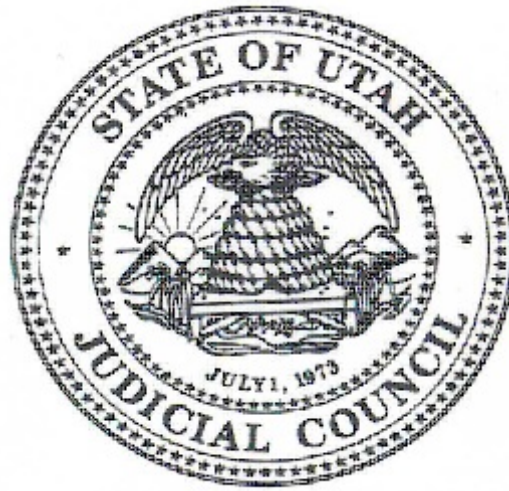


# REPORT

Judicial Council  
Study Committee on the Representation  
of Indigent Criminal Defendants in Trial Courts



October 26, 2015

Although the Study Committee on the Representation of Indigent Criminal Defendants was commissioned by the Judicial Council, this Report represents solely the deliberations and recommendations of the Committee and not necessarily the views or position of the Judicial Council. For additional information, contact the Administrative Office of the Courts, 450 South State Street, Salt Lake City, UT 84114.

## **TABLE OF CONTENTS**

### **COMMITTEE MEMBERSHIP**

<b>EXECUTIVE SUMMARY</b>	1
<b>INTRODUCTION</b>	3
<b>BACKGROUND</b>	6
<b>COMMITTEE RECOMMENDATIONS</b>	16
Indigent Defense Commission	16
Fixed-Fee Contracts	19
Justice Court Concerns	22
Additional Suggestions	25
<b>CONCLUSION</b>	27

## COMMITTEE MEMBERS

Judge Stephen L. Roth  
Utah Court of Appeals  
Study Committee Chair

Paul Boyden  
Executive Director, Statewide  
Association of Prosecutors  
Associate Chair

Ann Marie McIff Allen  
Private Practice Attorney

Patrick Anderson  
Director, Salt Lake Legal Defenders  
Association

Tony Baird  
Deputy Cache County Attorney

David Brickey  
Private Practice Attorney

Parker Douglas  
Chief of Staff & Federal Solicitor  
Utah Attorney General's Office

Jared Eldrige  
Juab County Attorney

Ron Gordon  
Executive Director, Commission on  
Criminal and Juvenile Justice

Kent Hart  
Executive Director, Utah Association of  
Criminal Defense Lawyers

Judge Douglas Hogan  
Third District Court

Brent Johnson  
General Counsel  
Administrative Office of the Courts

Linda Jones  
Zimmerman Jones Booher

Richard Mauro  
Mauro Law Office

Rep. Daniel McCay  
Utah House of Representatives

Judge Gregory K. Orme  
Utah Court of Appeals

Judge Derek Pullan  
Fourth District Court

Rick Schwermer  
Assistant Court Administrator  
Administrative Office of the Courts

Tyson Skeen  
Domestic Violence Unit Chief  
West Jordan City

Roger Tew  
Senior Policy Analyst  
Utah League of Cities and Towns

Judge Vernice Trease  
Third District Court

Adam Trupp  
Executive Director  
Utah Association of Counties

Todd Utzinger  
Davis County Legal Defender  
Coordinator

Judge J. Frederic Voros Jr.  
Utah Court of Appeals

Sen. Todd Weiler  
Utah State Senate

Kelly Wright  
Salt Lake County Deputy  
District Attorney

Michael Zimmerman  
Zimmerman Jones Booher

Staff: Mary Westby  
Staff Attorney  
Utah Court of Appeals

Additional Participants:

Judge Sydney Magid, Salt Lake City  
Justice Court

Padma Veeru-Collings, Salt Lake City  
Prosecutor

Cameron Diehl, Utah League of Cities  
and Towns

## EXECUTIVE SUMMARY

This report is the culmination of the efforts of the Study Committee on the Representation of Indigent Criminal Defendants (the Committee), formed by the Judicial Council in 2011. The Committee was asked to assess the provision of indigent criminal defense services at the trial level in Utah courts and to identify any concerns and make appropriate recommendations for improvement. After consultation with the Judicial Council and a number of State leaders, the Committee obtained a grant from the Department of Justice to engage the services of the Sixth Amendment Center (6AC), an independent organization experienced in assessing state indigent defense representation systems, to perform a study in Utah. The Committee adopted a set of principles, derived from Sixth Amendment case law, to help guide 6AC's study and selected a ten-county sample for review. The 6AC's report provided substantial information and analysis that has proved very useful in the development of the Committee's own findings and recommendations.

Utah has delegated the State's constitutional responsibility to provide effective representation of counsel to indigent defendants entirely to counties and municipalities. The State does not guide or oversee this function, nor does it provide funding. Each local government is essentially on its own. The result is a mix of systems operating without consistent standards and often without sufficient information to determine whether constitutional requirements are being met. In addition, high-volume workloads affect both attorneys and the judiciary, and may work against the protection of criminal defendants' right to counsel. This report primarily focuses on three structural issues affecting the provision of indigent defense services and the State's obligation to assure compliance with constitutional standards.

- First, there is lack of State oversight of the multitude of county and municipal indigent defense systems. This results in a dearth of information about how local systems function and whether they meet constitutional standards for providing indigent defense. It also means that local governments are left to their own sometimes-limited resources in seeking to discharge their indigent defense responsibilities.
- Second, some contracting conventions, such as the use of all-inclusive, flat-fee contracts, create systemic disincentives that may negatively affect the provision of defense services. The use of those contracts can create a structural tension by pitting an attorney's financial interests against the best interest of a client.

- Third, Utah’s justice courts face systemic pressures from a high volume caseload and a lack of uniformity in information and procedures to assure compliance with constitutional requirements. This is not tied to defense issues in the same manner as the first two issues, but rather is within the purview of the judiciary to ensure that it is fulfilling its role in protecting defendants’ rights.

To address these issues, the Committee makes the following recommendations; the first requires legislative action while the other two can and should be implemented as soon as possible:

- That the legislature create an Indigent Defense Commission to provide statewide oversight of indigent defense services and to promulgate standards and to provide training, economic assistance, and other resources to local jurisdictions to meet constitutional obligations for indigent defense.
- That local governments reform indigent defense services contracts that create significant disincentives for effective representation, such as, for example, a fixed fee for all representation services and expenses. A shift in the terms of indigent defense contracts has already begun in some jurisdictions based on issues identified over the course of the Committee’s work.
- That the Judicial Branch enhance the ability of judges to ensure compliance with right-to-counsel obligations, especially in justice courts, and improve and standardize forms and procedures used to ensure compliance with constitutional mandates. Efforts have already begun in this regard and should continue. Additionally, implement a monitoring and feedback program to improve the ability of justice court judges to understand and abide by Sixth Amendment requirements.

A fuller description of the Committee’s work and its findings and recommendations are set out in the following Report.

## INTRODUCTION

The Sixth Amendment to the United States Constitution provides:

**“In all criminal prosecutions, the accused shall enjoy the right** to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and **to have the Assistance of Counsel for his defense.”** (Emphasis added.)

In *Gideon v. Wainwright*, 372 U.S. 335 (1963), and cases that followed, the United States Supreme Court made it clear that the Sixth Amendment requires that states provide counsel to those who cannot afford it in any case where an accused may be exposed to a sentence of incarceration.

In Utah, the State has delegated the responsibility to provide indigent defense counsel to county and municipal governments. In 2011, the Utah Judicial Council received recommendations from a study committee it had formed in 2008 to address the issue of appellate representation of indigent defendants. That committee recommended changes to enhance the quality of appellate representation. It also noted that the quality of appellate representation was inextricably tied to the way that counties were providing trial counsel to indigents, which often created disincentives to appeal that had little to do with the merits of a case. In response, the Utah Judicial Council formed a Study Committee on the Representation of Indigent Criminal Defendants (the Committee) to review and report back to the Council on the more complicated issue of the current state of the right to counsel in Utah’s trial courts with any appropriate recommendations.

The resulting Committee was a broad based group, composed of judges, prosecutors, criminal defense counsel, and representatives of county and local government, as well as members of the Utah Legislature. This Report is the result of the work of the Committee and its consultant, The Sixth Amendment Center (6AC), whose own work was funded by a grant from the Bureau of Justice Assistance (BJA), U.S. Department of Justice (DOJ). The 6AC has prepared a comprehensive report to the



Committee setting out its findings, *The Right to Counsel in Utah, An Assessment of Trial-Level Indigent Defense Services* (the 6AC Report). Having considered the observations, findings, and recommendations of the 6AC Report, the Committee has prepared this Final Report (Report) which outlines its recommendations as to the steps it believes are needed to ensure that the minimum standards for the constitutional right to counsel are met in Utah courts.

This Report first recognizes that the absence of State oversight of the way in which the right to counsel is administered by counties and municipal governments means that there is no mechanism for gathering needed comparative data across jurisdictional boundaries, no statewide mechanism for overseeing how the right is actually provided by local governments, and no statewide standards that can be relied upon by counties and municipal governments to assure that the constitutional obligation to provide counsel is adequately met. At the same time, the Report recognizes that the very fact of the Committee's studying the issue over the past four years has resulted in steps being taken to address problems that have become apparent. Counties and municipal governments, as well as the Utah judiciary, have begun to make changes in how counsel and associated services are provided to indigent defendants.

The Committee is fully supportive of these efforts. However, we believe that if provision of counsel for indigent defendants facing possible incarceration is to remain the responsibility of local government, there must be some mechanism for setting uniform standards and monitoring the implementation of those standards statewide. Such standards should be established with sensitivity to the fact that there are a variety of ways that local governments may choose to fulfill their charge to provide counsel, but that also permit the State to be assured that its constitutional obligation to provide counsel to indigent defendants is being met. And it is important to acknowledge, that though indigent defense is a state responsibility, in Utah it has been almost exclusively a local burden. To ensure that it is possible for local governments to meet statewide constitutional standards of representation, it is very likely that additional resources will be required that are beyond ability of local governments to reasonably provide. Hence, a legislatively approved mechanism is needed, not only to set uniform standards, but to bring the State into meaningful partnership with local governments in funding indigent defense services once statewide standards are set. The Committee's central recommendation in this regard is that the State create an indigent defense commission to oversee the indigent defense function by promulgating uniform statewide standards for indigent defense services, gathering information and data necessary to ensure that standards are being met, assuring that adequate resources are made available to that

end, and providing programmatic and structural assistance to assist local governments to more effectively and efficiently provide representation services.

The Committee also recommends two other changes in approach that can be undertaken now, without any need for legislation or broader policy changes. First, attorney contracts for indigent defense services should eliminate provisions that create significant disincentives to effective representation, for example, a fixed fee for all defense services and expenses. This can be done without waiting for the creation of a commission. Second, significant steps should be taken, especially in justice courts, to improve the ability of judges to ensure compliance with right-to-counsel obligations. It is unlikely that the creation of an indigent defense commission will play a part in judicial capabilities in this regard. The AOC has already increased its focus on judicial training on right-to-counsel concerns over the past year, and we recommend that these efforts continue and that other steps be taken, such as improvement and standardization of forms and procedures and the creation of a monitoring and feedback program in the justice courts.

A final note on the working of the Committee: The Committee is composed of prosecutors, defense counsel, and judges, among others—people who often operate in conflicting capacities in the criminal justice system. Yet over the years the members have come to develop mutual respect and trust, and have been able to work together with a common purpose—to assure that constitutionally adequate defense services are made available to those charged with crimes that may result in incarceration in jail or prison. All agree that this is a constitutional guarantee that the State must meet to assure that the public has confidence in the criminal justice system and that that system operates as fairly as possible before it deprives anyone of their liberty. This sense of common purpose, and mutual respect, has made it possible to bridge legitimately differing perspectives on the operation of the system and reach substantial agreement on what should be done to improve Utah’s indigent defense system. It is in that same spirit that we offer this Report.

A note on the study performed for the Committee by our consultant, the 6AC, under grants from the Department of Justice: That study has provided the Committee with much valuable information about how the right to counsel is administered in both district courts and justice courts in Utah. In addition, the 6AC Report sets out in a very clear way the operation of the Sixth Amendment right to counsel, which should assist those who address this issue to more easily grasp the Amendment’s scope and requirements. Committee members differ on the validity of certain observations and conclusions in the report, particularly as to whether many problematic examples can be

interpreted to be more broadly representative of how the right-to-counsel is administered in Utah. Some thought the value was limited, while others saw the report's specific observations to be useful as examples of how the broader systemic problems the report identifies can negatively impact the constitutional rights of real defendants. Nevertheless, the Committee considers the 6AC Report's central conclusions and recommendations to be sound, focusing, first, on the need for a statewide commission to oversee and coordinate compliance with the constitutional obligation and, second, on the inhibiting effects of fixed-fee contracting on the ability of counsel to provide meaningful representation to persons accused of criminal conduct.

In addition, the Report identifies concerns with how effectively justice courts handle right-to-counsel issues. Because the Committee has a number of representatives of the courts and local governments—those who are actually administering key aspects of the right to counsel, the Committee has been a forum for mutual education and evaluation of the unique challenges faced by Utah's diverse governmental units in providing the right to counsel. And in this respect, any honest differences of opinion between committee members and the 6AC Report in no way diminish the Committee's appreciation and respect for the work of the 6AC. Their willingness to candidly engage the Committee about their findings and conclusions as the process has moved along has been a model of professionalism, and helps explain why whatever differences Committee members may have with certain details of the 6AC Report, those differences are not grounded on any doubt as to the integrity and depth of knowledge of 6AC personnel. And 6AC's extensive efforts have produced an independent and thorough report that provides a solid basis for moving forward with important improvements to Utah's system of providing effective representation to indigent defendants in our criminal courts.

## **BACKGROUND**

### **A. The Genesis of the Committee.**

The genesis of the trial court study committee is linked to the formation of two previous Utah Judicial Council committees that studied the representation of indigent defendants on appeal. In 2008, the Judicial Council formed the Appellate and Post-Conviction Representation Study Committee (the Appellate Committee) to consider issues related to appellate and post-conviction representation for indigent defendants. Then Utah Supreme Court Chief Justice Christine Durham outlined the committee's charge to follow up on a 1994 study. Chief Justice Durham explained that although the previous committee had identified various issues involved in providing indigent

defense services on appeal, no concrete action had resulted from that committee's 1994 report. Moreover, the Chief Justice stated that since the 1994 report's release, issues involving the adequacy of indigent appellate defense had become even more complex. Accordingly, the Judicial Council concluded that a follow up committee was needed to determine what changes, if any, were warranted.

The Appellate Committee defined its goal more broadly than that of the earlier committee with a view to identify specific recommendations that had a realistic chance of implementation. The earlier committee, the author of the 1994 report, had narrowly defined its task as studying "the feasibility of creating a statewide appellate public defender's office" as a means of addressing the inconsistent quality of representation for indigent criminal appellants. The 2008 committee, rather than operating from the assumption that any actual problems existed or that any particular solution was appropriate, sought to determine the current state of appellate representation in Utah and to identify whether any deficiencies actually existed and then identify feasible responses and recommend improvements.

To fulfill its charge, the Appellate Committee developed data to identify constitutional requirements, best practices, and practical concerns in Utah's provision of appellate representation to indigent criminal defendants. With criminal appeals being a relatively narrow part of criminal practice, the Appellate Committee was able to assemble information from available sources. The committee obtained indigent defense contracts from counties, evaluated a broad sample of briefs from recent appeals, and mined data to determine appeal rates from various jurisdictions. Based on the information gathered, the Appellate Committee compiled the information, identified issues, and made recommendations to address the issues in a report released in January 2011.

The Appellate Committee included a number of county government representatives and prosecutors, as well as defense counsel and judges, which enabled it to more fully consider local input and focus on solutions that better took into account local concerns. Countervailing opinions were discussed openly and seeking common ground became the norm. The resulting Appellate Committee report produced a consensus on steps to improve indigent defense representation on appeal.

Near the end of the Appellate Committee's work, the Judicial Council decided to expand the committee to consider indigent representation at the trial level once the appellate report was completed. As detailed above, the Appellate Committee had already gathered some information relevant to the question of trial level representation.

Further, a number of the issues bearing on the quality of appellate representation were linked to the quality of representation at trial. Trial attorneys who lacked the independence, time, and resources to fully represent their clients inevitably led to problems with representation on appeal.

Accordingly, in 2011 the Judicial Council renamed the Appellate Committee as the Study Committee on the Representation of Indigent Criminal Defendants (the Indigent Defense Committee or the Committee) and reconfigured it to add trial-level experience suitable to the new task. Specifically, the Judicial Council officially appointed to the Committee county leaders who had served as advisors to the Appellate Committee. And, consistent with the Appellate Committee's collaborative efforts, the Indigent Defense Committee actively sought out additional stake holders to work with the Committee, including prosecutors and others from cities with justice courts. The Indigent Defense Committee enlisted this input to identify all pertinent issues and to maximize the chances of success of any proposed changes.

B. Consulting with the Sixth Amendment Center.

Committee members concluded that the same process that the Appellate Committee successfully employed should be used for trial issues: collect data, identify actual concerns, and develop common recommendations to address issues raised. Although some of the information that the Appellate Committee had gathered was useful to assess trial court issues, it became apparent that the complexity and scope of indigent defense at the trial level required information-gathering resources and analytical skills far beyond what the members of the Committee could provide. While hundreds of appeals are filed each year in Utah, tens of thousands of criminal cases are generated annually. And while the adequacy of appellate representation can be evaluated to an extent based on information from the appeals actually filed—the quality of appellate briefing, for example—the adequacy of trial level representation could not easily be determined by looking simply at statistics and case files.

The Indigent Defense Committee had several discussions about what information would be needed to evaluate trial defense services and how to obtain such information. Although Utah's Administrative Office of the Courts (the AOC) compiles relevant court data, it did not appear that court-centered data alone would provide a complete picture of attorney workloads where an attorney has public defense contracts and a private practice as well. No statewide tracking of such multi-tasking by defense counsel was readily available because individual counties and municipal governments are the contracting entities for indigent defense contracts, and local officials do not

generally require specific tracking of workloads or performance measures when entering into indigent defense contracts. In sum, because of the complications involved in collecting meaningful data on the provision of indigent representation, the Indigent Defense Committee determined that obtaining reliable information on its own was beyond its capability.

In the course of looking into the work of other states that had already undertaken similar efforts to study their trial-level indigent defense systems, the Committee contacted Jon Mosher, then with the National Legal Aid & Defender Association (NLADA), who had worked with a number of those states in their efforts to improve indigent defense services. At a Committee meeting in early 2012, Mr. Mosher provided the Indigent Defense Committee with an overview of the approach a number of other states had taken and explained the role of his organization in helping to evaluate those states' indigent defense systems. Over the course of the next few months, individual committee members contacted their counterparts in a number of other states who had worked with Mr. Mosher and his colleague, David Carroll, to get input on the quality of their work and their ability to deal with the distinct issues presented by different state systems and cultures. The feedback was uniformly positive about the quality of their work and the nature of the working relationships.

The committee determined that there were grants available from the BJA to cover the costs of such a study in Utah. The availability of outside funding assured that the study could be done by an entity independent from the Indigent Defense Committee. The study's independence was further assured by the departure of both Mr. Mosher and Mr. Carroll from NLADA to form their own non-profit organization devoted entirely to right-to-counsel issues, the Sixth Amendment Center. In late 2012 the Committee requested that 6AC perform a study of indigent defense services in Utah similar to what it had done in other states. That study began in late 2013.<sup>1</sup>

---

<sup>1</sup> Intervening events delayed the beginning of the 6AC's work on the ground. First, during the time the Indigent Defense Committee was vetting 6AC's qualifications, 6AC's, Mr. Carroll, its executive director, and Mr. Mosher, its deputy director, were in the process of severing ties with the NLADA, a process that took some time. More significantly, in addition to the time required for the grant application process itself, once the grant was approved, the federal budget sequester of 2013 and Congress's subsequent failure to authorize a federal budget before the end of the fiscal year complicated the funding process. Once funding finally became available DOJ decided to split the grant money between two annual budget cycles for internal budgetary reasons. As a result, the 6AC was unable to begin its work until late 2013.

C. Selecting a Representative Sample of Utah Counties for the Study.

The BJA grant for the Utah study provided funding for 6AC to assess a representative sampling of Utah's twenty-nine counties. Accordingly, the Indigent Defense Committee formed a subcommittee to determine which counties to include in order to get the most benefit from the study. The subcommittee determined that the sample ought to represent a significant percentage of Utah's population, in order to include as many local providers of indigent defense services as possible, and should also take into account the State's geographic and demographic diversity. In the end, the subcommittee proposed the following ten counties for study: Cache, Weber, Davis, Salt Lake, Utah, Tooele, Uintah, Sanpete, San Juan, and Washington.

The selection was based on several considerations. The first seven counties are the most populous in the state, including nearly 90% of Utah's population. In addition, the seven exhibit a wide range of population density (from Salt Lake County, with over a million residents, to Tooele County, with about 50,000) and considerable geographic diversity (from Cache County in the far north of the state to Washington County in the far southwest). The seven are also demographically and economically diverse, including the four counties in the central Wasatch Front (Utah, Salt Lake, Davis and Weber); Cache County, a county with a growing urban population that still maintains a significant agricultural base; Washington County, one of the fastest-growing counties in the country; and Tooele County, in some respects economically tied to the larger urban populations of Salt Lake and Utah Counties but with its own unique character and concerns. The remaining three counties provided additional geographic and demographic diversity: Uintah County, in the east, has been experiencing the challenges of burgeoning energy development and a growing, diverse population; Sanpete County, in the state's center, is more rural and agricultural, with a smaller population and tax base; and San Juan County, a more rural county at the southeast corner of the state, has a diverse population and a unique history.

In the end, choosing the sample counties was a challenging task because of Utah's considerable diversity of population, geography, demographics, and economies. With this in mind, the ten counties proposed for review were chosen to include as broad a cross section of Utah as possible. As noted, the selected counties accounted for over 90% of the state's total population; they also took in all 29 state senate districts and 71 of Utah's 75 house districts, as well as all eight of Utah's judicial districts. The Indigent Defense Committee adopted the subcommittee's county selection recommendation, and the 6AC began its work gathering information in late 2013.

The Committee believes that the selection of counties finally chosen for review provides a reasonable basis for broader conclusions about how well the State of Utah is fulfilling its constitutional obligations to provide effective representation to indigent criminal defendants. But we emphasize that the 6AC report was never intended to be a report card on the efforts of the individual counties involved in the study; rather, it provides a basis for broader consideration about how well the State of Utah is carrying out its responsibility to provide constitutionally adequate legal representation to indigent defendants charged with crimes.

D. The Scope of the 6AC Study Expands to Include Justice Courts.

The Judicial Council's original charge to the Indigent Defense Committee focused on the right to counsel in the district courts, which have jurisdiction over felony prosecutions and class A misdemeanors. After beginning its work, however, 6AC recommended that justice courts, which handle class B and C misdemeanors, as well as infractions (which do not involve the potential for jail time), also be included in its survey. This recommendation was based on the recognition that justice courts handle a significant segment of criminal cases requiring indigent defense services and on 6AC's observations that, in many counties, a number of attorneys providing indigent defense services under contract at the district court level also had contracts involving justice court representation. It became apparent that in order to get a more comprehensive picture of how indigent defense actually functions, it was necessary to expand the scope of the study, and this was done soon after 6AC's work on the ground began.

E. Understanding Utah's Unique Indigent Defense System.

To evaluate the effectiveness of Utah's indigent defense system, 6AC first needed to gain an understanding of Utah's unique delivery system. *Gideon v. Wainwright* holds that state governments have the constitutional duty to provide counsel to all defendants (or suspects, in some instances) who qualify as indigent. While many states delegate the responsibility to local governments, the great majority of those that do so provide at least some funding to local governments for indigent defense services and a number of them have state-level oversight of some kind. In contrast, Utah delegates all responsibility for funding indigent defense to local governments. It is generally accepted that this approach can satisfy constitutional requirements as long as local governments provide constitutionally-adequate defense services to criminal defendants.



At the district court level, each county provides indigent defense services through some variation of a basic model. The great majority of Utah's counties contract with a handful of private attorneys to serve as the county's public defense provider for an annual fee. In a few larger counties, such as Davis and Weber, the county also contracts with or employs an attorney who serves as coordinating attorney for private attorneys under contract to provide indigent representation. Under both of these approaches, contract attorneys may also maintain a private practice representing clients who retain the attorneys' services for a fee. Salt Lake County and Utah County, the State's two largest, contract with nonprofit law firms to operate as the county's primary counsel for indigent criminal defendants. The attorneys working for these organizations are full-time public defenders and do not maintain private practices on the side, unlike most contract defenders in other counties.

Representation of indigent defendants charged in Utah's justice courts is the responsibility of each municipality and county sponsoring such a court. In each incorporated town or city with a justice court, local governments are required to provide legal counsel services to any defendant accused of committing a class B or C misdemeanor within its incorporated limits. Where there is a justice court serving unincorporated parts of a given county, the indigent defense responsibility falls to county government just as it does for district court representation.<sup>2</sup> With the exception of the more urban parts of the state, each city or town generally contracts with a single private attorney to represent all misdemeanor defendants in the local court. It is not unusual for the same private attorney to have contracts with other municipalities, handling one court's cases on one day before moving to another's the next day, and may have a contract for district court representation as well.

In both felony and misdemeanor cases, county and local governments provide varying degrees of support services to contract defenders. Counties that contract with nonprofit law firms and those that employ coordinating attorneys provide at least some separate funding or additional defense resources such as investigative services and expert witnesses. In addition, these counties may contract with other attorneys to represent accused persons in cases where the main contract attorneys have conflicts of interest. Conflict attorneys are needed, for example, when co-defendants are charged with the same crime, thus creating a potential for conflicting defenses. Conflict

---

<sup>2</sup> Where a county does not maintain a justice court, class B and C misdemeanors are handled in the district court. And some municipalities without justice courts contract with other municipal justice courts to handle their misdemeanor cases.

attorneys are also needed when defendants and their defense attorneys cannot agree on how to handle a case. Some other counties also provide separate funding for defense expenses and conflict counsel. In a number of counties and municipalities, however, local governments have historically funded indigent defense services by awarding a single contract that pays a fixed fee for all services. From that fixed amount, contract defenders must pay for defense resources out of the lump sum in the contract.<sup>3</sup> Under this approach, contract defenders are required to hire conflict counsel themselves and pay for these services out of the fixed contract amount.

F. Principles for a Constitutionally Adequate Indigent Defense System.

The Committee decided that it was important to provide 6AC with a set of principles that, in the Committee's judgment, appropriately described the components of a constitutionally adequate indigent defense system, one that ought to be able to fulfill the obligation to provide effective representation for indigent defendants in Utah. In consultation with a subcommittee formed for that purpose, district judge Derek Pullan, based on an analysis of the applicable legal precedent, proposed a set of seven basic principles for effective representation and presented it to the Committee. Those principles became the basis for 6AC's assessment of Utah's indigent defense representation system. A copy of Judge Pullan's article explaining those principles is attached to this report as Appendix A.

The Committee believes that the principles compiled by Judge Pullan (the Pullan Principles) provide a guide for assessing and improving Utah's indigent defense system and securing the right to counsel guaranteed by the state and federal constitutions:

1. Representation that is independent. Defense counsel must be free to defend the client zealously and without fear of termination, reduction in compensation, reduction in staff, or reduction in defense resources.
2. Representation without conflicts of interest.
3. Representation without interference. Defense counsel must receive timely notice of appointment, have reasonable access to incarcerated clients, and a workspace where the attorney-client privilege is safeguarded.
4. Representation at all critical stages of the criminal justice process.

---

<sup>3</sup> Some contracts also require trial attorneys to decide whether to appeal their own cases without providing any additional funds to complete the appellate process. Rather, the appeal is part of the workload the attorney has agreed to handle under the contract.

5. Representation that tests the State's evidence in a meaningful adversarial process. This standard includes the following components:
  - a. Defense counsel has ability, training, continuing legal education, and experience equal to the complexity of the case.
  - b. Defense counsel has access to adequate defense resources.
  - c. Defense counsel's workload permits effective representation of each client.
  - d. Defense counsel provides representation with reasonable continuity throughout a case.
6. Representation by defense counsel who is fairly compensated.
7. Representation with proper incentives. Employment or contracting arrangements should avoid economic or other incentives or disincentives that impair effective representation.
8. Representation by defense counsel whose work is systematically reviewed to ensure that it meets constitutional standards.

G. The Sixth Amendment Center's Report.

6AC completed its work on the ground in Utah in late 2014, having spent a number of days in each county talking with attorneys, judges, prosecutors, county leadership, and others, as well as observing court proceedings in justice and district courts. 6AC staff also met with a number of state and judicial leaders and communicated with the Committee during this period and with individual committee members to gather additional information and provide updates on their progress.<sup>4</sup> The Committee received a draft report in the spring of this year and, at 6AC's request, invited comments on the draft from the ten counties that had been the subject of the survey in order to insure that the final report was as accurate and complete as possible. Then 6AC's principals, David Carroll and Jon Mosher, travelled to Utah in June to attend a meeting arranged by the Committee to hear responses to the draft report from

---

<sup>4</sup> In addition, the 6AC was able to gather substantial amounts of information from court data maintained by the AOC. The AOC tracks all court cases throughout the state and, among many other things, identifies party and attorney names, the general category of cases filed, the nature of criminal charges, and all docket entries in each case. This information allowed 6AC to collect statistical information important to its analysis, including data that allowed it to identify with some level of confidence the attorneys representing indigent defendants in Utah courts and the number of cases assigned.

representatives of the counties and municipalities affected. Carroll and Moser met with the Committee, as well, and received substantial feedback in both venues. They invited additional comments and received a number of them through email and telephone conversations. 6AC has now provided us with its final report, *The Right to Counsel in Utah, An Assessment of Trial-Level Indigent Defense Services*. A copy of the 6AC Report, separately bound, is attached to the Committee's Report as Appendix E.

We think it important to note that while 6AC has welcomed and been responsive to feedback, throughout the process they have emphasized the independence required to ensure the quality and integrity of their work. And while the Committee appreciates the efforts 6AC has made to cooperate with the Committee in this process, we recognize that 6AC's independence is essential to the integrity of its report and to the report's value as a basis for understanding and improving the quality of representation of indigent criminal defendants in Utah. In that regard, many in the counties surveyed, as well as some members of the Committee itself, remain critical of various aspects of the 6AC Report. In particular, there is disagreement about how broadly certain critical observations described in the report can be interpreted to be representative of day-to-day occurrences in the state as a whole or even of the typical practices of the institutions or individuals involved. That said, 6AC has been painstaking in its efforts to make the Report as accurate as possible, and the Committee believes that the core concerns the Report identifies with Utah's indigent defense system are well supported.

The 6AC Report is extensive, but it contains an Executive Summary that provides ready access to its findings and recommendations. We do not go into detail here, but it is important to note that the 6AC Report indicates that both actual and constructive denial of counsel are occurring in Utah's criminal justice system. A constructive denial of counsel occurs when a person is represented by counsel, but that counsel provides constitutionally deficient representation. 6AC concluded that, for the most part, persons charged with crimes in district courts are routinely appointed counsel and, thus, are not actually deprived of their Sixth Amendment rights. However, two systemic factors raise concerns about the quality of such representation. First, data suggests that in some locations, very high caseloads may be making it unlikely that contract counsel is able to spend the necessary time on each case to adequately represent defendants. Second, local governments who contract for indigent defense services have historically done so by using flat-fee contracts that provide a lump sum for attorneys to handle indigent defense for all cases that may be filed for a specified period (typically a year). Although such contracts are useful to local governments for budgeting purposes, there are obvious economic disincentives that can impede effective representation of each client in every case, especially where fixed-fee contracts are awarded on a low-bid basis.

An actual denial of counsel occurs when a person is constitutionally entitled to the assistance of counsel but counsel is not appointed and there is no constitutionally adequate waiver of that right. The 6AC Report concludes that in justice courts, it is often the case that misdemeanor defendants are not appointed counsel when they are constitutionally entitled to it. The 6AC Report identifies some circumstances existing in justice courts that contribute to these denials of counsel. A significant factor is very large caseloads that require efficient processing. Justice court judges must quickly determine who is entitled to the appointment of counsel. These time pressures heighten the tension that always exists between the steps that must be taken to provide the right to counsel and the efficient processing of cases. And although most people who appear in justice courts choose to resolve their cases quickly by paying a fine, the actual sentence often involves suspension of a jail term that may later be imposed if the defendant fails to pay or otherwise violates the terms of probation. It is this potential for incarceration that triggers the right to counsel, not whether a jail sentence is imposed at the time. But the time pressures of the justice court environment, and certain weaknesses in key procedures used to advise of the right to counsel and forms provided to facilitate waivers of counsel can often result in defendants relinquishing the right to counsel without really understanding it. In addition, the 6AC Report notes that the same systemic pressures on defense counsel that can impact the quality of representation in district courts—high caseloads and flat-fee contracts—also exist in justice courts.

The 6AC Report makes three core recommendations intended to address the systemic concerns it identifies: First, the creation of “a statewide independent oversight commission” to promulgate right-to-counsel standards and to actively monitor and enforce ongoing compliance with those standards . . . ;” second, elimination of indigent defense “contracts that create financial incentives for attorneys to fail to provide effective representation;” and third, additional training of justice court judges regarding Sixth Amendment concerns and reformation of procedures in justice courts that can lead to denial of counsel. The Committee agrees in principle with these recommendations, and sets out below its own specific proposals.

## **COMMITTEE RECOMMENDATIONS**

### **I. Indigent Defense Commission**

As discussed above, the State of Utah has elected to fulfill its constitutional obligation to provide indigent criminal defendants with the effective assistance of legal

counsel through delegation of the responsibility to local governments. This is an approach that has the advantages of local control and decision-making, and it can work. But good—even just adequate—trial work requires attorneys with knowledge, experience, resources, preparation time, and a commitment to do the job for each indigent client. There are enough qualified attorneys in Utah to get the job done, given appropriate resources. The challenge, however, is to ensure that a responsibility so widely-disbursed among local governments is actually producing the required result—representation for each indigent defendant that meets constitutional standards. The most obvious shortcomings in Utah’s approach have been the lack of any systematic statewide data collection, standards, or oversight respecting the provision of indigent services. Each local government unit operates as an island. Communication among them often occurs through collateral organizations, such as the Utah Association of Counties (UAC) and the Utah County and District Attorneys Association (the UCDA). This is not a result of lack of commitment to the task. As the 6AC Report acknowledges, “In every jurisdiction visited, conscientious people were striving to do well by both victims of crime and by the accused” but “even the most well-meaning local stakeholders . . . at times, fail to meet the dictates of right to counsel case law without appropriate guidance and supervision.”

This lack of any formal coordination and of reliably shared information among local governments makes it nearly impossible to determine how well each unit of government is fulfilling the Sixth Amendment responsibility. For example, the dearth of information is certainly responsible for the inability of most units of local government to know the full scope of their contracted defenders’ workloads. Many contract attorneys in more rural areas work for other courts and other jurisdictions, as well as in private practice, and as the 6AC report notes, this is a direct cause of overwork among defense counsel, and consequent likelihood of inadequate defense services to clients. Although the State of Utah is the entity constitutionally responsible for assuring that Sixth Amendment rights are provided to indigent defendants, it has little information about what local governments are doing, and whether they are fulfilling the State’s constitutional responsibility. Moreover, the lack of statewide performance standards leaves local governments at sea when they attempt in good faith to meet their delegated constitutional obligations.<sup>5</sup> Finally, local governments are left to their own resources in

---

<sup>5</sup> And there are surely jurisdictions where right-to-counsel obligations are being largely fulfilled. But there is no systemic way to ensure this is the case, both at present and in the long run; and the 6AC Report’s observations suggest that the lack of systemic oversight can produce real problems for defendants even in jurisdictions where overall compliance may be substantial.

funding indigent defense. In order to ensure that this responsibility can be adequately fulfilled, it is very likely that additional funding will be needed beyond what can reasonably be expected of many local governments.

### **Recommendation**

Local governments are becoming increasingly aware of the scope of their right-to-counsel responsibilities, and many are working to improve current practices to better meet their obligation, including exploration of interlocal cooperation and changes to contracting processes. But whatever local governments may do on their own, there remains a lack of any statewide mechanism for gathering and disseminating information, for setting uniform standards for providing defense counsel and evaluating their performance, for assessing the diverse needs of local governments for financial and other assistance, and for providing that assistance. The Committee recommends that an independent state commission be created to ensure that the State's constitutional obligations are being met through the efforts of its local governments.

Just as the Committee adopted Utah-specific constitutional standards for effective representation of indigent defendants, we have also addressed the question of what principles ought to guide the formation of an indigent defense commission that will accomplish the necessary goals. The Committee's Proposed Principles for An Effective Indigent Defense Commission (the Commission Principles) are attached as Appendix B. They address independence and accountability, membership, permanent staff, responsibilities and authority, the need for a state-local funding mechanism, and compliance. The Committee recommends these principles as a framework for legislation to enable the State to assume an active coordinating and support role to assist the local governments actually providing indigent defense services, and for the development of standards for assessing capabilities and ensuring compliance with constitutional right-to-counsel obligations.<sup>6</sup>

---

<sup>6</sup> We have also attached, as Appendix C, a working draft of legislation establishing a Utah Indigent Defense Commission as part of the Indigent Defense Act, Utah Code Ann. §§ 77-32-101, *et seq.*, primarily in a proposed new Part 8. We include this draft legislation, not as a proposal *per se*, but as an example of how the Commission Principles might be implemented in practice. While the Committee has reached consensus regarding the Commission Principles, its members are not in full agreement about either the provisions or the language of the draft legislation. Nevertheless, we have found it useful as a focus for considering solutions to the political and practical

## II. Fixed-Fee Contracts

One of 6AC's two "broad recommendations" is that Utah "[p]rohibit contracts that create financial incentives for attorneys to fail to provide effective representation." In this regard, "fixed rate" or "flat fee" contracts are used to engage indigent defense counsel in many areas of the state. An example is a contract that pays a fixed fee for representation without regard to case volume or complexity. Under such arrangements it is too easy for circumstances to result in a workload that may become increasingly disproportionate to the set fee. Further concerns arise when the contract requires that defense counsel pay for investigators and experts, pursue appeals, and even hire substitute counsel to represent a defendant where the contract attorney has a conflict of interest—all to be paid for out of the fixed contract price. In addition, where flat fee contracting is also part of a low-bid process, there are pressures on bidding attorneys to underestimate the caseload burden and "low ball" their bid in order to get the job, with the hope that all will be well in the end. All this leaves contract counsel with the difficult task of balancing fixed resources with the obligation for effective representation. The responsibility for striking this kind of balance should not be left solely on the shoulders of defense counsel or the quality of representation will too readily be compromised. While the Committee acknowledges the tension between more flexible fee arrangements and local governments' need for budget predictability from year to year, that tension cannot always be resolved in favor of predictability and still meet constitutional standards because the result can be underpaid and overworked contract counsel who are under considerable pressure to cut corners in representing their indigent clients. This is not to say that all will succumb to this pressure, but the disincentives from flat-fee contracting are systemic and inimical to the goal of uniformly effective representation.

### **Recommendation**

In recognition of the tendency of flat-fee contracts to undermine the effectiveness of defense counsel on a systemic basis—even if individual counsel may still be found to perform adequately—and the principle that counsel who provide public defense services ought to be fairly compensated for their work, the Committee recommends that such contracting approaches be eliminated as soon as reasonably possible and that a

---

questions and complications that will inevitably arise in creating an effective commission through a legislative process.



model contract that eliminates disincentives to effective representation be fully developed and implemented by local governments statewide.

Local governments that contract for indigent defense services should incorporate the principles of a constitutionally adequate system as outlined above, to include:

- Workload at a level that ensures contract counsel will have reasonably sufficient time to effectively represent each client.
  - Initial workload assessment based on history and reasonable projections.
  - Contracting attorney required to disclose total workload, including other defender contracts and private practice caseload, with periodic updates.
  - Counsel required to devote sufficient resources to provide effective representation.
- Compensation adequate for projected workload and not established solely by lowest bid.
- A contractual mechanism for adjusting compensation to address significant unexpected increases in projected workload or complexity.
- Separate funding for defense resources, such as investigators; witness fees (including experts); and travel expenses beyond the local jurisdiction.
- Separate contracts and funding for conflict counsel and appellate counsel.
- A requirement that contract attorneys be qualified by education, training, and experience to effectively handle the number and type of cases anticipated during the contract period and that they maintain their skills by participating in annual training relevant to their role as criminal defense counsel.
- Assurance that contract attorneys can exercise independent judgment in defending their indigent clients and that appropriate facilities will be made available at courthouses and places of confinement for consultation with appropriate attorney-client safeguards.

The 6AC Report points out that a number of states have taken steps to ban flat-fee contracting for indigent defense services. The Committee believes that the question of whether flat-fee contracting ought to be banned by rule or statute is one that should be taken up in the context of an appropriate public process by a statewide commission better equipped to consider the details and the full implications of such a step and to provide workable alternative models that meet the goal of effective representation and the needs of local governments. But local governments do not need to wait for a commission before making changes in contracting for defense services that can make a

difference in the meantime. The principles that we have identified above can be incorporated in future contracts. As a starting place, the UCDAAs has developed a model contract that, while currently still including a fixed fee for attorney services, addresses a number of issues bearing on attorney compensation and other hallmarks of effective representation.<sup>7</sup> A copy of the UCDAAs model Public Defender Agreement, still a work in progress, is attached to this report as Appendix D. Some counties have adopted that model as a significant improvement to prior contracting practices, but many jurisdictions, including many municipalities, continue to use a fixed-fee contract

---

<sup>7</sup> The UCDAAs draft Public Defender Agreement—Trial Services includes a number of provisions that can improve the quality of representation. For example, this model contract 1) provides for trial-level representation only, with no requirement for appeal representation other than an obligation to timely file an appropriate notice of appeal and then consult with a separate appellate defender; 2) requires continuing professional education and provides tuition payment for eight hours of appropriate CLE each year; 3) makes accessibility to indigent clients “an integral consideration” and requires accessibility to clients in advance of hearings and trials; 3) requires representation under the contract be “the first priority in scheduling” and encourages continuity of representation; 4) provides for a two-year term, which also contributes to continuity of representation and reduces to some extent the political and other pressures of annual renewal; 5) requires semi-annual reporting of number and type of cases, significant case proceedings and other statistical information as well as an annual performance evaluation; 6) provides separate funding for a number of important expenses and resources, such as out-of-county travel, investigators, defense witness fees (including expert witnesses), and transcripts, subject to prior court approval; 7) does not require that contract counsel pay for conflict counsel; and 8) prohibits assignment of the contract without written consent of the county. Thus, a number of the most troublesome aspects of fixed-fee contracts are addressed to some extent. Nevertheless, while providing separate funding for many representation expenses and other useful provisions, the basic fee for the attorney’s services remains fixed: There is no provision for adjustment of the fee in the event of significant increase in case load or complexity, nor is there a mechanism for ensuring that the fee itself is reasonably related to the likely workload, other than the incentive the defense attorney may have to avoid a contract that cannot be reasonably fulfilled to professional standards. And to the extent that the contract is subject to a low-bid selection process, the pressures to take on too much work for less than reasonable compensation will further increase the systemic risk of less than effective representation for each indigent criminal defendant. The UCDAAs may want to consider the value of a provision requiring the contract attorney to disclose other public defender contracts and private case workload, so that the local government has some means to assess whether the attorney can devote sufficient time to the endeavor to meet reasonable standards of performance. To be useful throughout the life of the contract, a provision requiring periodic updates and a mechanism for addressing the effects of excessive workload might be considered, as well.

approach without even the limited improvements available in the UCDAAs model. We recommend that local governments consider making changes in contracting practices that address the impediments to effective representation of indigent defendants that have been identified here and in the 6AC report. In addition, we note that an indigent defense commission could contribute significantly to the development and promulgation of a workable model contract and serve as a mechanism for ensuring that state funding is available to cover the additional costs that are likely to result from the recommended improvements to the contracting process. Finally, we encourage the UCDAAs to continue to improve the model contract, in particular by addressing the central questions that remain unresolved.

### III. Justice Court Concerns

Utah's justice courts have criminal jurisdiction over class B and class C misdemeanors and infractions. By statute, in addition to fines, those misdemeanors carry potential penalties of incarceration (up to 180 days for a class B and 90 days for a class C). Though the potential punishment is significantly less than for felonies, a misdemeanor criminal conviction can still have serious collateral consequences and even a short jail stay is a serious deprivation of liberty. *Jones v. United States*, 463 U.S. 354, 361 (1983) (holding that any involuntary confinement "for any purpose constitutes a significant deprivation of liberty"). The Sixth Amendment does not distinguish between lesser and greater crimes in terms of the right to counsel, nor does it matter whether jail is imposed at sentencing or suspended, conditioned on compliance with terms of probation. *Shelton v. Alabama*, 535 U.S. 654, 662 (2002). Rather, in any case where there is the potential for incarceration, whether immediate or in the future, legal counsel must be afforded to indigent defendants. *Id.*

The large volume of cases in many justice courts imposes significant pressures on judges, court staff, prosecutors, and defense attorneys. To meet the challenges posed by such heavy caseloads, justice courts must process cases quickly and efficiently. The Committee is concerned that the need to dispose of cases under time and volume pressures may work against ensuring the right to counsel. To the degree that justice court caseload issues are a source of the deprivation of the Sixth Amendment right, those issues ought to be addressed.<sup>8</sup> *Argersinger v. Hamlin*, 407 U.S. 25, 34 (1972) ("[T]he

---

<sup>8</sup> As part of the Justice Reinvestment Initiative, a significant number of traffic offenses were reduced to infractions, which carry no risk of incarceration. This may impact justice court

volume of misdemeanor cases [in justice courts], far greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of the fairness of the result.”).

The 6AC Report contains a number of observations that raise concerns about how effectively the right to counsel is implemented by judges in justice courts. Among those causing most concern are instances where, based on a misunderstanding of the scope of the right to counsel, judges routinely fail to appoint counsel where a jail term is to be suspended, even though a subsequent probation violation would expose the defendant to imposition of the suspended sentence; take a plea without defense counsel present; have prosecutors meet with unrepresented defendants to negotiate a case resolution without having first addressed the right to counsel; and advise defendants and negotiate pleas in the absence of any counsel, whether defense or prosecution. In addition, though a defendant may decide to waive the right to counsel, a court must ensure that such a waiver is knowing and voluntary, and there are serious concerns about how effective the waiver processes are in justice courts, given 1) the high caseloads in many courts; 2) the often-crowded calendars; and 3) what appear to be inadequacies in some forms and other media used to educate defendants about their rights.<sup>9</sup>

While it is apparent from the 6AC Report that issues of this sort can also arise in district courts, the incidence was relatively rare, with concerns in the district courts focused more on systemic questions about assuring effective assistance of counsel rather than failure to appoint when constitutionally required. One reason for this may be found in the different systems provided for handling appeals in these two court levels. The district courts are courts of record, and appeals involve review by a three or five judge panel of specific decisions and actions of the district court judge in the course of proceedings. This means that if a district court judge fails to appoint counsel to represent an indigent defendant or fails to ensure that a defendant’s waiver of the right

---

criminal caseloads and the number of cases implicating the right to representation, as discussed further below.

<sup>9</sup> The 6AC Report notes that about 60% of criminal defendants may be unrepresented in justice court, based on case information electronically maintained by the AOC identifying no counsel in specific cases. Those numbers are not necessarily reliable indicators of Sixth Amendment violations, however, because they do not account for such variables as circumstances where the defendant is not indigent or has appropriately waived the right to counsel or for possible errors in the recording of information. Nevertheless, the raw numbers still raise a significant concern.

to counsel is knowing and voluntary, those actions are subject to specific review and will be the subject of written appellate decisions analyzing the rights involved and the nature of any error involved. This creates a feedback loop between appellate courts and district courts that analyzes and instructs about what is required to appropriately implement constitutional rights such as the right to counsel.

No such feedback loop exists for justice courts. They are not courts of record. Rather, under Utah law, the right of “appeal” consists of a trial *de novo* in the district court. Utah Code Ann. § 78A-7-118. In other words, there is simply a brand new trial in the district court, and (with one exception not relevant here) neither the justice court’s decisions or processes are subject to review or critique of any kind by another court. Hence, there is no ongoing conversation between two court levels about how rights, such as the right to counsel, should be implemented. As the 6AC report notes, “a *de novo* review can never change the underlying systemic flaws that resulted in the denial of the right to counsel in the first place.”<sup>10</sup>

### **Recommendation**

In district and justice courts, the judge is ultimately responsible to see that defendants are adequately informed of their Sixth Amendment rights and that any waiver of those rights is knowingly and intelligently made. In justice courts, in particular, waiver is very common. According to the 6AC report, over 65% of criminal cases are resolved in justice courts through waivers of the right to counsel and guilty pleas. Yet there is no structural mechanism for ensuring that the waiver process is constitutionally sound. The absence of appellate review or a trial court record means that justice court judges receive no feedback on the adequacy of waivers or plea colloquies. The judiciary is ultimately responsible for assuring that judges are well trained in the intricacies of the Sixth Amendment and that they apply it properly.

The Committee is aware that the AOC has taken significant steps to enhance Sixth Amendment-related training for justice court judges once it became aware of problems during the course of 6AC’s work in Utah. The Committee recommends that the AOC reinforce the steps already taken to enhance training for all judges in Sixth Amendment rights and procedures, particularly justice court judges. The Committee

---

<sup>10</sup> See also *North v. Russell*, 427 U.S. 328, 335 (1976) (Explaining that because many defendants are unrepresented in justice courts that rely on *de novo* appeals, *Argersinger* obligates those courts “to inform defendants of their right to a lawyer if a sentence of confinement is to be imposed.”).

also recommends that the judiciary take steps to see that accurate and effective procedures, forms, and colloquies are developed to be used uniformly statewide in all courts to ensure these rights are appropriately implemented by judges and properly understood by criminal defendants and that any waivers meet the knowing and voluntary standard. This should include, as well, attention to the processes and forms used to determine whether defendants are indigent and therefore qualify for appointment of counsel.

The Committee also recommends that, because there is no meaningful appellate review of justice court proceedings with respect to Sixth Amendment rights, the Judicial Council consider implementing an ongoing monitoring/mentoring program designed to provide justice court judges and staff appropriate feedback on how these constitutional responsibilities are being met. The Committee acknowledges that additional funding may be needed to implement such a program throughout the state. And, there may be other approaches to resolution of the problems identified that may be more cost efficient. Nevertheless, the absence of any oversight mechanism on the justice court level and the concerns identified call for some meaningful response to ensure that criminal defendants are afforded their constitutional right to counsel.

#### **IV. Additional Suggestions**

Regional Cooperation. The Indigent Defense Act encourages “[c]ounties and municipalities . . . to enter into interlocal cooperation agreements . . . for the provision of legal defense . . . .” Utah Code Ann. § 77-32-306(4). For example, counties could organize by geographic region or join with counties having similar interests, whether or not geographically contiguous, to pool resources to hire full-time counsel to represent indigent defendants. Such an arrangement could improve both quality control and budgetary predictability. Such a pool could operate on the kind of self-insurance model adopted to successfully run the Capital Defense Fund over a number of years. Some counties, such as Cache and Juab, for example, are already exploring this option, and we encourage other counties and municipalities to consider its potentially significant advantages in funding predictability and quality of representation. Encouraging and facilitating interlocal cooperation would be one of the responsibilities of the proposed indigent defense commission. But, as with contracting reforms, local governments can take such steps on their own.

Training and Mentoring. We have noted the importance of having defense attorneys who are qualified to competently handle the kind and complexity of cases

they are likely to encounter in representing indigent defendants. It is also important that attorneys maintain and improve their capabilities. A requirement for ongoing professional education is a recommended provision for any indigent defense contract. In this regard, the Utah Association of Criminal Defense Attorneys (UACDL) has been making available training aimed at improving the skills of criminal defense attorneys for some time. The UACDL has recently sought and received from the Utah Commission on Criminal and Juvenile Justice a substantial grant to fund additional training initiatives in this area. We encourage UACDL to continue its efforts to provide pertinent training in this area, and we encourage attorneys performing indigent criminal defense work to take advantage of such training opportunities. We commend CCJJ for its support of this effort. In addition, we encourage UACDL (and the state bar, through its ongoing mentoring program) to consider developing a mentoring program that would make it possible for attorneys with questions or concerns about particular issues that arise in the course of indigent defense to reach out for advice from other attorneys with useful experience in the area. Finally, we note that the UCDA model contract provides, as a benefit, tuition for eight hours each year of pertinent professional education. We encourage local governments to follow this approach in contracting for indigent defense counsel.

The Justice Reinvestment Initiative. Criminal justice reforms currently being implemented in Utah may result in a reduction in the number of criminal cases that require appointment of counsel in justice courts. Immediately following the conclusion of the 2014 Utah legislative session, the Commission of Criminal and Juvenile Justice (CCJJ) initiated the Justice Reinvestment Initiative (JRI) to identify the factors underlying the increase in Utah's rising prison population. Despite lowering crime rates, Utah prison populations have grown steadily over the past decade. With the assistance of the Pew Charitable Trusts, CCJJ issued a comprehensive report that determined the main sources of the increasing number of inmates and listed 18 recommendations to reverse the trend.

The chief proposals included reducing penalties for most drug possession offenses; implementing assessment tools to identify high, medium, and low risk offenders; developing individual case action plans for each offender; and, matching an offender's risk level with the appropriate combination of services and punishment as directed by research-based evidence. Pertinent to justice court caseload concerns, CCJJ recommended reducing the level of offense of many traffic offenses that had been deemed misdemeanors under Utah law. Rather than classifying traffic violations as misdemeanors, CCJJ recommended categorizing them as infractions, thus, eliminating incarceration as a potential punishment.

The 2015 Utah Legislature endorsed the JRI in an omnibus bill, House Bill 348, that adopted all 18 proposals including the reclassification of many traffic offenses as infractions, and the governor signed the bill into law. Those changes in the approach to traffic violations became effective on May 12, 2015.

Because incarceration is no longer a possibility for these reduced traffic offenses, the Sixth Amendment right to counsel will not apply. This reclassification effort began after 6AC collected its data and completed its report, and there is not enough information as yet available to determine what effect removing traffic offenses from the misdemeanor category will have on justice court caseloads. Nevertheless, the Committee is hopeful that reclassification will reduce some of the pressures on justice courts that implicate Sixth Amendment concerns and free up resources that can be used to improve the quality of representation for indigent defendants charged with other crimes. We understand that there may be further legislative efforts in this regard, as well. We recommend that an effort be made to assess the impact of JRI on justice court caseloads and any commensurate effect on the need for appointment of counsel, as information becomes available.

Suggestions for Further Consideration. The Judicial Council may want to consider whether other factors may have an impact on the availability of the right to counsel:

- The Judicial Council studied the operation of Utah's justice courts in 2008 and received a report from the Nehring committee. That report included many observations and recommendations that directly and indirectly affect the right to counsel, and certain aspects of the report may be worth revisiting.

Utah's Judicial Conduct Commission (JCC) receives and investigates complaints about judges in Utah. At least some of these complaints may involve the denial of the right to counsel. For that reason, though the JCC is an independent organization, the Judicial Council may want to consider how JCC operations may affect the right to counsel.

## CONCLUSION

The Committee submits this Report and its recommendations for consideration by the Judicial Council, with the hope that it will encourage and facilitate needed improvements in the quality of representation provided to indigent criminal defendants within the State of Utah. In doing so, we acknowledge the hard work and cooperation



of so many in the counties and municipalities of this state who became involved in this process and added much of value to the Committee's work.

We would be happy to respond to any questions or concerns the Judicial Council may have.

# APPENDIX A

**THE CONSTITUTIONAL RIGHT TO COUNSEL**  
**Evaluating the Health of Utah’s Indigent Defense System**

By Hon. Derek P. Pullan

[dpullan@utcourts.gov](mailto:dpullan@utcourts.gov)

*In all criminal prosecutions, the accused shall enjoy the right . . . to have  
the Assistance of counsel for his defence.*

--U.S. Const., Amend. VI

*In criminal prosecutions the accused shall have the right to appear  
and defend in person and by counsel.*

--Utah Const., Art. I, Sec. 12

—oo0oo—

Enshrined in the United States Constitution and the Utah Constitution is the right of the accused to the assistance of counsel.<sup>1</sup> This right is “necessary to insure fundamental human rights of life and liberty.”<sup>2</sup> It is an “essential barrier[] against arbitrary or unjust deprivation of human rights”<sup>3</sup> and “embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty . . . .”<sup>4</sup>

The need of the accused for a lawyer is perhaps best stated by Supreme Court Justice Sutherland in the seminal case, *Gideon v. Wainwright*:

---

<sup>1</sup> U.S. CONST, amend. IV; UTAH CONST., art. I, § 12. *See also* UTAH CODE ANN. § 77-1-6(1)(a) (West 2012) (“In criminal prosecutions the defendant is entitled: to appear in person and defend in person or by counsel.”).

<sup>2</sup> *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 463.

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 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.<sup>5</sup>

Sadly, not every person charged with a crime has equal opportunity to retain counsel. In *Gideon*, the U.S. Supreme Court acknowledged this “obvious truth”—“in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”<sup>6</sup> The ideal of equality before the law “cannot be realized if the poor man charged with a crime [must] face his accusers without a lawyer to assist him.”<sup>7</sup> The Court concluded that the Sixth Amendment requires the states to provide indigent criminal defendants with legal counsel at public expense.<sup>8</sup>

This right is one that touches more Utah citizens than one might expect. In 2000, the U.S. Department of Justice estimated that “[p]oor people account for more than 80% of individuals prosecuted.”<sup>9</sup> In 2012, public defenders represented more than twenty-one thousand people charged with crimes in Utah district courts alone.<sup>10</sup>

<sup>5</sup> *Gideon v. Wainwright*, 372 U.S. 335, 344–45 (1963) (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)).

<sup>6</sup> *Gideon*, 372 U.S. at 796.

<sup>7</sup> *Id.* 796–97.

<sup>8</sup> The Sixth Amendment right to counsel is a fundamental right made obligatory upon the State by the due process clause of the Fourteenth Amendment. *Id.* at 795–96.

<sup>9</sup> Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L. J. 1031, 1034 (2006).

<sup>10</sup> At the request of the author, information analysts at the Utah Administrative Office of the Courts reviewed district court dockets statewide to determine the number of cases to which public defenders were assigned. The following table shows the number of public defender cases by judicial district in calendar year 2012:

Judicial District	Public Defender Cases
First District	865
Second District	3,689
Third District	8,455
Fourth District	3,879
Fifth District	2,268
Sixth District	436

While the duty to provide legal counsel to the indigent ultimately rests with the State of Utah, the Utah legislature has delegated to counties, cities, and towns the responsibility to provide and fund public defenders.<sup>11</sup> The legislature has allowed political subdivisions broad discretion in determining how to do this,<sup>12</sup> but has encouraged counties and cities to “enter into interlocal cooperation agreements . . . for the provision of legal defense.”<sup>13</sup> To date, this legislative invitation to cooperate has not been accepted. Public defender services continue to be provided on a county-by-county basis.

Finally, consistent with U.S. Supreme Court case law,<sup>14</sup> the Utah legislature has recognized that the right to counsel encompasses more than representation at trial. It also includes the right to adequate defense resources at public expense, including “a competent investigator, expert witnesses, scientific or medical testing, or other appropriate means necessary for an effective defense.”<sup>15</sup>

Around the country, state indigent defense systems face a constitutional crisis.<sup>16</sup> Utah’s own system has been the subject of recent public criticism.<sup>17</sup> The fundamental question is how to assess the health of the Utah’s indigent defense system—what factors or principles indicate constitutional health or disease? In different terms, through what lenses may one view an indigent defense system to determine its constitutional sufficiency?

---

Seventh District	656
Eighth District	983
<b>Total:</b>	21,231

<sup>11</sup> UTAH CODE ANN. § 77-32-301(1) (West 2012).

<sup>12</sup> UTAH CODE ANN. § 77-32-306(1), (2), and (6) (West 2012) (permitting counties to [1] contract with a defense service provider, [2] authorize the court to appoint qualified attorneys, [3] create a legal defender’s office, or [4] “provide for some other means which are constitutionally adequate for legal defense of indigents.”).

<sup>13</sup> UTAH CODE ANN. § 77-32-306(4) (West 2012).

<sup>14</sup> See *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (Sixth Amendment right to counsel presumes the right to effective assistance of counsel); *Strickland v. Washington*, 466 U.S. 668 (1984) (Sixth Amendment right to counsel envisions counsel playing a role critical to the ability of the adversarial system to produce just results and a fair trial); *Powell v. Alabama*, 287 U.S. 45, 57 (1932) (Sixth Amendment required that defendants be afforded the right to consultation, thorough-going investigation, and preparation prior to trial); *Padilla v. Kentucky*, 559 U.S. 356 (2010) (counsel engaged in deficient performance by failing to advise client that guilty plea to drug charges would result in client’s automatic deportation); *Missouri v. Frye*, 132 S. Ct. 1399 (2012) (Sixth Amendment right to counsel extends to consideration of a plea bargaining).

<sup>15</sup> UTAH CODE ANN. § 77-32-201(3) (West 2012) (defining defense resources); UTAH CODE ANN. § 77-32-303(3) (outlining circumstances under which defense resources shall be provided at public expense when the accused has retained private counsel).

<sup>16</sup> See Backus & Marcus, *supra* note 9; Emily Chiang, *Indigent Defense Invigorated: A Uniform Standard for Adjudicating Pre-Conviction Sixth Amendment Claims*, 19 TEMP. POL. & CIV. RTS. L. REV. 443, 448–50 nn. 30–38 (2010).

<sup>17</sup> AM. CIVIL LIBERTIES UNION OF UTAH, *FAILING GIDEON: UTAH’S FLAWED COUNTY-BY-COUNTY PUBLIC DEFENDER SYSTEM* (2011), available at [http://www.aclutah.org/Failing\\_Gideon.pdf](http://www.aclutah.org/Failing_Gideon.pdf).

In assessing the constitutional viability of a public defense system, one must distinguish between “probabilistic evidence” and constitutional injury. As Professor Emily Chiang observed:

Evidence of systemic shortcomings in the jurisdiction--such as violations of guidelines, checklists, or administrative standards on issues like caseloads, training, or access to investigators--is relevant insofar as it demonstrates the probability of harm that indigent criminal defendants face, but such probabilistic evidence does not in and of itself constitute constitutional injury. In other words, the fact that caseloads are high or that none of the public defenders receive any training in a given jurisdiction does not mean any injury has necessarily taken place--individual criminal defendants do not have a right to a public defender with a caseload below a certain limit or who has attended a certain list of training sessions.<sup>18</sup> Still, probabilistic evidence is telling. A public defender system exhibiting many symptoms of poor health is more likely to be constitutionally unfit. To assess the health of a patient, the doctor considers a host of symptoms which together may indicate illness, injury, or disease (i.e. temperature, blood pressure, elevated white blood cell counts, location and intensity of pain). We can similarly assess the health of Utah’s public defense system using the following factors:

1. **Independent representation.** The defense service provider must be free to defend the client zealously without concern for retaliation (i.e. termination of employment, reduction in pay, reduction in personnel, or reduction in defense resources). Clearly, the county attorney and judges should not be involved in the hiring and supervising of public defenders.
2. **Representation without conflicts of interest.** In deciding whether an attorney provided ineffective assistance of counsel, courts presume prejudice to the client when counsel is burdened with a conflict of interest.<sup>19</sup> These conflicts of interest can be personal to the defense provider, or systemic. Systemic conflicts of interest can arise in the contract terms of engagement, the manner of selection, funding, and payment of defense counsel.<sup>20</sup> Like all attorneys, public defenders must screen for conflicts of interest between clients, and withdraw from a case when non-waivable conflicts arise.<sup>21</sup>
3. **Representation without interference.** In deciding whether an attorney provided ineffective assistance of counsel, courts presume prejudice if the state interferes with the

---

<sup>18</sup> Chiang, *supra* note 15, at 474.

<sup>19</sup> *Strickland*, 466 U.S. 668 (1984).

<sup>20</sup> The Utah Supreme Court has suggested that minimal compensation of public defenders may create a conflict of interest resulting in ineffective assistance of counsel, either in an individual case or in a system-wide challenge. *State v. Taylor*, 947 P.2d 681, 688 n.3.

<sup>21</sup> *See*, Utah R. Prof. Cond. 1.7, 1.8, 1.9, 1.10, and 1.11.

assistance of counsel. State interference can take many forms. Obviously, it occurs when custodial authorities deny an attorney meaningful access to his or her client at the jail. However, interference can be more subtle. Delay in notifying the defender of appointment or the lack of a private place for consultation can interfere with effective representation.

4. **Representation at all critical stages.** The accused is entitled to legal counsel at all critical stages of the proceeding. The Sixth Amendment right extends to custodial interrogation, lineups, initial appearance, bail hearings, preliminary examination, arraignment, plea bargaining, sentencing, and the first appeal of right.<sup>22</sup>
5. **Representation That Ensures Meaningful Adversarial Testing Of The State’s Evidence—“The Fair Fight.”** In 1984, the United States Supreme Court held:

The right to 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 . . . 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.<sup>23</sup>

The following factors materially impact the adversarial nature of proceedings:

- a. ***Qualified Counsel—Ability, Training, and Experience.*** The Sixth Amendment does not guarantee the individual right to a public defender with a certain number of continuing legal education hours. However, it does contemplate counsel with ability, training, and experience commensurate to the complexity and seriousness of the case. Public defenders fresh from the bar exam should not be representing clients charged with rape of a child or aggravated murder.
- b. ***Access To Defense Resources.*** By statute, counties and cities are required to provide defense resources at public expense. These include “a competent investigator, expert witnesses, scientific or medical testing, or other appropriate means necessary, for an effective defense.”<sup>24</sup> Access to relevant continuing legal education and training is also critical.

---

<sup>22</sup> See Chiang, *supra* note 15 at 452, nn. 46–52.

<sup>23</sup> United States v. Cronin, 466 U.S. 648, 656–57 (1984).

<sup>24</sup> UTAH CODE ANN. § 77-32-201(3).

- c. ***Reasonable Caseload Standards.*** The Sixth Amendment does not entitle the accused to a public defender with a particular number of cases annually. But the “fair fight” is clearly impacted by the amount of time a public defender can devote to each case. National caseload standards may be instructive, but not outcome determinative for Utah. As Professor Backus observed:

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.<sup>25</sup>

6. **Fair Compensation and Proper Incentives.** Public defenders should be fairly compensated for their work. The public defender system should not create incentives that undermine the effective assistance of counsel.<sup>26</sup>

- a. ***Fair Compensation Rather Than Parity.*** Some have argued for parity in compensation and benefits for prosecutors and public defenders. Examining the pay and benefits afforded to prosecutors may be instructive, but fair compensation, not parity should be the ultimate goal. This is true for several reasons. In a complex system, fair compensation can turn on a host of legitimate factors. The prosecution and defense functions are dissimilar in material ways. Parity in compensation with a prosecutor who is not herself fairly compensated achieves little. Finally, parity on its own is a principle that may be hijacked by self-interest.
- b. ***Proper Incentives.*** Contracts for defense services should not create incentives that undermine the effective assistance of counsel. For example, a public defender may be paid a lump sum from which the costs of investigation, expert witnesses, scientific or medical testing, and appeal must be deducted. This defense contract creates a financial incentive not to investigate, hire experts, test

---

<sup>25</sup> Backus & Marcus, *supra* note 9, at 1125.

<sup>26</sup> Taylor, 947 P.2d at 688, n.2 (noting that due to minimal pay, attorneys “often fail to spend the time needed to prepare for a case. Instead, in order to survive economically, they must take on other cases that also demand time”) (citing Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329 (1995); Anthony Paduano & Clive A. Stafford Smith, *The Unconscionability of Sub-Minimum Wages Paid Appointed Counsel in Capital Cases*, 43 RUTGERS L. REV. 281 (1991)).



evidence, and appeal. Concrete caps on total compensation per assigned case can have the same effect.<sup>27</sup> The right to counsel is compromised when losing the case is more profitable to the attorney than providing an effective defense.<sup>28</sup> Finally, contracts should encourage the public defender to declare conflicts of interest. Clearly, a requirement that the public defender pay for conflicts counsel in such cases creates the wrong incentive.

7. **Case-Specific and Systemic Quality Control.** Any public defense system should safeguard against both case-specific and systemic violations of the right to counsel. Individual public defenders should meet minimum performance standards and be meaningfully supervised. Data about the factors discussed in this article should be collected so that the health of the public defender system can be regularly evaluated. Taxpayers can then assess the quality of the public defender system they finance.

It has been fifty years since the Supreme Court's decision in *Gideon*—a good time to ask whether the indigent accused have in fact realized the promise of effective assistance of counsel. While there is room for honest disagreement about the health of Utah's public defender system, there is room for improvement. One thing is clear. No matter what method is used to provide public defense, the promise of *Gideon* will not be achieved in a one-time effort at reform. Rather, we must commit to long-term treatment. We must correctly identify symptoms of constitutional injury, commit to regular and honest examination the patient, and then act timely to maintain constitutional health.

---

<sup>27</sup> Section 77-32-304.5 of the Indigent Defense Act caps total compensation at: (1) \$3,500.00 for each assigned attorney in felony cases; (2) \$1,000 for each assigned attorney in misdemeanor cases; and (3) \$2,500.00 for each assigned attorney in the representation of an indigent in an appellate court on a first appeal of right. Defense counsel can seek court approval to exceed these caps. However, the uncertainty of having a request for excess compensation granted by the court may deter qualified attorneys from seeking defense appointments.

<sup>28</sup> *Taylor*, 947 P.2d at 688, n.2.

# APPENDIX B

## Proposed Principles For An Effective Indigent Defense Commission

1. Independence and Accountability. The commission should be:
  - a. An independent body, housed with an appropriate executive branch agency, but insulated from undue political, judicial, prosecutorial or other influence inimical to its function.
  - b. In the interests of transparency, subject to appropriate provisions of the the Open and Public Meetings Act (Utah Code Ann. §§ 54-2-101, et seq.) and the Government Records Access and Management Act (Utah Code Ann. §§ 63G-2-101, et seq.)
  
2. Membership. To ensure independence and effective operation, the commission membership should include representatives of the key constituencies of the indigent defense responsibility at both district and justice court levels and others necessary for appropriate balance. This may require a commission composed of eleven to thirteen persons chosen from:<sup>1</sup>
  - a. State government
    - i. Legislature
    - ii. Executive
  - b. County governments
  - c. Municipalities
  - d. Prosecution
  - e. Defense bar
  - f. Administrative Office of the Courts
  - g. Utah State Bar (Utah Minority Bar Association)
  
3. Permanent Staff. The commission should have a full-time staff adequate to enable the commission to carry out its responsibilities.
  - a. An Executive Director (a full-time, licensed attorney with appropriate background and experience) to assist and advise the commission in developing and implementing performance, contracting, and other standards for indigent defense representation; supervise the collection and

---

<sup>1</sup> To avoid actual or apparent conflicts of interest, many states preclude persons who are actively serving as judges, prosecutors or appointed counsel for indigent defendants in state or local courts from membership in an indigent defense commission. The committee could not reach consensus on this issue, some believing that the knowledge, experience and active role of such persons could be valuable and others that the actual or potential conflict of interest outweighed any benefit. The issue is flagged here for further attention.

assessment of information on the state of indigent defense in Utah; and perform any other duties assigned by the commission.

- b. Additional professional and clerical staff sufficient to enable the commission to carry out its responsibilities.
4. Responsibilities and Authority. Authority and sufficient resources to accomplish the following responsibilities:
- a. Regularly assess the health and effectiveness of Utah's system for providing constitutionally-adequate representation of indigent defendants.
  - b. Gather and analyze data and other information necessary to accomplish point 4.a.
  - c. Promulgate statewide standards for providing effective assistance of counsel to indigent defendants that meet constitutional requirements. Such standards should be adopted through an open and public process in accordance with the Utah Administrative Rulemaking Act, Utah Code Ann. § 63G-3-101, et seq. Such standards should reflect at least the following principles:
    - i. Representation that is independent. Defense counsel must be free to defend the client zealously and without fear of termination, reduction in compensation, reduction in staff, or reduction in defense resources.
    - ii. Representation without conflicts of interest.
    - iii. Representation without interference. Defense counsel must receive timely notice of appointment, have reasonable access to incarcerated clients, and have a workspace where the attorney-client privilege is safeguarded.
    - iv. Representation at all critical stages of the criminal justice process.
    - v. Representation that tests the State's evidence in a meaningful adversarial process. This standard includes the following components:
      1. Defense counsel has ability, training, continuing legal education, and experience equal to the complexity of the case.
      2. Defense counsel has access to adequate defense resources.
      3. Defense counsel's workload permits effective representation of each client.
      4. Defense counsel provides representation with reasonable continuity throughout a case.
    - vi. Representation by defense counsel who is fairly compensated.

- vii. Representation with proper incentives. Employment or contracting arrangements should avoid economic or other incentives or disincentives that impair effective representation.
    - viii. Representation by defense counsel whose work is systematically reviewed to ensure that it meets constitutional standards.
  - d. Identify and encourage best practices at local government and individual defense counsel levels for delivering representation to indigent defendants in the most effective and economical way, which may include encouraging inter-local or regional approaches for delivery of defense services.
  - e. Confirm that constitutional standards for effective assistance of counsel, once established, are being met throughout the state by accomplishing at least the following objectives:
    - i. After establishing appropriate procedures, perform data collection and analysis; auditing; observation; and consultation with local governments, defense attorneys, prosecutors, judges, and others involved in the criminal justice system sufficient to determine whether the provision of indigent defense representation services at each level of adult court within the state complies with constitutional standards.
    - ii. Provide local governments with advice and assistance in bringing indigent representation plans and defense attorney contracts into compliance with constitutional standards.
    - iii. Determine the need for additional funding to achieve compliance with standards for effective representation, and seek from the legislature funding to ensure that local governments have adequate resources, based on demonstrated need, to fulfill constitutional requirements.
    - iv. Provide additional resources, including online resources, designed to assist local governments and defense attorneys in meeting constitutional standards.
  - f. Report annually to the Governor, the Legislature and the Judicial Council on the condition of indigent defense representation in the state, as well as on the commission's activities and proceedings. The annual report should include timelines for establishing and implementing minimum statewide standards and estimates of the additional funding needed to bring local indigent representation systems into compliance with constitutional standards.

- g. Identify and provide training opportunities to local government and individual defense attorneys to assist in better understanding and meeting constitutional standards for effective representation.
  
- 5. State-Local Funding Mechanism. Indigent defense is a state obligation within a Utah justice system where responsibility is shared by state and local governments. Nevertheless, indigent defense has been almost exclusively a local burden. To ensure that compliance with statewide constitutional standards of representation can realistically be met, it is very likely that additional resources will be required beyond the reasonable ability of local governments to provide. Hence, a legislatively-approved mechanism is needed to bring the state into meaningful partnership with local governments in funding indigent defense services once the commission begins to set statewide standards and assess compliance. In this regard:
  - a. The commission should evaluate the funding needed to provide indigent defense services to meet at least the minimum level required to comply with constitutional standards for effective representation.
  - b. As part of an annual report to the Governor, the Legislature, and the Judicial Council regarding its activities and the status of indigent criminal defense within the state, the commission should include as accurate an assessment as practicable of the current level of expenditures statewide for indigent defense services and a projection, based on the best data practicably available, of future needs to meet appropriate standards.
  - c. The commission should annually seek from the Legislature funding necessary to meet the demonstrated needs of local governments for additional funds to comply with minimum constitutional standards for indigent representation.
  - d. Any such additional funding should be allocated through the commission to local governments by means of a legislatively-created mechanism designed to provide incentives for local governments to meet constitutional standards and to reward those that do.
  
- 6. Ensuring Compliance. The commission should have a means of ensuring compliance with constitutional standards for effective representation of counsel.
  - a. Should the commission determine that indigent representation in a particular location is not in compliance with constitutional standards after the commission has set standards and provided appropriate training and consultation, a reasonable time must be afforded to the local provider to come into compliance once the commission has given written notice of specific concerns.

- b. The means of enforcement should be incremental and flexible in order to meet the varied circumstances and challenges of local governments and should emphasize positive state-funding incentives, but should also provide, as a last resort, a means for the commission to seek compliance through the state courts.
- c. Any such compliance process should begin with consultation and negotiation and should include mediation at an early stage.
- d. The commission should have the capability, through an appropriate open process, to temporarily provide indigent defense services using state resources in circumstances where a local provider is unable to provide effective representation.

# APPENDIX C



**Chapter 32**  
**Indigent Defense Act**  
**Part 1**  
**Title**

**77-32-101 Indigent Defense Act.**

This chapter is known as the "Indigent Defense Act."

Enacted by Chapter 354, 1997 General Session

**Part 2**  
**General Provisions**

**77-32-201 Definitions.**

For the purposes of this chapter:

(1) "Board" means the Indigent Defense Funds Board created in Section 77-32-401.

(2) "Commission" or "UIDC" means the Utah Indigent Defense Commission created in section 77-32-801.

~~(23)~~ "Compelling reason" shall include one or more of the following circumstances relating to the contracting attorney:

(a) a conflict of interest;

(b) the contracting attorney does not have sufficient expertise to provide an effective defense of the indigent; or

(c) the legal defense is insufficient or lacks expertise to provide a complete defense.

~~(34)~~ "Defense resources" means a competent investigator, expert witness, scientific or medical testing, or other appropriate means necessary, for an effective defense of an indigent, but does not include legal counsel.

~~(45)~~ "Defense services provider" means a legal aid association, legal defender's office, regional legal defense association, law firm, attorney, or attorneys contracting with a county or municipality to provide legal defense and includes any combination of counties or municipalities to provide regional indigent criminal defense services~~legal defense~~.

(6) "Effective assistance of counsel" or "effective representation" or "adequate representation" all mean legal representation consistent with amendment VI of the

constitution of the United States, and section 12 of article I of the Utah constitution, as interpreted through federal and Utah state appellate courts.

(7) "Funding Plan" means a service plan and budget prepared by an indigent criminal defense system for the provision of indigent defense services and approved by the Commission that fairly allocates Local Share and State Share for the ongoing costs of indigent defense services determined necessary for the effective assistance of counsel.

~~(68)~~ "Indigent" means a person qualifying as an indigent under indigency standards established in Part 3, Counsel for Indigents.

(9) "Indigent criminal defense services" means the provision of a defense services provider and defense resources to a defendant and to which the following conditions apply:

(i) The defendant is being prosecuted or sentenced for a crime for which that defendant may be incarcerated upon conviction, beginning with the defendant's initial appearance in court to answer to the criminal charge; and

(ii) The defendant is determined to be indigent under section 77-32-202.

(10) "Indigent criminal defense system" or "system" means either of the following:

(i) The provision of indigent criminal defense services by local units of government, including counties, cities and towns funded by state and local government; or

(ii) The provision of indigent criminal defense services by regional legal defense funded by state and local governments.

~~(119)~~ "Legal aid association" means a nonprofit defense association or society that provides legal defense for indigent defendants.

~~(120)~~ "Legal defender's office" means a division of county government created and authorized by the county legislative body to provide legal representation in criminal matters to indigent defendants.

~~(134)~~ "Legal defense" means to:

(a) provide defense counsel for each indigent who faces the potential deprivation of the indigent's liberty;

(b) afford timely representation by defense counsel;

- (c) provide the defense resources necessary for a complete defense;
- (d) assure undivided loyalty of defense counsel to the client;
- (e) provide a first appeal of right; and
- (f) prosecute other remedies before or after a conviction, considered by defense counsel to be in the interest of justice except for other and subsequent discretionary appeals or discretionary writ proceedings.

(14) “Local Share” means an indigent criminal defense system’s annual expenditure for indigent criminal defense services based on its indigent defense case load of felonies and misdemeanors in the fiscal year immediately preceding the submission of an initial Funding Plan under this act, excluding money reimbursed to the system by individuals determined not to be indigent. The Local Share shall be adjusted for indigent defense case load fluctuations and inflation whenever subsequent Funding Plans are submitted for approval by the UIDC.

~~(153)~~ "Participating county" means a county which has complied with the provisions of this chapter for participation in the Indigent Capital Defense Trust Fund as provided in Sections 77-32-602 and 77-32-603 or the Indigent Felony Defense Trust Fund as provided in Sections 77-32-702 and 77-32-703.

~~(164)~~ "Regional legal defense" means a defense services provider which provides legal defense, including defense resources, to any combination of counties or municipalities through an interlocal cooperation agreement pursuant to Title 11, Chapter 13, Interlocal Cooperation Act, and Subsection 77-32-306(3).

~~(175)~~ "Serious offense" means a felony or capital felony.

(18) “State Share” means the portion of ongoing costs funded by the state under an approved Funding Plan, including ongoing costs of indigent defense services determined necessary by the Commission to comply with promulgated standards for the effective assistance of counsel.<sup>1</sup>

Amended by Chapter 180, 2012 General Session

---

<sup>1</sup> State Share funding should also include incentives or rebates to county and city systems that exceed minimum standards and use best practices in the provision of indigent criminal defense services.

**77-32-202 Procedure for determination of indigency -- Standards.**

(1) A determination of indigency or continuing indigency of any defendant may be made by the court at any stage of the proceedings.

(2)

(a) Any defendant claiming indigency who is charged with a crime the penalty of which is a class A misdemeanor or serious offense shall file with the court a fully complete affidavit verified by a notary or other person authorized by law to administer an oath and file a copy of that affidavit with the prosecuting entity. The affidavit shall contain the factual information required in this section and by the court.

(b) A defendant claiming indigency who is charged with a crime the penalty of which is less than a class A misdemeanor is not required to comply with the requirements of Subsection (2)(a) and Subsection (4).

(3)

(a) "Indigency" means that a person:

(i) does not have sufficient income, assets, credit, or other means to provide for the payment of legal counsel and all other necessary expenses of representation without depriving that person or the family of that person of food, shelter, clothing, and other necessities; or

(ii) has an income level at or below 150% of the United States poverty level as defined by the most recently revised poverty income guidelines published by the United States Department of Health and Human Services; and

(iii) has not transferred or otherwise disposed of any assets since the commission of the offense with the intent of establishing eligibility for the appointment of counsel under this chapter.

(b) In making a determination of indigency, the court shall consider:

(i) the probable expense and burden of defending the case;

(ii) the ownership of, or any interest in, any tangible or intangible personal property or real property, or reasonable expectancy of any such interest;

(iii) the amounts of debts owned by the defendant or that might reasonably be incurred by the defendant because of illness or other needs within the defendant's family;

(iv) number, ages, and relationships of any dependents;

(v) the reasonableness of fees and expenses charged to the defendant by the defendant's attorney and the scope of representation undertaken where the defendant is represented by privately retained defense counsel; and

(vi) other factors considered relevant by the court.

(4)

(a) Upon making a finding of indigence, the court shall enter the findings on the record and enter an order assigning a defense services provider to represent the defendant in the case.

(b) Upon finding indigence when the defendant has privately retained counsel, the court, subject to Section 77-32-303, shall enter the findings into the record and issue an order directing the county or municipality to coordinate the providing of defense resources as appropriate.

(c) The clerk of the court shall send a copy of the affidavit and order to the prosecutor and to the county clerk or municipal recorder.

(5) If the county or municipality providing the defense services provider has any objections to or concerns with the finding of indigency and assignment of a defense services provider or the continuing of indigency status and assignment of a defense services provider, it shall file notice with the court and a hearing shall be scheduled to review the findings and give the county or municipality the opportunity to present evidence and arguments as to the reasons the finding of indigency should be reversed and the court shall proceed as provided in Section 77-32-302.

(6)

(a) If the trial court finds within one year after the determination of indigency that any defendant was erroneously or improperly determined to be indigent, the county or municipality may proceed against that defendant for the reasonable value of the services rendered to the defendant, including all costs paid by the county or municipality in providing the legal defense.

(b) Subsection (6)(a) does not affect any restitution required of the defendant by the court pursuant to Chapter 32a, Defense Costs.

(c) A defendant claiming indigency has a continuing duty to inform the court of any material changes or change in circumstances that may affect the determination of his eligibility for

indigency.

(d) Any person who intentionally or knowingly makes a material false statement or omits a material fact in an affidavit for indigency is guilty of a class B misdemeanor.

Amended by Chapter 245, 2013 General Session

### **Part 3 Counsel for Indigents**

#### **77-32-301 Minimum standards for defense of an indigent.**

(1) Each county, city, and town shall provide indigent criminal defense services for the legal defense of an indigent in criminal cases in the courts and various administrative bodies of the state in accordance with legal defense standards as defined in Subsection 77-32-201(118) and as promulgated by the UIDC under Part 8 of this act.

(2)

(a) A county or municipality which contracts with a defense services provider shall provide that all legal defense elements be included as a single package of legal defense services made available to indigents except as provided in Sections 77-32-302 and 77-32-303.

(b) When needed to avoid a conflict of interest between:

(i) trial counsel and counsel on appeal, a defense services provider contract shall also provide for separate trial and appellate counsel; and

(ii) counsel for co-defendants, a defense services provider contract shall also provide for separate trial counsel.

(c) If a county or municipality contracts to provide all legal defense elements as a single package, a defendant may not receive funding for defense resources unless represented by publicly funded counsel or as provided in Subsection 77-32-303(2).

Amended by Chapter 258, 2015 General Session

#### **77-32-302 Assignment of counsel on request of indigent or order of court.**

(1) The indigent criminal defense services provider shall be assigned to represent each indigent and shall provide the legal defense services necessary for ~~an~~-effective representation defense if the indigent is under arrest for or charged with a crime in which there is a substantial probability that the penalty to be imposed is confinement in either jail or prison if:

(a) the indigent requests legal defense; or

(b) the court on its own motion or otherwise orders legal defense services and the defendant does not affirmatively waive or reject on the record the opportunity to be provided legal defense.

(2)

(a) If a county responsible for providing indigent legal defense has established a county legal defender's office and the court has received notice of the establishment of the office, the court shall assign to the county legal defender's office the responsibility to defend indigent defendants within the county and provide defense resources.

(b) If the county or municipality responsible to provide for the legal defense of an indigent has arranged by contract to provide those services through a defense services provider, and the court has received notice or a copy of the contract, the court shall assign the defense services provider named in the contract to provide legal defense.

(c) If no county or municipal defense services provider contract exists, the court shall select and assign a legal defense provider.

(d) If the court considers the assignment of a noncontracting legal defense provider to an indigent defendant despite the existence of a defense services provider contract and the court has a copy or notice of the contract, before the court may make the assignment, it shall:

(i) set the matter for a hearing;

(ii) give proper notice of the hearing to the attorney of the responsible county or municipality and county clerk or municipal recorder; and

(iii) make findings that there is a compelling reason to appoint a noncontracting attorney.

(e) The indigent's preference for other counsel or defense resources may not be considered a compelling reason justifying the appointment of a noncontracting defense services provider.

(3) The court may make a determination of indigency at any time.

Amended by Chapter 180, 2012 General Session

**77-32-303 Standard for court to appoint noncontracting attorney or order the provision of defense resources -- Hearing.**

(1) If a county or municipality has contracted or otherwise provided for a defense services provider, the court may not appoint a noncontracting attorney under this part, Section 78B-1-151, or Rule 15, Utah Rules of Criminal Procedure, unless the court:

(a) conducts a hearing with proper notice to the county clerk or municipal recorder, with a copy of the notice provided to the prosecutor, to consider the authorization or designation of a noncontract attorney; and

(b) makes a finding that there is a compelling reason to authorize or designate a noncontracting attorney for the indigent defendant.

(2) Except as provided in Subsection (3), if a county or municipality has contracted or otherwise provided for a defense services provider, the court may not order under this part, Section 78B-1-151, or Rule 15, Utah Rules of Criminal Procedure, and the county or municipality may not provide defense resources for a defendant who has retained private counsel.

(3) The court may order, and the county or municipality may provide, defense resources to a defendant represented by private counsel only if:

(a) the court conducts a hearing with proper notice to the county clerk or municipal recorder, with a copy of the notice provided to the prosecutor;

(b) the court conducts an in camera review of the defense contract, a full accounting of the defense retainer, anticipated costs of defense resources and other relevant defense records and finds by clear and convincing evidence all of the following:

(i) the defendant would be prejudiced by the substitution of a contracted defense services provider and any prejudice cannot be remedied by a continuance or other alternative means;

(ii) at the time of retention of private counsel, the defendant and attorney entered into a written contract which provided that the defendant had the means to pay for fees and defense resources;



(iii) there has been an unforeseen change in circumstances which requires defense resources beyond the defendant's ability to pay; and

(iv) all of the above representations are made in good faith and are not calculated to allow the defendant or defense attorney to avoid the requirements of this section.

(4) The court may not order the defense services provider to act as co-counsel with a privately retained legal counsel as a means of circumventing the requirements of this section.

Amended by Chapter 180, 2012 General Session

**77-32-304 Duties of assigned counsel -- Compensation.**

(1) When representing an indigent, the assigned counsel shall:

(a) counsel and defend the indigent at every stage of the proceeding following assignment; and

(b) file any first appeal of right or other remedy before or after conviction that the assigned counsel considers to be in the interest of justice, except for other and subsequent discretionary appeals or discretionary writ proceedings.

(2) An assigned counsel may not represent an indigent in any discretionary appeal or action for a discretionary writ, other than in a meaningful first appeal of right to assure the indigent an adequate opportunity to present the indigent's claims fairly in the context of the appellate process of this state.

(3) An assigned counsel for an indigent shall be entitled to compensation upon:

(a) approval of the district court where the original trial was held;

(b) a showing that:

(i) the indigent has been denied a constitutional right; or

(ii) there was newly discovered evidence that would show the indigent's innocence; and

(c) a clear showing that the legal services rendered by counsel were:

(i) other than that required under this chapter or under a separate fee arrangement; and

- (ii) necessary for the adequate defense of the indigent and not for the purpose of delaying the judgment of the original trier of fact.

Amended by Chapter 180, 2012 General Session

**77-32-304.5 Reasonable compensation for defense counsel for indigents.**

(1) This section does not apply to any attorney acting as a defense services provider or otherwise under contract with the county or municipality for defense of an indigent person.

(2)

(a) The county or municipality shall pay reasonable compensation to any attorney assigned by the court under Section 77-32-306 at the conclusion of the representation or any segment of the representation, as provided in Subsections (2)(b), (c), (d), and (e):

- (i) before the district or justice courts, including interlocutory appeals; and
- (ii) before the appellate court on a first appeal of right.

(b) The legislative body of each county and municipality shall establish and annually review guidelines for the rate of compensation, taking into account:

- (i) the nature and complexity of the case;
- (ii) the competency and years of experience in criminal defense of the assigned attorney;
- (iii) the adjusted net hourly rate incurred by the county or municipality for a prosecutor or public defender of equivalent experience and competency; and
- (iv) the prevailing rates within the judicial district for comparable services.

(c) If the legislative body of a county or municipality does not establish the rate guidelines, the rate of compensation shall be determined by the trial judge or a judge other than the trial judge if requested by:

- (i) the assigned attorney; or
- (ii) the county or municipality.

(d) If the assigned attorney disagrees with the amount of compensation paid or contemplated for payment by the county or municipality, the assigned attorney

shall nonetheless continue to represent the indigent defendant and may file a claim against:

(i) the county pursuant to Section 17-50-401, in which event the period for a denial by the county shall be 20 days; or

(ii) the municipality pursuant to Title 10, Chapter 6, Uniform Fiscal Procedures Act for Utah Cities.

(e) In determining the reasonable compensation to be paid to defense counsel under Subsections (2)(c) and (d), the court shall consider the factors contained in Subsections (2)(b) (i) through (iv).

(f) The total compensation in a noncapital case may not, without prior court approval following a hearing, exceed:

(i) \$3,500 for each assigned attorney in a case in which one or more felonies is charged;

(ii) \$1,000 for each assigned attorney in a case in which only misdemeanors or lesser offenses are charged; or

(iii) \$2,500 for each assigned attorney in the representation of an indigent in an appellate court on a first appeal of right.

Amended by Chapter 17, 2012 General Session

Amended by Chapter 180, 2012 General Session

**77-32-305 Expenses of printing briefs, depositions, and transcripts.**

The state, county, or municipal agency that prosecuted the indigent at trial is responsible for the expenses of printing or typewriting briefs on any first appeal of right, including expenses of depositions and other transcripts.

Renumbered and Amended by Chapter 354, 1997 General Session

**77-32-305.5 Reimbursement of extraordinary expense.**

(1) For the purposes of this section, an "extraordinary expense" means the collective expense which exceeds \$500 for defense resources or any particular service or item such as experts, investigators, surveys, or demonstrative evidence.

(2) The county or municipality shall reimburse expenses, exclusive of overhead and extraordinary expense not approved by the court in accordance with this chapter, reasonably incurred by assigned attorneys for indigent defendants through a contracted defense services provider or if so ordered by the court based on a hearing held in accordance with Subsections 77-32-303(2) and (3), or for an appointed counsel under Section 77-32-304.5.

(3) The assigned attorney shall file a motion with the court for approval of the proposed expenditure for any extraordinary expense before the expense is incurred. The motion shall be heard and ruled upon by a judge other than the trial judge if so requested by either party or upon the motion of the trial judge.

Amended by Chapter 180, 2012 General Session

### **77-32-306 County or municipal legislative body to provide legal defense.**

(1) The county or municipal legislative body shall either:

(a) contract with a defense services provider; or

(b) authorize the court to provide the services prescribed by this chapter by assigning a qualified attorney in each case.

(2) A county may create a county legal defender's office to provide for the legal defense as prescribed by this chapter.

(3) A county legal defender's office may, through the county legislative body contract with other counties and municipalities ~~within a judicial district~~ to provide the legal services as prescribed.

(4) Counties and municipalities are encouraged to enter into interlocal cooperation agreements pursuant to Title 11, Chapter 13, Interlocal Cooperation Act, for the provision of legal defense, including multiple counties and municipalities contracting with either a private defense services provider or with a legal defender's office. An interlocal agreement may provide for:

(a) the creation of or contract with a private defense services provider, as defined in Subsection 77-32-201(4);

(b) multiple counties or municipalities to contract with a county legal defender's office, as defined in Subsection 77-32-201(107); or

(c) the creation of an interlocal entity under the provisions of Section 11-13-203.

(5) When a county or municipality has contracted under Subsection (1)(a) or a county has created a legal defender's office as provided under Subsection (2) to provide the legal defense resources required by this chapter, the legal services provider is the exclusive source from which the legal defense may be provided, unless the court finds a compelling reason for the appointment of noncontracting attorneys and defense resources, under the provisions of Section 77-32-302 or 77-32-303, in which case the judge shall state the compelling reason and the findings of the hearing held under Subsections 77-32-303(2) and (3) on the record.

(6) A county or municipality may, by ordinance, provide for some other means which are constitutionally adequate for legal defense of indigents.

Amended by Chapter 180, 2012 General Session

**77-32-307 Expenditures of county or municipal funds declared proper -- Tax levy authorized.**

(1) An expenditure by any county or municipality is considered a proper use of public funds if the expenditure is necessary to carry out the purposes defined in this chapter.

(2) A donation to a nonprofit legal aid or other association charged with the duty to provide the services is a proper use of public funds.

(3) Any county or municipality of the state is authorized to levy and collect taxes to meet the requirements of this chapter.

Amended by Chapter 180, 2012 General Session

**77-32-308 Pro bono criminal representation -- Liability limits.**

Counsel assigned by a court to represent an indigent in criminal, post-conviction, or habeas corpus proceedings is immune from suit if the attorney provides the legal services:

(1) at no cost; or

(2) for only a substantially reduced cost that is applied to, but does not cover, expenses of the service; and

(3) without gross negligence or willful misconduct.

Renumbered and Amended by Chapter 354, 1997 General Session

## PART 8

### INDIGENT DEFENSE COMMISSION

#### 77-32-801 Utah indigent defense commission creation – membership – staggered terms – powers – carrying forward unexpended funds.

(1) There is created within the Commission on Criminal and Juvenile Justice the Utah Indigent Defense Commission composed of the following eleven voting members:

(a) One member appointed by the Utah Commission on Criminal and Juvenile Justice;

(b) One member appointed by the Utah Administrative Office of the Courts;

(c) Except as provided under subsection 77-32-801(1)(c)(i) for the initial creation of the commission, two members who are practicing criminal defense lawyers appointed by the commission after considering recommendations from the Utah State Bar and the Utah Association of Criminal Defense Lawyers;

(i) The governor shall make initial appointment to the commission by selecting two practicing criminal defense lawyers considering recommendations from the Utah State Bar and the Utah Association of Criminal Defense Lawyers, with one selected to initially serve a two year term.

(d) The acting director or designee from the legal defender's association of the county of the first class;

(e) Two members appointed by the Utah Association of Counties from its membership, one from a county of the second class, and one from a county of the third through sixth class;

(f) Two members appointed by the Utah League of Cities and Towns;

(g) One member appointed by the Statewide Association of Prosecuting Attorneys; and

(h) One member appointed by the Utah State Bar to represent minority interests.

(2) Members shall serve four-year terms, except as provided in subsection (3).

(3) The terms of the members shall be staggered so that five or six members of the commission expire every two years.

(a) Members appointed below to the initial board shall serve two-year terms:

(i) One member appointed by the Utah Commission on Criminal and Juvenile Justice;

(ii) One member appointed by the Utah Administrative Office of the Courts;

(iii) One practicing criminal defense attorney appointed by the governor pursuant to 77-32-801(1)(c)(i);

(iv) One member appointed by the Utah Association of Counties from its membership in a county of the second class; and

(v) One member appointed by the Utah League of Cities and Towns.

(b) The remaining six members appointed to the initial board shall be appointed for four-year terms.

(c) At the conclusion of the initial two-year terms identified in subsection (3)(a), those board positions shall have four-year terms.

(4) UIDC members shall not hold office longer than eight consecutive years.

(5) UIDC members shall hold office until their successors are appointed.

(6) The UIDC shall retain as an autonomous entity all statutory authority, powers, duties, functions, records, personnel, property, unexpended balances of appropriations, allocations, and other functions, including the functions of budgeting, personnel, locating offices, and other management functions.

**77-32-802 UIDC membership qualifications – vacancy – chairperson – compensation – removal – quorum – exemption from freedom of information act.**

(1) Individuals appointed for service on the UIDC as provided in section 77-32-801 shall have significant experience in the defense or prosecution of criminal proceedings or have demonstrated a strong commitment to providing effective representation in indigent criminal defense services.

(2) When a vacancy occurs in the membership of the commission for any reason, a replacement shall be appointed for the remaining unexpired term in the same manner as the original appointment.

(3) The governor shall appoint one of the initial UIDC members to serve as chairperson of the UIDC for a term of one year. At the expiration of that year, or upon the vacancy in the membership of the member appointed chairperson, the UIDC shall annually elect a chairperson from its membership to serve a one-year term. A UIDC member shall not serve as chairperson of the UIDC for more than three consecutive terms.

(4) UIDC members shall not receive compensation in that capacity but shall be reimbursed for their reasonable actual and necessary expenses by the state treasurer.

(5) The UIDC board may remove a UIDC member for incompetence, dereliction of duty, malfeasance, misfeasance, or nonfeasance in office, or for any other good cause.

(6) Six members shall constitute a quorum, provided however, that the affirmative vote of at least six members of the UIDC are required for official action of the commission.

(7) Confidential case information, including, but not limited to, client information and attorney work product, is exempt from disclosure under the government records access and management act (GRAMA), U.C.A. 63G-2-101.

### **77-32-803 Duties of the Commission.**

(1) The Commission shall:

(a) Promulgate minimum standards, rules and procedures pursuant to Utah's Administrative Rulemaking Act, Utah Code Ann. 63G-3-101, et seq., for the local delivery of indigent criminal defense services providing effective assistance of counsel throughout this state. These minimum standards, rules and procedures shall be designed to ensure the provision of indigent criminal defense services that meets constitutional requirements for effective assistance of counsel.

(b) Identify data necessary to ascertain compliance by criminal defense systems of minimum standards for the effective assistance of counsel and establish procedures for the collection and analysis of the data and for reporting the operation of the UIDC, the provision of indigent criminal defense services and the operations of each indigent criminal defense system

(c) Develop and oversee the implementation and modification of minimum standards, rules, and procedures to ensure that indigent criminal defense services providing effective assistance of counsel are consistently delivered in this state consistent with the safeguards of the United States constitution, the state constitution, and this act.

(d) Identify and encourage best practices for delivering the effective assistance of counsel to indigent defendants charged with crimes.

(e) Investigate, audit, and review the provision of indigent criminal defense services for compliance with the commission's minimum standards, rules, and procedures. However, an indigent criminal defense system that is in compliance with the commission's minimum standards, rules, and procedures shall not be required to provide indigent criminal defense services in excess of those standards, rules, and procedures.



(e) Hire a full-time licensed attorney with appropriate background and experience to serve as the full-time executive director, two full-time professional staff, one as a licensed attorney and one with data collection and analysis skills to assist the executive director together with one full-time support staff as necessary to accomplish the purposes of the UIDC consistent with annual appropriations, and review further staffing needs from time to time.

(f) Assign the executive director the following duties:

(i) Establish an annual budget, and oversee the hiring, discipline, and firing of staff;

(ii) Assist the UIDC in developing, promulgating, and regularly reviewing the UIDC's standards, rules, and procedures, including, but not limited to, recommending to the UIDC suggested changes to the criteria for an indigent defendant's eligibility to receive criminal defense services under this act; and

(iii) Perform all other duties as assigned.

(g) Establish procedures for the receipt, acceptance and resolution of complaints, and the implementation of recommendations from the courts, other participants in the criminal justice system, clients, and members of the public.

(i) Establish rules and procedures for indigent criminal defense systems to apply to the UIDC for State Share funding through Funding Plans to bring the system's delivery of indigent criminal defense services into compliance with the minimum standards established by the UIDC.

(j) Establish procedures for annually reporting to the governor, legislature, and judicial council. The report required under this subdivision shall include, but not be limited to, reporting the operations of the UIDC, the provision of indigent criminal defense services in the state, the operations of each indigent criminal defense system and recommendations for improvements and further legislative action.

(k) Receive public comment before a proposed standard, rule or procedure is promulgated by the UIDC in accordance with Utah Code Ann. § 63G-3-101 et seq.

(l) Review all contracts and interlocal agreements in the state for the provision of indigent criminal defense services and provide advisory assistance regarding compliance with established rules, procedures and minimum standards providing for the effective assistance of counsel as established by the commission.

(m) Facilitate and encourage the regionalization of indigent criminal defense services within the state for effective assistance of counsel and for efficiency and cost savings to local systems.

(2) Upon appropriation of sufficient funds from the state, the UIDC shall establish minimum standards, rules and procedures to carry out the purpose of this act, and collect data from all indigent criminal defense systems and defense services providers. The UIDC shall propose goals for compliance with the minimum standards, rules and procedures established under this act consistent with the metrics established under this section and appropriations by this state.

(3) In establishing and overseeing the minimum standards, rules, and procedures described in subsection (1)(a), the UIDC shall emphasize the importance of indigent criminal defense services provided to juveniles and adults, whether charged with a misdemeanor or felony.

(4) The UIDC shall establish procedures for the conduct of its affairs and internal policies necessary to carry out its duties and responsibilities under this act.

(5) Commission policies shall be placed in an appropriate manual, made publicly available on a website, and made available to all attorneys and professionals providing indigent criminal defense services, the judicial council, the governor, and the legislature.

**77-32-804 Establishment of minimum standards, rules, and procedures – principles – application for, and appointment of, indigent criminal defense services – requirements.**

(1) The UIDC shall establish minimum standards, rules, and procedures to effectuate the following:

(a) The delivery of indigent criminal defense services shall be independent of the judiciary but ensure that the judges of this state are permitted and encouraged to contribute information and advice concerning that delivery of indigent criminal defense services.

(b) Trial courts shall be encouraged to assure that each criminal defendant is advised of his or her right to counsel.

(2) The UIDC shall implement minimum standards, rules, and procedures to guarantee the right of indigent defendants to the assistance of counsel as provided under amendment VI of the constitution of the United States, and section 12 of article I of the Utah constitution, and this act. In establishing minimum standards, rules, and procedures, the UIDC shall adhere to the following principles:

- (a) Representation that is independent. Defense counsel must be free to defend the client zealously and without fear of termination, reduction in compensation, reduction in staff, or reduction in defense resources.
- (b) Representation without conflicts of interest.
- (c) Representation without interference. Defense counsel must receive timely notice of appointment, have reasonable access to incarcerated clients, and a workspace where the attorney-client privilege is safeguarded.
- (d) Representation at all critical stages of the criminal justice process.
- (e) Representation that tests the State's evidence in a meaningful adversarial process. This standard includes the following components:
  - (i) Defense counsel has ability, training, continuing legal education, and experience equal to the complexity of the case.
  - (ii) Defense counsel has access to adequate defense resources.
  - (iii) Defense counsel's workload permits effective representation of each client.
  - (iv) Defense counsel provides representation with reasonable continuity throughout a case.
- (f) Representation by defense counsel who is fairly compensated.
- (g) Representation with proper incentives. Employment or contracting arrangements should avoid economic or other incentives or disincentives that impair effective representation.
- (h) Representation by defense counsel whose work is systematically reviewed to ensure that it meets constitutional standards

**77-32-805 Investigation, audit, and review of indigent criminal defense services – cooperation and participation with UIDC – development of funding plan and cost analysis – state share funding – submission of funding plan – annual funding plan – approval or disapproval of funding plan and cost analysis by UIDC – report to governor – maintenance of local share – necessity for excess funding – appropriation of additional funds – state share funding to local units of government – funds received by UIDC as state funds.**

(1) All indigent criminal defense systems and attorneys engaged in providing indigent criminal defense services shall cooperate and participate with the UIDC in the investigation, audit, and review of their indigent criminal defense services.

(2) Under approved guidelines, an indigent criminal defense system may submit a Funding Plan to the UIDC for approval. A Funding Plan will include a service plan and budget for the provision of indigent criminal defense services compliant with established minimum standards as provided under subsection (3). Upon approval, the UIDC shall authorize the indigent criminal defense system to receive State Share funding in addition to its Local Share.

(3) Under rules promulgated by the commission, an indigent criminal defense system may submit a Funding Plan to the UIDC for the provision of indigent criminal defense services in a manner consistent with established guidelines. A Funding Plan submitted under this subsection shall specifically address how the minimum standards established by the UIDC under this act shall be met and shall include a cost analysis that considers the Local Share and the State Share need. The standards to be addressed in the annual Funding Plan are those promulgated the UIDC before the annual Funding Plan submission date. This cost analysis shall include a statement of State Share funding needs, if any, necessary to allow its system to comply with the UIDC's minimum standards.

(4) The UIDC shall approve or disapprove a Funding Plan submitted under subsection (3) within 60 calendar days of the submission of the Funding Plan. If the UIDC disapproves the Funding Plan, the indigent criminal defense system shall consult with the UIDC and submit a new Funding Plan within 30 calendar days of the mailing date of the official notification of the UIDC's disapproval. If after 3 submissions a compromise is not reached, the dispute shall be resolved as provided in section 77-32-806.

(5) The UIDC shall submit a report to the governor, the senate majority leader, the speaker of the house of representatives, and the appropriations committees of the senate and house of representatives requesting the appropriation of funds necessary to implement the Funding Plan for each system as approved by the UIDC. The information used to create this report shall be made available to the governor, the senate majority leader, the speaker of the house of representatives, and the appropriations committees of the senate and house of representatives.

(6) Except as provided in subsection (8), an indigent criminal defense system shall maintain its Local Share. If the UIDC determines that funding in excess of the indigent criminal defense system's Local Share is necessary to bring its system into compliance with the minimum standards established by the UIDC, that excess funding shall be paid by the state through State Share funding. The legislature shall appropriate to the UIDC the additional funds necessary for a system to meet and maintain those minimum standards, which funds shall be provided to indigent criminal defense systems through State Share funding as described in subsection (7).

(7) An indigent criminal defense system shall not be required to provide funds in excess of its Local Share. The UIDC shall provide State Share funding to indigent criminal defense systems to assist in bringing the systems into compliance with minimum standards established by the UIDC.

(8) An indigent criminal defense system is not required to expend its Local Share if the minimum standards established by the UIDC may be met for less than that Local Share.

(9) The state shall also appropriate funds to the UIDC for State Share funding to the local units of government for the reasonable costs associated with data required to be collected under this act that is over and above the local unit of government's data costs for other purposes.

(10) Within 180 days after receiving State Share funding from the UIDC under subsection (7), an indigent criminal defense system shall comply with the terms of its Funding Plan in bringing its system into compliance with the minimum standards established by the UIDC for effective assistance of counsel.

(11) The UIDC may apply for and obtain State Share funding from any source to carry out the purposes of this act. All funds received by UIDC, from any source, are state funds and shall be appropriated as provided by law.

#### **77-32-806 Dispute between UIDC and indigent criminal defense system.**

(1) If a dispute arises between the UIDC and an indigent criminal defense system following consultation concerning the requirements of this act, including a dispute concerning the approval of an indigent criminal defense system's Funding Plan or compliance with section 807 or 809, the parties must first attempt to resolve the dispute by mediation. The state court administrator or designee shall appoint a mediator agreed to by the parties within 30 calendar days of the mailing date of the official notification of the third disapproval by the UIDC under section 807(4) to mediate the dispute and shall facilitate the mediation process. The UIDC shall immediately send the state court administrative office a copy of the official notice of that third disapproval. If the parties do not agree on the selection of the mediator, the state court administrator shall appoint a mediator of his or her choosing. Mediation shall commence within 30 calendar days after the mediator is appointed and terminate within 60 calendar days of its commencement. Mediation costs associated with mediation of the dispute shall be shared equally by the parties.

(2) The UIDC, or an indigent criminal defense system may bring an action seeking equitable relief in the district court only as follows:

(a) After all remedies set forth in section 77-32-806 are exhausted.

(b) Following mediation, within 60 days of the UIDC decision to deny a system's Funding Plan under subsection (2)(b).

(c) Within 30 days of the UIDC's determination that the indigent criminal defense system has breached its duty to comply with an approved Funding Plan.

(d) The action shall be brought in the judicial district where the indigent criminal defense system is located.

(4) If the dispute involves the indigent criminal defense system's Funding Plan, the court may approve, reject, or modify the submitted plan or the terms of State Share funding under section 807(7) other than the amount of the State Share, determine whether section 807 has been complied with, and issue any orders necessary to obtain compliance with this act. However, the system shall not be required to expend more than its Local Share in complying with this act.

(5) If a party refuses or fails to comply with a previous order of the court, the court may enforce the previous order through the court's enforcement remedies, including, but not limited to, its contempt powers.

(6) If the court determines that an indigent criminal defense system has breached its duty under section 809(1), the court may order the UIDC to cause that indigent criminal defense services be provided on behalf of that system.

(7) If the court orders the UIDC to cause that indigent criminal defense services be provided on behalf of an indigent criminal defense system, the court shall order the system to pay the following amount of the State Share funding costs that the UIDC determines are necessary to bring the indigent criminal defense system into compliance with the minimum standards established by the UIDC:

(a) In the first year, 10% of the state's costs.

(b) In the second year, 20% of the state's costs.

(c) In the third year, 30% of the state's costs.

(d) In the fourth year, 40% of the state's costs.

(e) In the fifth year, and any subsequent year, not more than the dollar amount that was calculated under subdivision (d).

(8) An indigent criminal defense system may resume providing indigent criminal defense services at any time as provided under section 807. When a system resumes providing indigent criminal defense services, it is no longer required to pay an assessment under subsection (7) but shall be required to pay no less than its Local Share.

**77-32-807 Duty of compliance with approved plan.**

(1) Except as provided in subsection (2), every local unit of government that is part of an indigent criminal defense system shall comply with an approved plan under this act.

(2) A system's duty of compliance with the terms of the Funding Plan as prescribed under subsection (1) is contingent upon receipt of State Share funding in the amount contained in the Funding Plan approved by the UIDC.

(3) The UIDC may proceed under section 808 if an indigent criminal defense system breaches its duty of compliance under subsection (1).

**77-32-808 Annual report, budget, and listing of expenditures – availability on website.**

The UIDC shall publish and make available to the public on a website its annual report, its budget, and a listing of all expenditures and a list of indigent criminal defense systems not in compliance with an approved Funding Plan. Publication and availability of the listing of expenditures shall be on a quarterly basis, except for the annual report and salary information, which may be published and made available on an annual basis. As used in this section, "expenditures" means all payments or disbursements of UIDC funds, received from any source, made by the UIDC.

**77-32-809 Applicability of GRAMA and open meetings act.**

Both of the following apply to the UIDC:

(a) The government records access and management act (GRAMA), U.C.A. 63G-2-101 et seq. and

(b) The open and public meetings act, U.C.A. 52-4-101 et seq.

**77-32-810 Effect of United States or state supreme court cases – failure to comply with statutory duties – grounds for reversal or modification of conviction.**

(1) Nothing in this act shall be construed to overrule, expand, or extend, either directly or by analogy, any decisions reached by the United States Supreme Court or the supreme court of this state regarding the effective assistance of counsel.

(2) Except as otherwise provided in this act, the failure of an indigent criminal defense system to comply with statutory duties imposed under this act does not create a cause of action against the government or a system.

(3) Statutory duties imposed that create a higher standard than that imposed by the United States constitution or the state constitution do not create a cause of action against a local unit of government, an indigent criminal defense system, or this state.

(4) Violations of UIDC standards or rules that do not constitute ineffective assistance of counsel under the United States constitution or the state constitution do not constitute grounds for a conviction to be reversed or a judgment to be modified for ineffective assistance of counsel.



# APPENDIX D

**PUBLIC DEFENDER AGREEMENT  
TRIAL SERVICES**

**JANUARY 1, 20\_\_ - DECEMBER 31, 20\_\_ [TWO OR MORE YEARS]**

This agreement made and executed in duplicate by and between \_\_\_\_\_ County, a body corporate and politic of the State of Utah, hereinafter referred to as “County,” and \_\_\_\_\_, hereinafter referred to as “Attorney”.

**WITNESSETH**

WHEREAS, pursuant to Utah Code Ann. §77-32-101 *et. seq.* (1953 as amended), the County is obligated to provide for the defense of an indigent adult and juvenile in criminal cases in the courts; and

WHEREAS, the County may fulfill the statutory obligation through the appointment of qualified legal counsel who may provide the indigent legal services required by Utah Code Ann. §77-32-301 and §77-32-304; and

WHEREAS, Attorney is a qualified and competent attorney, licensed to practice law in the State of Utah and is willing to enter into this agreement with the County and is willing and desirous to perform the necessary legal services for indigent juvenile and adult defendants;

NOW THEREFORE, for and in consideration of the mutual promises and covenants contained herein, it is hereby agreed between the parties as follows:

Section 1. REPRESENTATION

- 1.1 Utah Code Ann. §77-32-301 requires Counties “[t]o provide counsel for each indigent who faces the substantial probability of the deprivation of the indigent’s liberty.”
- 1.2 Pursuant to statutory directive, Attorney shall provide competent legal counsel in criminal matters for persons charged with criminal acts in the Justice, District or Juvenile Courts of \_\_\_\_\_ County (hereinafter “indigent defendant(s)”) except as specifically excluded by Section 6 and Section 7.1 below. These criminal matters may include any misdemeanors and any felony up to and including first degree felonies.
- 1.3 Attorney shall cooperate with the courts to obtain an affidavit from the individual defendant averring his/her inability to pay for private counsel. The affidavit shall comply with the requirements of Utah Code Ann. §77-32-202. Attorney agrees not to act in a case until the court has issued its order of appointment. Attorney further agrees to promptly notify the court of any changes with regard to the

indigent status of a defendant, which changes would affect the qualifying of the defendant for court-appointed counsel. Attorney also agrees to assist the courts and the County Attorney's Office in providing information necessary to recover costs pursuant to Utah Code Ann. §77-32-202(6).

## Section 2. QUALIFICATIONS

- 2.1 By his signature below, Attorney certifies that he is a member in good standing of the Utah Bar and that he is competent in the criminal practice of law. Attorney further certifies that he shall at all times during the period of this contract, maintain his status as a member in good standing of the Utah Bar.
- 2.2 Attorney certifies that he is a citizen of the United States or permanent resident alien.
- 2.3 Attorney shall maintain a bona fide office in the County at which to conduct business which shall be made known to the clients served under this agreement.
- 2.4 Attorney Agrees to abide by all federal state and local laws, to abide by the Canons of Ethics adopted by the Utah Bar Association and to be bound by the Rules of Civility adopted by the Utah Supreme Court.
- 2.5 Attorney agrees that he is not currently, nor shall be, party to any litigation which would place his licensing or standing with the Utah Bar in jeopardy.
- 2.6 Attorney shall, during the period of this Agreement, maintain professional malpractice insurance with at a minimum, limits of \$\_\_\_\_\_ per person and an aggregate of \$\_\_\_\_\_ per occurrence and provide to the County, evidence of the insurance. Additionally, Attorney agrees to hold the County harmless from all damages, loss or injury it may suffer or be held liable for as a result of the conduct of Attorney or as a result of this Agreement.
- 2.7 In the event of any change of address, on-going conflict of interest, conflicting litigation or inability to practice law, the Attorney shall promptly notify the County in writing of such change of status.
- 2.8 Attorney shall keep abreast of all current legal trends and to that end shall maintain sufficient continuing professional education credits during the period of this agreement. To further encourage the continuing education of Attorney, the County shall pay tuition costs annually for one (1) criminal law continuing legal education seminar or up to eight (8) hours of criminal law related continuing legal education presented by Utah's Criminal Defense Association, Utah Prosecution Council, or other equivalent approved entity during the period of this agreement.

## Section 3 BASE DUTIES OF ATTORNEY

In exchange for the base compensation described in Section 5.1 below, Attorney agrees

to provide the following base duties in his representation of indigent defendants.

- 3.1 Pursuant to Utah Code Ann. §77-32-301, Attorney shall, subject to the exclusions of Section 6 and Section 7.1 below, provide competent and timely representation and counsel for each indigent defendant who has been charged by the \_\_\_\_\_ County Attorney's Office with violations of Utah law or County Ordinance in proceedings before the Justice, District and Juvenile Courts of \_\_\_\_\_ County and who faces the substantial probability of the deprivation of liberty as outlined in Section 1 above.
- 3.2 It is understood and agreed that accessibility to indigent defendants is an integral consideration in the making of this agreement and therefore the Attorney agrees to be available and accessible to indigent clients reasonably in advance of any hearing or trial. Attorney also agrees to make reasonable efforts to visit indigent defendants who are incarcerated in the \_\_\_\_\_ County Jail, admitted to a hospital or otherwise confined at the earliest possible moment; to return telephone calls as soon as reasonably possible and to otherwise be reasonably accessible to all indigent defendants.
- 3.3 Attorney shall, subject to the exclusions of Section 6 and Section 7.1 below, provide legal representation to indigent defendants in all matters involving criminal charges and for which \_\_\_\_\_ County is obligated by statute to provide legal services. The representation shall include conferring with clients, attending all matters before the court including scheduling conferences, all hearings and trials, and all other matters required to ensure adequate representation including, but not limited to probation revocation hearings and restitution hearings.
- 3.4 In the event of a scheduling conflict, Attorney must make his best effort to ensure that the representation under this contract is the first priority in scheduling. In the event Attorney requires that a matter assigned to him be temporarily reassigned on the basis of a scheduling conflict, the Attorney shall use only those attorneys on the approved conflict counsel list.
- 3.5 Attorney is responsible to always appear for his assigned indigent defendants whenever and wherever Court is held on their cases, including when those appearances are in \_\_\_\_\_ and/or Juvenile Court.
- 3.6 Attorney agrees to maintain adequate and proper records of the representation for each assigned indigent defendant.
- 3.7 Attorney agrees to provide to the legislative body or its designee, a bi-annual report of the number and types of cases or matters handled specifying the types and classes of offenses, courts, particular clients, non-jury trials, jury trials, hearings other than trials, plea-negotiated settlements and/or such other factors or statistical information as may be reasonably requested by the County that do not violate attorney client privilege. Attorney further agrees to undergo annually a

performance evaluation before the legislative body or designee to consider compliance with the terms of this agreement, including review of all bi-annual reports considering dispositions on each assigned indigent defendant, continuing legal education and training requirements together with review of qualitative input from the Judiciary and the County Attorney's Office.

- 3.8 Representation of indigent defendants shall be up to and including the filing of the first notice of appeal (*see* Section 4 below).
- 3.9 It is agreed between the parties that the County will bear the reasonable and necessary cost of investigators, laboratory costs, transcripts and defense witness fees, including expert witnesses called on behalf of indigent clients. Further, the County will bear the reasonable travel costs of Attorney, if any is required outside of \_\_\_\_\_ county in conjunction with their representation. It is agreed by the parties that prior to Attorney incurring expert witness fees on behalf of a client, the amount of the fee and the expert used will be approved by the court having jurisdiction of the case. The Attorney hereby agrees to use his best efforts to minimize the cost and expenses and shall make application for the approval of expenses in the form of a written motion the trial judge, specifying the reasons for the expense. Payment for any expense incurred by the Attorney and not previously approved by the Court or in excess of that approved by the Court, shall be the sole responsibility of the Attorney.
- 3.10 Except as provided herein, Attorney will bear all other expenses in providing the services contemplated herein, including, but not limited to, transportation within \_\_\_\_\_ county, office, telephone, postage, copying and secretarial costs.

Section 4 SPECIAL DUTIES OF ATTORNEY – RIGHT OF APPEAL

- 4.1 In addition to the base legal services described in Section 3 above, Attorney shall file a notice of appeal to the Utah Court of Appeals and/or the Utah Supreme Court with a copy sent to Appellant Counsel designated by County within ten (10) days of a conviction or final judgment against client upon consultation with and direction of his/her client based on a good faith belief the claims, defenses, or other legal contentions are warranted by existing law, or by a non-frivolous argument for the extension, modification or reversal of existing law or the establishment of new law.
- 4.2 Immediately upon filing a notice of appeal, but not later than ten (10) calendar days thereafter, Attorney shall contact Appellant Counsel designated by County to transition and turn over all relevant records within Attorney's possession or control as necessary in the interests of justice and as requested by Appellate Counsel.

Section 5 PAYMENT

5.1 In exchange for the services rendered in Section 3 above (Base Duties), County shall pay to Attorney the sum of \_\_\_\_\_ annually. Said sum shall be paid \_\_\_\_\_ (e.g, in equal monthly installments\_.

5.2 It is specifically understood that Attorney will accept no other payment for work provided under this agreement, other than that compensation provided in the agreement under this Section. In the event a court orders repayment from any defendant for attorney fees and costs, all such repayment shall belong to the County.

5.3 Upon a showing of critical need, Attorney may request additional funding for extraordinary unforeseen expenses which may arise during the term of this agreement. A critical need for extraordinary unforeseen expenses shall be construed in favor of the accused and shall be determined weighing the nature, scope and materiality of the need in light of County resources and the County's constitutional duty to provide adequate defense resources for each indigent who faces the substantial probability of the deprivation of the indigent's liberty.

## Section 6 EXCLUSIONS.

6.1 Attorney shall not be required to represent any indigent defendant charged with a capital felony matter.

6.2 Attorney shall not be required to represent any indigent defendant charged with violations of municipal law or any civil matter or any juvenile matter except those involving charges of delinquency.

## Section 7 OTHER PROVISIONS

7.1 Conflicts of Interest. Attorney agrees to use his best efforts to avoid any conflicts of interest which would divide loyalty of defense counsel to the client. The parties recognize, however, that certain cases may arise where conflicts are of sufficient magnitude that Attorney cannot represent the indigent defendant.

7.1.1 In the event of a conflict of interest or other permanent reassignment, Attorney shall first give notice to the Court in writing of the need and/or purpose of reassignment with a copy to the County Attorney, and must use only those attorneys on the approved conflict counsel list of \_\_\_\_\_ County for reassignment.

7.1.2 In the event Attorney is disqualified from representing an indigent defendant after appointment, for any reason involving the misconduct of the Attorney or the filing of litigation in which Attorney is a party by any or all of the courts in which services are provided under this agreement or by the Utah State Bar, then Attorney shall be responsible for costs incurred by the County in provided substitute counsel for indigent

defendants.

7.2 Assignability of Agreement. This agreement is personal in nature and is not assignable to any person not a party to the agreement without the express written consent of the County.

7.3 Independent Contractor. It is understood by the parties that the Contractor is an independent contractor and not an agent, representative, or employee of the County nor is this contract intended to create such a relationship. It is further understood by the parties that all compensation provided hereunder shall not include deductions for FICA, Federal and State income tax and shall not include retirement benefits, health benefits, holiday pay leave or any other fringe benefit of the County.

7.4 Duration. This contract shall be of two (2) years in duration commencing on January 1, 20\_\_\_\_ and ending on December 31, 20\_\_\_\_.

7.5 Renewal. This contract may be renewed for an additional one (1) year term, not to exceed December 31, 20\_\_\_\_, upon written agreement by both parties.

7.6 Termination. This agreement may be terminated upon the following events:

7.6.1 Breach. In the event that either party hereto shall deem the other to be in breach of any provision hereof, the party claiming the existence of the breach on the other's part shall notify the other in writing of such breach. The breaching party shall have fifteen (15) days in which to commence all actions necessary to cure the breach and shall notify the complaining party in writing of the actions taken to cure the breach. In the event the actions reasonably necessary to cure the breach are not commenced in a timely manner, the complaining party may terminate this agreement.

7.6.2 Voluntary Termination. Either party may terminate this agreement upon the delivery of written notice to the other party ninety (90) days prior to the termination.

7.6.3 Misconduct. In the event any disciplinary action is taken by the Utah State Bar against the Attorney, this contract may be immediately terminated without notice.

7.7 Notice. Any notice required by this agreement shall be given in writing addressed to the following unless otherwise designated in writing.

**FOR THE COUNTY:**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

with a copy to:

\_\_\_\_\_

**FOR THE ATTORNEY:**

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

- 7.8 Transition. In the event this agreement is terminated under the provisions of Sections 7.6 above or is not renewed under the provisions of Section 7.5 above:
- 7.8.1 Attorney agrees to complete those existing cases where it is not feasible for Attorney to withdraw. Compensation for such cases shall be under the then prevailing hourly rate being paid to attorneys who handle conflict-of-interest cases.
- 7.8.1 The Attorney agrees to cooperate with his successors including the filing of all necessary pleadings for withdrawal and to deliver all applicable files, information and materials to the successor.
- 7.8.2 In the event the Attorney is not permitted to withdraw from the representation in any matter by the court, the County agrees to compensate the Attorney for base services under Section 3 above, at the prevailing hourly rate being paid to attorneys who handle conflict-of-interest cases.
- 7.9 Private practice. Nothing in this agreement shall prohibit Attorney from representing private clients so long as the representation of private clients does not interfere with or create a conflict of interest in the representation of indigent defendants.
- 7.10 Governing law. This agreement shall be governed by the laws of the State of Utah.
- 7.11 Non-funding clause. It is understood by the parties that as a governmental entity, the County funding for this agreement is subject to the funds being appropriated by the legislative body. In the event no funds or insufficient funds are appropriated and budgeted in the fiscal year(s) of this agreement, this agreement shall terminate and become null and void on the last day of the fiscal year for which funds were budgeted and appropriated, or in the event of a reduction in appropriations, on the last day before the reduction becomes effective. Said termination shall not be construed as a breach or default under this agreement and said termination shall be without penalty, additional payments, or other expense to the County of any kind whatsoever, and no right of action for damages or other relief shall accrue to the benefit of Attorney.
- 7.12 Discrimination. Attorney assures that he will comply with the Americans with



Disabilities Act (ADA), and Title VI of the Civil Rights Act of 1964 and that no person shall, on the grounds of race, creed, color, sex, sexual orientation, marital status, disability, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under this agreement.

7.13 Entire Agreement. The parties agree that this Agreement constitutes their entire Agreement and any changes or modifications must be agreed to in writing by both parties and approved by the County Legislative Body in a public meeting.

In witness whereof, the parties have executed this contract the day and year written below:

FOR THE COUNTY:

FOR THE ATTORNEY:

\_\_\_\_\_

\_\_\_\_\_

DATED: \_\_\_\_\_

DATED: \_\_\_\_\_

Approved as to form

\_\_\_\_\_ County Attorney

by: \_\_\_\_\_