

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

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I

INTRODUCTION

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

Four counties (Carson City, Storey, White Pine and Eureka) employ the services of the Nevada State Public Defender (NSPD) under NRS 180. Three counties (Elko, Humboldt, and Pershing) have established county public defender offices, pursuant to NRS 260. The remaining rural counties provide indigent legal service by contracting with private lawyers. These contracted attorneys are governed by separate contracts that specify the fee to be paid on a flat yearly basis for all work to be performed and are allowed to do private practice. Generally, appellate work is included in the contract. Each of the counties uses a contract that permits the contracting attorney to ask the court for additional fees for investigation or expert consultation. Most of the contracts refer to NRS 7.135 et. seq. as the applicable statutory remedy for this request and, if granted, those expenses are presumably borne by the county. None of the flat fee contracts referenced above provide for additional fees should any of the cases proceed as capital or death penalty prosecutions. However, some of the contracts allow the attorneys to go to the court for additional fees in extraordinary or exceptional cases.

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

The Subcommittee also has received the yearly caseloads from each of the rural counties (except Esmeralda and Lincoln, other counties (Lyon and Nye) provided only partial data) and has been able to ascertain the approximate total yearly caseload and per attorney per year caseload for each county. (Charts attached as Exhibit 1 and 2). The Subcommittee also has obtained each of the fee contracts that are in use by the counties using that method. There is disparity in the fee contracts in respect to the amounts being paid for services being rendered.

Of major concern to the Subcommittee is that the State of Nevada has chosen to place the majority of funding for indigent defense upon the counties when this is a State Constitutionally mandated service. This has placed a significant burden on the counties resulting in three types of methods whereby services are provided: namely, Nevada State Public Defender, County Public Defender, or contract counsel. The financial burden on the counties was an issue which many counties considered when they opted into the contract counsel method of service. However, the Subcommittee acknowledges that other issues were factors in the individual county decisions, to include issues with the services being provided by the Nevada State Public Defender's Office in the past, which included a turnover of counsel in the rural counties, an inability to provide consistent representation, and a lack of local involvement.

A review of the case numbers and the nature of the flat fee contracts cause concern to the Subcommittee. The Subcommittee would support a well-funded program by the State of Nevada that would provide for uniformity as to the case numbers assigned to such counsel, and uniformity as to the services being provided. Given the current state of funding of indigent defense, it is unrealistic to think that this type of funding will come back to the counties from the State, and as such we are stuck with the three methods that the counties are using to meet the State's Constitutional obligation. This issue is also very sensitive to the rural counties who have become involved in the selection of the contract counsel, subscribe to the contract counsel methodology and strongly support it, if the State does not assume responsibility and pay for indigent defense.

Historically, as represented in the January 2008 Order issued by the Nevada Supreme Court, the best overall method for equality and uniformity of representation would be to have a state funded Nevada State Public Defender's Office, fully funded for access to justice, competent counsel, and adequate case loads, with contracts to private counsel for conflict cases.

II

OVERVIEW OF DATA COLLECTED

The counties using flat fee contracts have provided the Subcommittee with caseload and cost (contracts) information (no data was received from Esmeralda or Lincoln counties and only partial data was received from Nye and Lyon counties). The counties using the NSPD or a county public defender additionally provided the Subcommittee with caseload information because the costs are born partially by the State (20% state funding/ 80 % county funding). The

following provides the caseload per attorney and, with respect to flat fee counties and Carson City conflict attorneys, the yearly amount of money spent per attorney:

1) CARSON CITY/ STOREY/ WHITE PINE/ EUREKA

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

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

2) CHURCHILL

Churchill County hires three (3) contract attorneys with each paid a flat fee of \$120,000 yearly. Their representation includes all felonies, gross misdemeanors, misdemeanors, traffic, juvenile cases, to include 432B, and appeals/writs. Capital cases are not included. The court appoints counsel in Capital cases based on the statutory compensation. The contract allows for extraordinary costs for investigation and experts. Conflict cases are appointed by the court to other attorneys paid the statutory rate.

3) ESMERALDA

This county uses a one year/one attorney flat fee contract in the amount of \$47,000. The contract includes extraordinary cases and capital cases. The Subcommittee did not receive caseload data from this county.

4) LYON

This county's flat fee contract provides for each attorney to be compensated in the amount of \$135,000 per year. There are three contracting attorneys so multi-defendant cases of three people or less are handled within the scope of the flat fee contract. The Subcommittee is not aware of how the county pays for conflict attorneys, when necessary. Contracts provide that the three contracts are considered Public Defender under NRS 260.

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

5) LINCOLN

This county uses a flat fee contract with one lawyer on an annual basis. The fee paid is \$122,000. The contract includes routine investigations and allows the lawyer to seek extraordinary investigation and/or expert assistance pursuant to the court's approval. The contract allows additional attorney fees for extraordinary cases, including death penalty cases. The county did not provide caseload information.

6) NYE

This county uses a flat fee contract with five lawyers. Each lawyer is paid \$125,000 per year. Each lawyer has an average approximate yearly caseload of 205 cases (only partial data was received). The contract excludes capital cases. The contract does allow the lawyer to ask the court to provide investigation and/or expert assistance at county expense when warranted under NRS 7.135 et. seq. Capital cases are on a separate contract at the statutory rate.

7) MINERAL

This county uses an annual flat fee contract with one lawyer, which includes post-conviction. This lawyer is paid \$70,000. Investigation and expert assistance is subject to court approval pursuant to NRS 7.135 et. seq. In non-capital cases, an hourly rate applies after 3 days. Reimbursement for travel fees and expenses allowed. In capital cases, contract attorney must provide Rule 250 attorney and pay for Rule 250 to maintain qualification. The lawyer's average yearly caseload is 136 cases.

8) DOUGLAS

Until very recently this county used a flat fee contractual arrangement with three lawyers. The county now contracted a fourth lawyer. Each lawyer receives an annual fee of \$196,000. The per attorney caseload should be approximately 260 cases per year. Before the recent addition of the fourth lawyer, the per attorney caseload was 350 per year. The contract does not provide for additional fees for death penalty cases, however, additional fees can be applied for to the Court in extraordinary cases. Investigation and expert assistance can be requested from the Court pursuant to NRS 7.135 et. seq.

9) ELKO/ HUMBOLDT/ PERSHING

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

- 1) 420 cases per attorney per year in Elko;
- 2) 381 cases per attorney per year in Humboldt;

- 3) 597 cases per attorney per year in Pershing. This includes Humboldt's conflict and juvenile cases.

Elko/Humboldt/Pershing handle conflict cases on an hourly contract basis with private attorneys.

III

SUBCOMMITTEE RECOMMENDATIONS

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

Whether, the State of Nevada can delegate this task to its constituent counties without any financial subsidy presents an interesting legal question. This Subcommittee has not delved into this provocative issue. However, the Subcommittee uniformly agrees that the State's "unfunded mandate" results in an unfair financial burden on Nevada's counties and that it could unnecessarily result in less effective legal representation for indigent people in some counties. The Subcommittee uniformly agrees that funding needs to be addressed and rectified by the Nevada State Legislature.

The Subcommittee recommends as follows:

1. That the State of Nevada fully fund the Constitutional requirement of providing indigent defense to the rural counties and take the financial pressure off of the counties. The State Public Defender's Office could provide these services as set forth in the Order of the Nevada Supreme Court dated January 4, 2008.
2. Given the unlikelihood of the Nevada Legislature fully funding a State Public Defender's Office for the rural counties, the rural counties should continue to use either the Nevada State Public Defender's Office, establish a County Public Defender's Office under NRS 260, or continue to use the contract counsel method. This recommendation is made contingent on the counties using a contract method that does not use a totally flat fee contract, which have some built in legal issues, but execute contracts for indigent defense that allow for a modification of fees for extraordinary cases, for death penalty cases under the requirements of S. Ct. Rule 250, and allow for investigative fees and expert witness fees. A uniform contract could be developed for use by the counties with contract private attorneys, but should allow counties to negotiate for these contract attorneys.

3. Another alternative for counties to help alleviate the financial burden thereon is to have the State Public Defender's Office handle at the State's expense all death penalty cases and appeals. Some counties are in favor of this, others are not.
4. The January 4, 2008 Order of the Nevada Supreme Court should be implemented to the extent possible, to include the creation of the permanent oversight Indigent Defense Board.
5. The IDC provide legislative support to the NSPD and the counties to rebalance the costs of indigent defense back to the State and away from the constituent counties.