests, (c) people with mental illness, and (d) people with addictions).[882]

- **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).[883]

- **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

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880 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/.

881 Mich. Comp. Laws § 780.987(1)-(2) (2017) (prior to amendment by 2018 Mich. Pub. Acts 214).

882 Mont. Code Ann. § 2-15-1028(2)(a)-(g) (prior to repeal by 2017 Mont. Laws ch. 358 § 45).

883 N.M. Stat. § 31-15-2.1(A) (2018).

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).[884]

- **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).[885]

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 who 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 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 during their term of office."[886]

- **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."[887]

- **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)

884 N.C. Gen. Stat. § 7A-498.4 (b)(1)-(11) (2016).
885 N.D. Cent. Code § 54-61-01(2) (2018).
886 La. Rev. Stat. Ann. § 15:146(B)(2) (2017).
887 Mont. Code Ann. § 2-15-1028(7) (prior to repeal by 2017 Mont. Laws ch. 358 § 45).

> 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."[888]

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.

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 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;[889] attorney performance guidelines;[890] attorney supervision

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888 N.M. Stat. § 31-15-2.2 (2018).

889 La. Rev. Stat. § 15:148(B)(2) (2017) ("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.").

890 La. Rev. Stat. § 15:148(B)(1)(e) (2017) ("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."); La. Rev. Stat. § 15:148(B)(10) (2017):

protocols;[891] time sufficiency standards;[892] continuity of services standards whereby the same attorney provides representation from appointment through disposition;[893] client communication protocols;[894] and, data collection standards.[895]

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 a manner that is fair and consistent throughout the state."[896] The standards must take into consideration:

- 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;
- Acceptable caseloads and workload monitoring protocols to ensure that public defender workloads are manageable;
- Access to and use of necessary professional services, such as paralegal,

"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.").

[891] La. Rev. Stat. § 15:148(B)(1)(d) (2017) ("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.").

[892] La. Rev. Stat. § 15:148(B)(1)(a) (2017) ("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.").

[893] La. Rev. Stat. § 15:148(B)(1)(b) (2017) ("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.").

[894] La. Rev. Stat. § 15:148(B)(1)(c) (2017) ("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.").

[895] La. Rev. Stat. § 15:148(B)(11) (2017) ("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.").

[896] Mont. Code Ann. § 47-1-105(2) (2017). This section describes the Montana Public Defender Commission as established in 2005; the commission was repealed in 2017.

investigator, and other services that may be required to support a public defender in a case;
- Continuing education requirements for public defenders and support staff;
- Practice standards;
- Performance criteria; and Performance evaluation protocols.[897]

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:
> (a) The delivery of indigent criminal defense services must 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.
> (b) 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.
> (c) 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 must be assigned as soon as an indigent adult is determined to be eligible for indigent criminal defense services.[898]

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:

> (a) Defense counsel is provided sufficient time and a space where attorney-client confidentiality is safeguarded for meetings with defense counsel's client.
> (b) Defense counsel's workload is controlled to permit effective representation. Economic disincentives or incentives that impair defense counsel's ability to provide effective representation shall be avoided. The MIDC may develop workload controls to enhance defense counsel's ability to provide effective representation.
> (c) Defense counsel's ability, training, and experience match the nature and complexity of the case to which he or she is appointed.
> (d) 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.

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[897] Mont. Code Ann. § 47-1-105(2) (2017).
[898] Mich. Comp. Laws § 780.991(1) (2017).

(e) Indigent criminal defense systems employ only defense counsel who have attended continuing legal education relevant to counsels' indigent defense clients.
(f) Indigent criminal defense systems systematically review defense counsel at the local level for efficiency and for effective representation according to MIDC standards.[899]

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).[900]

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:

> 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.

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[899] Mich. Comp. Laws § 780.991(2) (2017). 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. *See* Montana Office of the State Public Defender, Administrative Policies, Policy No. 210 ¶ 3.2.2 (rev'd Dec. 7, 2017), *available at* http://publicdefender.mt.gov/Portals/61/Policies/200%20General%20Operations/210-RequiredReporting.pdf?ver=2017-12-11-100953-777&timestamp=1535096858816.

[900] 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*, David Carroll, *Montana caseload challenge results in a significant increase in resources*, Sixth Amendment Center, http://sixthamendment.org/montana-caseload-challenge-results-in-a-significant-increase-in-resources/ (Apr. 17, 2014).

(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.[901]

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,[902] 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.

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[901] La. Rev. Stat. § 15:148(1)(a) (2017).
[902] Montana Public Defender Act, 2005 Mont. Laws ch. 449.

Penalties for non-compliance

In 2014, the Idaho legislature created the Idaho State Public Defender Commission ("SPDC") within the Department of Self-Governing Agencies[903] – 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 empowered to promulgate standards consistent with *Cronic* and the ABA *Ten Principles*.[904]

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.[905] 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.[906] 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."[907]

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.[908] 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

903 Idaho Public Defense Act, 2014 Idaho Sess. Laws H0542 (codified as amended at Idaho Code §§ 19-848 et seq. (2018)).
904 Idaho Code § 19-850(a)(vii) (2018).
905 Idaho Code § 19-862A (2018).
906 Idaho Code § 19-862A(11) (2018).
907 Idaho Code § 19-862A(12) (2018).
908 Mich. Comp. Laws §§ 780.983(h), 780.993 (2017).

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 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.

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 d) 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.[909] 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 to serve as supervisors for other private attorneys handling direct case-assignments.

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.

Trial related expenses are approved by the court in individual cases and paid at rates set by CPCS out of a state funded account separate from the CPCS operating account, but administered by CPCS.[910]

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.

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[909] 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.

[910] *See* Mass. Gen. L. ch. 261, §§ 27A - 27G (2017).

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 in over 95% of cases. CPCS also maintains a small staff appellate unit to handle selected appeals."

- **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.

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 than conduct court observations and require financial reporting by local government to determine if the processes are being followed correctly.

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;[911] Nevada Health Services Corps;[912] and Teach Nevada Scholarship Program.[913]

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?

911 Nev. Rev. Stat. §§ 396.890 - 396.898 (2017).
912 Nev. Rev. Stat. §§ 396.899 - 396.908 (2017).
913 Nev. Rev. Stat. §§ 391A.555 - 391A.590 (2017).

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