

The Nevada Supreme Court convened the Indigent Defense Commission (IDC) under the Chairmanship of Justice Michael Cherry in 2007 to examine and make recommendations regarding the delivery of indigent defense services in Nevada. The Commission filed its initial report with the Court in November of 2007.

The Court issued its first ADKT 411 Order on January 4, 2008. This Order contained performance standards, a requirement to remove judges from the appointment of counsel process, and recommended that all rural counties use the State Public Defender's Office. The Order also required all jurisdictions to file a plan for the appointment of counsel with the Court by May 2007. The Order made real the voluntary request from Clark and Washoe Counties to conduct weighted caseload studies, in order to determine appropriate public defender caseloads. The Order also contains a definition of 'indigent' to be used when appointing counsel.

After objections were filed with the Court, by several groups including the district attorneys, rural judges, and the counties, a hearing was held in March 2007; resulting in an Order on March 21, 2007. This Order required that new members be added to the IDC, the performance standards be reconsidered, and the Rural Subcommittee be reconstituted to re-examine the issues in Rural Nevada.

During this interim period, the District Attorneys and Defense Bar worked with the IDC to revise the performance standards, and the Rural Subcommittee reconvened and developed new, refined recommendations. Clark and Washoe Counties, and the cities in urban jurisdictions, formulated and began to implement plans to remove judges from the process of appointment for conflict counsel, and reformed their contract attorney systems.

The Court issued another order on October 16, 2008. This Order sets the final performance standards to be implemented in April 2009, and grants Clark and Washoe Counties request they be given until May 2009 to complete their weighted caseload studies.

In January 2009, ADKT 411 hearing the Rural Subcommittee presented its final report, and later that year the weighted caseload study on the Clark and Washoe County Public Defenders' Offices was given to the Court.

There were disputes about that study and the Court asked the IDC to develop data regarding indigent defense in Nevada. The Commission has developed data definitions and reporting forms and is currently assessing the ability of the defenders, counties, and courts to collect that data. The Commission is also looking at the way flat fee contracts are used to provide for indigent defense services in Nevada.

In July 2013 Nye County Assistant Manager Joni Eastley and NACO Executive Director Jeff Fontaine were appointed by the Nevada Supreme Court to serve on the Rural Subcommittee of the Nevada Indigent Defense Commission. The District Attorneys from Humboldt County, Pershing County and Mineral County were also appointed. Since that time the Subcommittee has met several times to review county contracts with indigent defense counsel, case load data and other pertinent information. At the most recent meeting on May 28, 2014 the subcommittee approved drafting a report and recommendations for submittal to the IDC. The following is the draft report and recommendations.

**RURAL SUBCOMMITTEE REPORT ON THE STATUS OF INDIGENT DEFENSE IN THE
15 RURAL COUNTIES AND RECOMMENDATIONS TO IMPROVE SERVICE TO
INDIGENT DEFENDANTS**

JUNE 2014

I

INTRODUCTION

The Indigent Defense Commission (IDC) delegated the task to the Subcommittee for Rural Counties to study the current methods employed by those counties to make certain that people entitled to counsel under the Sixth Amendment or other applicable law receive meaningful and effective representation. The subcommittee is co-chaired by Judge Todd Russell and Diane Crow. Over the last several months the Subcommittee has received data from the respective counties regarding how each county undertakes the task of providing legal representation to indigent people accused of crimes.

Four counties (Carson City, Storey, White Pine and Eureka) employ the services of the Nevada State public Defender (NSPD) under NRS 180. Three counties (Elko, Humboldt, and Pershing) have established county public defender offices, pursuant to NRS 260. Every other rural county provides this service by contracting with private lawyers, who are also allowed to maintain a private practice. Each of those counties uses a contract that binds the contracting lawyer to provide representation to all indigents for a flat yearly fee. In other words, the contracting lawyer is not entitled to receive additional fees if one of his cases under the contract resulted in a jury trial. Additionally, the lawyer is not entitled to additional fees for any appellate work undertaken during the contract term. Each of the counties uses a contract that permits the contracting attorney to ask the court for additional fees for investigation or expert consultation. Most of the contracts refer to NRS 7.135 et. Seq. as the applicable statutory remedy for this request and, if granted, those expenses are presumably borne by the county. None of the flat fee contracts referenced above provide for additional fees should any of the cases proceed as capital or death penalty prosecutions.

Carson City, a “county” using the NSPD, also employs a contractual arrangement with the attorneys to handle all conflict cases that the NSPD cannot take. This contract provides that the contracting lawyer may seek fees in addition to the flat fee if the court is convinced that there are sufficient reasons to do so. The other three counties using the NSPD (Storey, White Pine, and Eureka) appoint conflict cases to private attorneys willing to take the matters pursuant to NRS 7.125 et. seq. for \$100 per hour. All four counties using the NSPD also receive S. Ct. Rule 250 qualified attorneys for any capital prosecutions that may arise in that county.

The Subcommittee also has received the yearly caseloads from each of the rural counties (except Esmeralda and Lincoln, other counties (Lyon and Nye) provided only partial data) and has been able to ascertain the approximate total yearly caseload and per attorney per year caseload for each county. (Charts attached as Exhibit 1 and 2). The Subcommittee also has obtained each of the flat fee contracts that are in use by the counties using that method. The Subcommittee has concluded that the amount of money spent by a county under

the flat fee arrangement is disparate and not uniform. In short, some counties pay much less than others for indigent defense legal services. This disparity is troubling because it suggests that the quality of representation may vary depending on where the indigent person is arrested.

One obvious reason for this disparity is the unfair burden the State of Nevada places on the counties regarding the funding for this constitutionally mandated service. In short, is is an “unfunded mandate” that may not survive legal scrutiny. Some counties have more money to spend on this service than others. The amount spent must be uniform throughout the state and any county unable to bear that financial burden must receive funding from the State.

II

OVERVIEW OF DATA COLLECTED

The counties using flat fee contracts have provided the Subcommittee with caseload and cost (contracts) information. (No data was received from Esmeralda or Lincoln counties and only partial data was received from Nye and Lyon counties). The other counties have provided the Subcommittee with caseload information because the costs are born partially by the State (20% state funding/ 80 % county funding, these are NSPD counties) or the counties that have established public defender offices (Elko, Humboldt, and Pershing). The following provides the caseload per attorney and, with respect to flat fee counties and Carson City conflict attorneys, the yearly amount of money spent per attorney:

1) CARSON CITY/ STOREY/ WHITE PINE/ EUREKA

These counties are within the NSPD system so the cost per attorney is not included in this synopsis. The NSPD employs 3 full time investigators for any investigation a case may be required in any case; however, the NSPD may apply to the court for expert witness fees. The approximate average per year per attorney caseload is 339 cases.

Carson City also contracts with three attorneys to handle the NSPD’s conflict cases. The yearly cost for one attorney is approximately \$114,000. The per conflict attorney yearly caseload is 166. The contract allows the lawyer to ask the court for additional fees if appropriate and warranted under NRS 7.125(4)(a-d). The county also will pay for investigations and expert services if those requests are warranted under NRS 7.135 et. seq. These extraordinary fees will presumably be made available by the county in the event that a multi-defendant capital prosecution occurs.

2) ESMERALDA

This county uses a one year/one attorney flat fee contract in the amount of \$47,000. There is no mention of or provision for additional money in the event of a capital prosecution. The Subcommittee did not receive caseload data from this county.

3) LYON

This county's flat fee contract provides for each attorney to be compensated in the amount of \$135,000 per year. There are three contracting attorneys so multi-defendant cases of three people or less are handled within the scope of the flat fee contract. The Subcommittee is not aware of how the county pays for conflict attorneys, when necessary.

Each contracting attorney maintains an approximate yearly caseload of 525 cases (only partial data was provided by two of the three lawyers). Interestingly, each contracting attorney is bound to provide legal services under this contract for at least one capital prosecution, if necessary.

4) LINCOLN

This county uses a flat fee contract with one lawyer on an annual basis. The fee paid is \$122,000. It does not provide for additional fees for capital cases but does allow the lawyer to seek investigation and/or expert assistance pursuant to the court's approval. The county did not provide caseload information.

5) NYE

This county uses a flat fee contract with three different lawyers. Each lawyer is paid \$125,000 per year. Each lawyer has an average approximate yearly caseload of 339 cases (only partial data was received). The contract does not provide for additional fees for capital cases but does allow the lawyer to ask the court to provide investigation and or expert assistance at county expense when warranted under NRS 7.135 et. seq.

6) MINERAL

This county uses an annual flat fee contract with one lawyer. This lawyer is paid \$70,000 and the contract does not provide for additional fees for capital cases. Investigation and expert assistance is subject to court approval pursuant to NRS 7.135 et. seq. The lawyer's average yearly caseload is 136 cases.

7) DOUGLAS

Until very recently this county used a flat fee contractual arrangement with three lawyers. The county now contracted a fourth lawyer. Each lawyer receives an annual fee of \$196,000. The per attorney caseload should be approximately 480 cases per year. Before the recent addition of the fourth lawyer, the per attorney caseload was 640 per year. The contract does not provide for additional fees for death penalty cases. Investigation and expert assistance is subject to court approval pursuant to NRS 7.135 et. seq.

8) ELKO/ HUMBOLDT/ PERSHING

The subcommittee has been advised that these counties have opted to create county public defender offices in which all personnel are county employees, pursuant to NRS 260. The subcommittee does not know the budgets for any of these county public defender offices. The per attorney caseloads are as follows:

- 1) 420 cases per attorney per year in Elko;
- 2) 381 cases per attorney per year in Humboldt;
- 3) 597 cases per attorney per year in Pershing. This includes Humboldt's conflict and juvenile cases.

The Subcommittee does not know how Elko or Pershing handles their conflict cases.

III

SUBCOMMITTEE RECOMMENDATIONS

The Constitutional obligation to provide effective legal representation to the indigent criminal defendant is set forth in the Sixth Amendment and that right has been made applicable to the states by the Fourteenth Amendment. To be clear, the financial obligation for this mandatory service must be borne by the states, not their political sub-divisions.

Whether, the State of Nevada can delegate this task to its constituent counties without any financial subsidy presents an interesting legal question. This Subcommittee has not delved into this provocative issue. However, the Subcommittee uniformly agrees that is "unfunded mandate" results in an unfair financial burden on Nevada's poorer counties and that it necessarily results in less effective legal representation for indigent people in those counties. Moreover, given the data collected by this Subcommittee it can reasonably be inferred that the indigent legal representation in the rural counties not using the services of the NSPD is generally inferior to both Washoe and Clark counties.¹ The Subcommittee uniformly agrees that this unfair treatment needs to be addressed and rectified by either the Nevada State Legislature or the legal system, in general.

¹ Based on higher caseloads compared to Washoe and Clark County Public Defender offices; no hourly pay incentive to go to trials or file appeals; travel distance in the rural counties; and allowance of private practice in addition to the contract for indigent defense.

The Subcommittee recommends as follows:

1. That the rural counties that are currently using flat fee contracts with private lawyers abandon that practice and, instead, employ the services of the NSPD. This recommendation is conditioned on the request that the State of Nevada undertake at least eighty per cent of that cost and that the NSPD provide effective representation in their respective counties;
2. If the counties do not opt to return to the NSPD, then it is recommended that the counties using the contract model open county public defender offices, pursuant to NRS 260, following Elko, Humboldt, and Pershing counties. It is further recommended that they follow the conflict contract model of Carson City;
3. Should the rural counties referenced in recommendations #1 or 2 above be unwilling to follow the Subcommittee's recommendation, then at very least, those counties should abandon the use of flat fee contracts. The Subcommittee recommends that the counties consider the type of contractual arrangement that Clark and Washoe counties use for the payment of conflict counsel. Those counties use a modified flat fee contract which provides the contraction attorney with an hourly fee should the case proceed to trial or for other extraordinary reasons. Further, the rural counties opting to remain with the contract model should use a uniform contract that addresses extraordinary and capital case funding.
4. The permanent oversight Indigent Defense Board should be created as previously ordered by the Court.
5. The IDC provide legislative support to the NSPD and the counties to rebalance the costs of indigent defense back to the State and away from the constituent counties.