

# Rural Nevada Indigent Defense Services Interim Weighted Caseload Study

Report  
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# **Rural Nevada Indigent Defense Services**

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## Table of Contents

<b><i>Introduction</i></b>	<b><i>1</i></b>
<b>A. Indigent Defense Services in Rural Nevada</b>	<b>3</b>
<b>B. About Weighted Caseload</b>	<b>4</b>
<b>C. Conducting a Time Study During COVID-19</b>	<b>5</b>
<b>D. Recommendation</b>	<b>6</b>

## Introduction

The Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense.”<sup>1</sup> In 1963, the United States Supreme Court held that the Sixth Amendment requires states to provide counsel for criminal defendants who cannot afford to hire counsel for themselves.<sup>2</sup> Twenty-one years later, the Court held that the right to counsel is a right not merely to token representation, but to the effective assistance of counsel.<sup>3</sup>

For any criminal defense attorney, maintaining a manageable caseload is essential to the ability to provide effective assistance of counsel. According to the Model Rules of Professional Conduct, the requirement of diligence in representation includes the responsibility to control the lawyer’s workload “so that each matter can be handled competently.”<sup>4</sup> Similarly, the American Bar Association Standards for Criminal Justice assert that “[d]efense counsel should not carry a workload that, by reason of its excessive size or complexity, interferes with providing quality representation, endangers a client’s interest in independent, thorough, or speedy representation, or has a significant potential to lead to the breach of professional obligations”<sup>5</sup> Faced with an excessive workload, an attorney may not have sufficient time to

investigate the facts of the case, visit the crime scene, identify and interview witnesses, prepare mitigation information, address potential collateral consequences, explore the possibility of diversion or alternative sentencing, or maintain regular communication with the client.

Since the beginning of the twenty-first century, concern over excessive workloads among attorneys who represent indigent clients has grown. Forty years after *Gideon v. Wainwright* established the right to state-provided defense counsel, the American Bar Association’s Standing Committee on Legal Aid and Indigent Defendants (SCLAID) held a series of hearings to determine whether that promise was being kept. SCLAID concluded that the defense function was systematically underfunded and that indigent defense providers in many states were chronically overworked and could not devote sufficient time to their cases.<sup>6</sup> Similarly, in 2009 the Constitution Project’s National Right to Counsel Committee found that inadequate funding and excessive workloads were “a problem virtually everywhere in public defense throughout the United States.”<sup>7</sup> In 2011, the Justice Policy Institute concluded that inadequate representation resulting from excessive indigent defense workloads leads to increased incarceration costs, reduces public trust and confidence in the judicial system, and has a disproportionate impact on people of color and low-income communities.<sup>8</sup>

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<sup>1</sup> U.S. Constitution amend. VI.

<sup>2</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>3</sup> *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

<sup>4</sup> American Bar Association Model Rules of Professional Conduct Rule 1.3 comment. 4 (2007).

<sup>5</sup> ABA Standards for Criminal Justice: Defense Function, Standard 4-1.8(a) (4<sup>th</sup> ed. 2015).

<sup>6</sup> Standing Committee on Legal Aid and Indigent Defendants, American Bar Association, *Gideon’s*

*Broken Promise: America’s Continuing Quest for Equal Justice* (2004).

<sup>7</sup> National Right to Counsel Committee, *Justice Denied: America’s Continuing Neglect of Our Constitutional Right to Counsel* 65 (2009).

<sup>8</sup> Justice Policy Institute, *System Overload: The Costs of Under-Resourcing Public Defense* (2011).

In response to these concerns, the American Bar Association promulgated a series of guidelines related to indigent defense workloads. These guidelines direct providers to “avoid excessive workloads and the adverse impact that such workloads have on providing quality legal representation to all clients.” The guidelines also advise that public defense providers establish “a supervision program that continuously monitors the workloads of its lawyers to assure that all essential tasks on behalf of clients ... are performed.”<sup>9</sup>

To monitor workloads effectively, public defenders must first establish workload standards. The current workload assessment study is the beginning step that DIDS is taking in this effort. The only existing national public defender workload standards were established in 1973 by the National Advisory Commission on Criminal Justice Standards and Goals and later adopted by the National Legal Aid and Defender Association. Assuming that each attorney handles only one case type, the standards call for limiting per-attorney caseloads to 150 felonies, 400 non-traffic misdemeanors, 200 juvenile

court cases, 200 Mental Health Act cases, or 25 appeals per year.<sup>10</sup> These standards have frequently been criticized on the grounds that they were not based upon empirical research, do not allow for the varying complexity of different types of cases within each of the broad categories (e.g., homicide, violent felonies, and nonviolent felonies), ignore variation among the states in criminal justice policies and procedures, and predate the widespread usage of information technology in courts and law offices.<sup>11</sup>

Over the past decade and a half, statewide public defender systems have increasingly begun to adopt state-specific weighted caseload systems for monitoring workload. Some of the earliest empirically based studies of public defender workload were conducted by National Center for State Courts (NCSC) in Maryland (2005), New Mexico (2007), and Virginia (2010).<sup>12</sup> More recently, the ABA has partnered with accounting firms to establish weighted caseload formulas in Missouri (2014), Louisiana (2017), Colorado (2017), and Rhode Island (2017).<sup>13</sup> Other organizations have conducted weighted

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<sup>9</sup> American Bar Association, *Eight Guidelines of Public Defense Related to Excessive Workloads*, guidelines 1 – 2 (2009).

<sup>10</sup> Task Force on Courts, National Advisory Commission on Criminal Justice Standards and Goals, *Courts*, Standard 13.12 (1973).

<sup>11</sup> Matthew Kleiman & Cynthia G. Lee, *Public Defenders*, in *Encyclopedia of Criminology and Criminal Justice* 4134, 4139 (Gerben Bruinsma & David Weisburg eds., 2013).

<sup>12</sup> Matthew Kleiman & Cynthia G. Lee, *Virginia Indigent Defense Commission Attorney and Support Staff Workload Assessment* (2010); National Center for State Courts & American Prosecutors Research Institute, *A Workload Assessment Study for the New Mexico Trial Court Judiciary*, New Mexico District Attorneys’ Offices and New Mexico Public Defender Department (2007); Brian J. Ostrom, Matthew

Kleiman & Christopher Ryan, *Maryland Attorney and Staff Workload Assessment* (2005).

<sup>13</sup> Blum Shapiro & Standing Committee on Legal Aid & Indigent Defendants, American Bar Association, *The Rhode Island Project: A Study of the Rhode Island Public Defender System and Attorney Workload Standards* (Nov. 2017); Rubin Brown & Standing Committee on Legal Aid & Indigent Defendants, American Bar Association, *The Colorado Project: A Study of the Colorado Public Defender System and Attorney Workload Standards* (Aug. 2017); Postlethwaite & Netteville & Standing Committee on Legal Aid & Indigent Defendants, American Bar Association, *The Louisiana Project: A Study of the Louisiana Public Defender System and Attorney Workload Standards* (Feb. 2017); Rubin Brown, *The Missouri Project: A Study of the Missouri Public Defender System and Attorney Workload Standards* (June 2014).

caseload studies in Missouri (2014), Massachusetts (2014) Texas (2015), New York (2016), Maryland (2017) and Idaho (2017).<sup>14</sup> These studies uniformly find that public defender agencies do not have enough attorneys to effectively handle their workloads.

In 2019, the Board on Indigent Defense Services (BIDS) and the Department of Indigent Defense Services were established to oversee and improve criminal defense services provided to indigent persons in Nevada by providing state funding and guidance to local indigent defense services. Specifically, BIDS and DIDS have been tasked with developing minimum standards and regulations for the delivery of indigent services, developing guidelines for maximum caseload sizes and, once these are established, overseeing the rural indigent defense attorneys to ensure that the minimum standards and regulations are being followed.

The Department of Indigent Defense Services is currently working on developing practice standards, and they contracted with the National Center for State Courts to conduct a workload assessment study for indigent defense providers in the 15 rural counties of the state. The results of the workload assessment study, described in this report, will be used to create preliminary caseload standards for indigent defense attorneys in Nevada.<sup>15</sup> At the foundation of the workload assessment study is a time study, which, under normal working conditions, will provide an empirical profile of

the amount of time indigent defense providers currently spend working on the various types of cases to which they are assigned. As will be discussed later, for the current study, the empirical data obtained through the time study was supplemented with additional empirical and qualitative data to develop the current preliminary standards.

## A. Indigent Defense Services in Rural Nevada

Nevada is composed of 17 counties, 15 of which are considered to be rural.<sup>16</sup> Nevada law stipulates that counties with populations of 100,000 or more must provide a county-funded public defender office; counties with populations of less than 100,000 may make independent decisions about the structure and delivery of its indigent defense services. In these counties, indigent defense services may be provided through 1) contracting with the Nevada State Public Defender, 2) creating a county public defender's office or 3) by contracting with attorneys to provide the service.

Two rural counties, Carson City and Storey County contract with the Nevada State Public Defender. Four rural counties, including Elko, Humboldt, Pershing and Churchill Counties have established county public defender offices; the remaining nine rural counties contract with private attorneys to provide indigent defense

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<sup>14</sup> Idaho Policy Institute, Boise State University, Idaho Public Defense Workload Study (2018); N.Y. State Office of Indigent Legal Services, A Determination of Caseload Standards Pursuant to § IV of the Hurrell-Harring v. The State of New York Settlement (Dec. 2016); Dottie Carmichael et al., Guidelines for Indigent Defense Caseloads: A Report to the Texas Indigent Defense Commission (Jan. 2015).

<sup>15</sup> As will be described later in this report, the standards developed in this report should be viewed as preliminary, as they study was conducted during the midst of the COVID-19 pandemic, thus the accuracy of these standards may not adequately represent typical work activities.

<sup>16</sup> Clark and Washoe Counties are considered urban counties, so they were not included in this study.

services. Currently, in the rural counties, only the Nevada State Public Defender Office in Carson City employs full-time investigators to support the work of county-based indigent defense attorneys. In locations in which investigators are not permanently employed, attorneys are permitted to ask the court for additional fees for investigation or expert consultation when needed. Administrative staffing support also varies across the counties, ranging from county-employed administrative staff in public defender offices to contract attorneys who have no administrative support staff, leaving the attorneys to provide their own administrative support. Finally, all of the rural counties have contracts with private attorneys to provide indigent defense services in cases in which the public defender or contract attorney has a conflict of interest. In cases involving the death penalty, attorneys must meet specific training and experiential criteria, so most of these attorneys are appointed from a specific pool of such attorneys, often located in the larger counties, necessitating travel costs to meet clients in the rural locations.

## B. About Weighted Caseload

The weighted caseload method of workload analysis is grounded in the understanding that different types of cases vary in complexity, and consequently in the amount of work they generate for attorneys and staff. For example, a typical non-capital felony creates a greater need for attorney and staff resources than the average misdemeanor case, largely because the cases tend to be more complex and the potential consequences are greater in the higher-level cases, so they are more likely to either go through trial or stay in the system longer before a plea bargain has been offered and accepted.

The weighted caseload method calculates resource need based on the total workload of each office, while accounting for the variations in workload associated with different types of cases. The weighted caseload formula consists of three critical elements:

1. *New case counts*, or the number of cases of each type assigned indigent defense providers each year;
2. *Case weights*, which represent the average amount of time required to handle cases of each type over the life of the case; and
3. The *year value*, or the amount of time each attorney or staff member has available for case-related work in one year.

Total annual workload is calculated by multiplying the annual new cases for each case type by the corresponding case weight, then summing the workload across all case types. Each office's workload is then divided by the year value to determine the total number of full-time equivalent attorneys needed to handle the workload.

## Original Project Design

To provide oversight and guidance on matters of policy throughout the project, DIDS established the Indigent Defense Workload Standards Advisory Committee (the Advisory Committee) comprised of public defenders, contract indigent defense providers, administrative staff members, an investigator, a Board of Indigent Defense Services member, a County Manager, and an Assistant County Manager. The workload assessment was designed to be conducted in two phases:

1. A time study in which all rural public defender/contract attorneys, investigators and administrative staff were asked to record all case-related and non-case-related work, including evenings and weekends, over a six-week period. The time study provides an empirical description of the amount of time currently devoted to handling cases of each type, as well as the division of the workday between case-related and non-case-related activities. 100 percent of all expected participants entered data during the time study.
2. A quality adjustment process to ensure that the final weighted caseload model incorporates sufficient time for effective representation. Grounded in applicable professional standards, the quality adjustment process included:
  - Focus groups conducted by NCSC staff with attorneys to develop an in-depth understanding of indigent defense work across the rural counties and to identify challenges attorneys face in handling their workload;
  - Delphi panels, consisting of a structured review of the case weights by a set of experienced attorneys, investigators and administrative staff members;
  - Census survey of rural indigent defense attorneys; and
  - A review of past indigent defense provider weighted caseload studies to compare case weights for similar case types, which also accounted for adherence to ABA standards.

This two-stage quantitative/qualitative approach takes advantage of empirical data from the time study (“what is”) and relies upon expert opinion and data from other states only

to formulate the quality adjustments (“what should be”), resulting in a high degree of accuracy.

### C. Conducting a Time Study During COVID-19

In total, 100% percent of all primary participants (attorneys, investigators, and administrative staff) participated in the time study. This extremely high level of participation, if collected during “normal times” would ensure sufficient data to develop an accurate and reliable profile of the amount of time attorneys, investigators and administrative staff currently spend representing clients in each type of case, as well as time spent on non-case-specific and non-case-related work.

Despite engaging in all of the tasks that typically result in useable data, this study was conducted during the global COVID-19 pandemic, so courts were not running or functioning in a typical fashion. Largely due to the pandemic, fewer cases were filed, because fewer arrests were made; few, if any jury trials occurred, since many courts were either closed or were limiting trials due to the need to socially distance and ensure health safety, and limited travel to courts and jails took place, again, to ensure health and safety. All of this combined to provide an atypical picture of the work conducted by indigent defense providers, investigators and staff. Similarly, the development of case weights relies on the ability to accurately count the number of cases on which indigent defense providers work, but this data was also not available in a consistent manner.

Given the unusual circumstances under which the time study was conducted and the fact that



business was not being conducted as usual, the NCSC is going to work with DIDS to use data collected on Legal Server in the future to develop case weights using rural Nevada-specific case processing data.

The NCSC has extended their contract with DIDS – at no extra cost<sup>17</sup> – to develop case weights based on data collected and maintained by DIDS. The Legal Server system, set up to maintain data on the number and type of cases on which attorneys are working, along with the number of hours spent on those cases, is available for use now, but entering case-specific data into this system will become compulsory in October 2021. The NCSC will work with the Department again as soon as six to nine months of data have been collected, in order to update the case weights.

#### D. Recommendation

Given the challenges experienced through the process of conducting the weighted caseload study in the middle of a pandemic, the single recommendation made in this report concerns the ongoing reporting of data into the Legal Server system beginning no later than October 1, 2021. This data collected through focus groups and Delphi Panels suggests the need for more attorney and staff resources, but at this time, sufficient data does not exist to quantify those needs.

##### ***Recommendation 1***

Indigent defense providers should begin entering caseload data along with hours worked

into the Legal Server system no later than October 1, 2021.

DIDS should monitor the new case counts and hours expenditure database to ensure that attorneys are entering data in a consistent manner. Once DIDS staff have ensured the data are completely and consistently entered and that ample data (six to nine months' worth) have been entered, DIDS should work with the NCSC to develop new case weights for the case types explored in the current study.

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<sup>17</sup> A no-cost extension to the NCSC's contract for this work has been signed, and the NCSC and DIDS will begin work on the development of new case weights

once sufficient data have been collected through the Legal Server system.