

# Indiana Task Force on Public Defense

Findings and Recommendations  
to the Indiana Public  
Defender Commission





# Indiana Task Force on Public Defense

Final Report and Recommendations of the  
Reporting Subcommittee to the  
Indiana Public Defender Commission

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## Introduction by Judge John D. Tinder, (Ret.) Chair

**B**oth the United States and Indiana Constitutions guarantee that all persons accused of crimes are entitled to representation by counsel in facing the consequence of those charges, even if they cannot afford the expense of that representation. This is a matter of right, not charity or enlightened benevolence. The right to counsel gives meaning and substance to all of the other rights that are central to our Constitutions. “Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have.”<sup>1</sup>

Fundamental rights are also implicated for those facing the life-altering consequences of child protection litigation and mental health commitments so the right to effective representation in those types of proceedings should be on the same plane as in criminal cases in this State. The right of due process of law demands no less.

Two recent reports, “The Right to Counsel in Indiana” issued by the Sixth Amendment Center and a report resulting from a federal planning grant for the federal Office of Juvenile Justice and Delinquency Prevention (OJJDP), identified serious concerns about the way in which defense services are delivered in Indiana. Additionally, the dramatic increase in the numbers of Child in Need of Services (CHINS) and Termination of Parental Rights (TPR) filings in Indiana combined with the multi-faceted effects of the opioid crisis have greatly increased the need for public defense representation and further strained many, if not all, of Indiana’s local defender systems and county budgets. The Indiana Public Defender Commission formed this Task Force in August 2017 to study these concerns and develop findings and corrective recommendations.

As you will read in the Report which follows, during the past year, the Task Force has compiled and reviewed voluminous information about the public defense function as it is and should be performed, not only in Indiana, but also throughout the United States. We have been assisted in this review by helpful expert local and national advisors and the talented staff of the Public Defender Commission. From the presentations and discussions at Task Force meetings, listening sessions held throughout the State, court and public defender office visits and from the interviews and surveys conducted and the articles and treatises identified for us, we have become well informed on a variety of challenges faced by those in need of public defense, their families, courts, the defense bar and governmental agencies.<sup>2</sup>

We are convinced that Indiana faces critical decisions on public defense reform. Our close look at Indiana’s public defense system reveals that it has grown during recent decades, but it has done so county-by-county and court-by-court, with a lack of cohesive uniformity so that there is not one public defense system, but rather several, and this variety of systems allows deficiencies in the provision of defense services in many instances. Public defense in Indiana began with the good will of volunteer lawyers who responded affirmatively to the call of the courts for help for those facing criminal charges without sufficient financial resources to pay for representation. Indiana courts quickly recognized that lawyers can’t be compelled to work without compensation; but it was left to the individual counties to figure out how that required compensation was to be accomplished. Courts also recognized that the critical matters at issue in child protection and mental health commitment

<sup>1</sup> *United States v. Cronin*, 466 U.S. 648, 654 (1984)(quoting Schaefer, *Federalism and State Criminal Procedure*, 70 HARV.L.REV.1, 8 (1956)).

<sup>2</sup> Indiana public defenders, both individually and collectively through the Indiana Chief Public Defenders’ Association and the Indiana Public Defender Council were invaluable resources and guides for us as we conducted our review. We greatly appreciate the time and effort expended by many defenders through testimony, discussions, office visits and written submissions to help us understand the needs of both their clients and their profession.

proceedings necessitate the appointment of counsel. It is understandable that courts would turn to their familiar criminal case public defenders to undertake those representations as well. But as our report details, representation on those types of civil matters does not necessarily fit well with a criminal defense practice, and those CHINS/TPR assignments have added to what is in many instances, a heavily overworked and underfunded public defense bar. Additionally, placing the representation of youths charged in juvenile proceedings in the same office that is responsible for representing their parents in CHINS or TPR proceedings can create serious ethical conflicts for the lawyers.

We certainly acknowledge that throughout Indiana, the best of intentions motivates courts to appoint and employ public defenders, that is, the goal is for those in need to have the effective assistance of counsel. And we find Indiana public defenders to routinely be hardworking and dedicated lawyers, willingly accepting difficult assignments, and doing their professional best to, under often very trying circumstances, to provide their clients with effective representation. But we also recognize that, even motivated by the best of intentions, the county-by-county creation of public defender systems has resulted in a hodge-podge of several different and, in many instances, unaccountable systems. This can lead to systemic barriers to the fulfillment of the State's duty to provide the effective assistance of counsel, such as overwhelming caseloads for individual public defenders. Since the early 1990's, the State has been sharing some of the financial burden of public defense, and in doing so, has fostered some accountability on lawyer workloads in those counties that participate in the reimbursement system. (It is only fitting that the State should participate in funding the public defense. After all, criminal prosecutions are brought in the name of the State of Indiana, not in the names of the various counties.)

But, as a program that allows voluntary county participation, this reimbursement system has not been accepted by over a third of Indiana counties,

resulting in haphazard or nonexistent controls over public defense workloads and performance. And the current State reimbursement system ignores the costs of public defense on misdemeanor charges entirely. This often results in additional overloading of county-employed public defenders in many instances and in others, allows systemic discouragement of employment of public defenders for individuals facing those lesser but still consequential criminal charges. As a result of the development of county-by-county defense systems, Indiana now has a series of separate and often inscrutable patchwork efforts to fulfill the State's Constitutional obligation rather than a comprehensive and uniformly understood system of public defense. Whether a person is arrested on one side of an Indiana county line or the other can have a distinct bearing on whether that person faces systemic barriers to obtaining the effective assistance of counsel. That should not be the case.

Of course, we understand that in the provision of all kinds of public services, the needs of the various Indiana counties can be quite different so that there is no 'one-size-fits-all' solution to the challenges of funding and providing public defense. In making our recommendations, we tried to allow for each county to choose what best fits its particular needs, even if that might involve the sharing of defense resources in multi-county or regional ways. But there needs to be some overarching oversight to avoid the many problems of incomplete or ineffective oversight.

One of the central themes of the Sixth Amendment Center's report was the need for Indiana public defenders to be independent from the courts who appoint them. We can confirm the importance of that need for independence, not only independence in fact, but also the need for the defenders to appear to their clients and the public to be independent from the appointing courts. It is understandable that historically, it has fallen to courts to find and appoint defense counsel for those who cannot afford it. But the counsel appointed must advocate for the client, and act in the client's best interests, and must





not, either in fact or appearance, be beholden to the appointing court. You will notice that some of our strongest recommendations are based on the need for Indiana public defenders to be truly independent from judicial authorities. Public defense clients must be assured that their lawyers are working for them, not for the courts. We know that no court or judge desires to interfere with a public defender's efforts to provide the effective assistance of counsel. We are hopeful that if our recommendations about independence are implemented, the public defense clients and the public will better recognize that independence.

Another theme of the Sixth Amendment Center and OJJDP reports that rang very true for us was the need for enhancement of the expertise, training and resources that should be available to Indiana public defenders. The current insufficiency of resources in many counties constitute some of the largest systemic barriers to the provision of a public defense. As such, our recommendations include a substantial ramping up of these necessary types of resources.

As the Task Force concludes its efforts, we are strongly convinced that the public defense function needs reform in Indiana. You will see that some of the reforms that we are recommending are of a critical nature so we are urging that they be implemented as soon as possible. Other recommendations can be incorporated over a longer period of time, and still others can be evaluated through the use of pilot projects and other forms of experimentation. And certain areas, like public defense representation on mental health commitments, need a continued focused study. But overall, reform of the public defense needs to be part of the reform of the criminal justice system initiated in Indiana in recent years. It should also be a part of the review of the child protection system

that appears to be currently underway. Much change and improvement has been undertaken in these areas, so it is critical that change and improvement of the public defense match those efforts.

I will close this introduction with a personal expression of my gratitude for the very helpful assistance that has been provided to this Task Force by the advisors listed in our Report and the hardworking and talented staff of the Public Defender Commission. Without their help, we would have been lost. But most of all, I want to thank my fellow Task Force members who actively participated in dozens and dozens of hours of meetings, listening sessions, phone calls and read thousands of pages of documents, articles, surveys and reports. The members of this Task Force have been very ambitious in compiling a very large volume of information about the public defense function in Indiana and throughout the states in a variety of contexts. They have also been very thoughtful and deliberate in discussing our work and in arriving at and analyzing our findings and recommendations. They have demonstrated their commitment to continuing the mission we were given of assisting the Public Defender Commission and the State of Indiana in meeting the challenges faced by the public defense. Thank you all.

Finally, as a tribute to the late Judge Larry J. McKinney, this report is dedicated in his memory. His commitment to the importance of an effective public defense and his willingness to organize and chair this project set this Task Force in motion, inspiring us to look deeply for ways to improve Indiana's public defense.

Respectfully submitted,

John Daniel Tinder



# Executive Summary

**Indiana Task Force on Public Defense**

*Findings and Recommendations of the  
Reporting Subcommittee to the  
Indiana Public Defender Commission*



# Executive Summary

## The Issue:

The Indiana and United States Constitutions provide every person accused of a crime the right to be represented by an attorney when they cannot afford to hire one. The responsibility to provide those lawyers falls to Indiana’s public defense system. Several recent studies have revealed significant deficiencies in how our state system is administered. The Indiana Task Force on Public Defense was convened by the Indiana Public Defender Commission to recommend solutions to these system-wide issues.

With the emergence of criminal justice reform efforts both in Indiana and nationwide, a number of states are evaluating how to address systemic barriers to an effective public defense system. Around the country, innovative ideas are being implemented that not only improve public defense, but also improve the criminal justice system as a whole. Strides have been made by all three branches of Indiana’s state government to improve the quality of criminal justice in our state. Changes proposed by the Reporting Subcommittee of the Task Force build on the existing framework of Indiana’s public defense system.

The right to counsel is enshrined in both the Indiana and federal constitutions. Article 1, Section 13 of the Indiana State Constitution provides that “[i]n all criminal prosecutions, the accused shall have the right to . . . be heard by himself and counsel.” The Sixth Amendment to the United States Constitution states that “[i]n all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense.” This right extends to misdemeanor cases as well as felonies.<sup>3</sup> This right also includes the appeal phase of a criminal case.<sup>4</sup> Juvenile defendants also have the right to counsel in juvenile

delinquency proceedings.<sup>5</sup>

Additionally, the right to counsel exists in other important areas:

- Representation of **incarcerated individuals** is provided in post-conviction proceedings through the State Public Defender.<sup>6</sup>
- **Parents** have the right to counsel when facing Child in Need of Service, and Termination of Parental Rights (CHINS/TPR) cases.<sup>7</sup>
- A right to counsel for **juveniles** in some non-delinquency cases.<sup>8</sup>
- A right to counsel when facing **mental health commitments** or when indigent and petitioning to have a person committed.<sup>9</sup>
- A right to counsel for parents when facing **child support contempt** proceedings.<sup>10</sup>
- A right to counsel in certain **paternity** cases.<sup>11</sup>

The complexity of the criminal justice system necessitates counsel to be appointed in order to preserve due process. As the Court concluded in *Gideon v. Wainwright*, “reason and reflection require us to recognize that 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>12</sup>

3 *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Bolkovac v. State*, 98 N.E.2d 250 (Ind. 1951).

4 *Halbert v. Michigan*, 545 U.S. 605 (2005); *Douglas v. California*, 372 U.S. 353 (1963); *Ross v. Moffitt*, 417 U.S. 600 (1974).

5 *In re Gault*, 387 U.S. 1 (1967).

6 I.C. § 33-40-1-2 (2018); IND. R. OF POST-CONVICTION REMEDIES § 9.

7 *In re G.P.*, 4 N.E.3d 1158, 1163-65 (Ind. 2014); I.C. § 31-32-2-5 (2018); I.C. § 31-32-4-1(2) (2108).

8 I.C. § 31-32-4-2(b) (2018) allows that a court may appoint counsel for a child in any proceeding other than delinquency (where the court should appoint). The reason children have representation at CHINS 6 hearings is because that is the one category where only the child can admit – the parent can’t admit on the child’s behalf. I.C. § 31-34-10-7 (2018).

9 I.C. § 12-26-2-2 (2018); I.C. § 12-26-2-5(c) (2018).

10 *In re Marriage of Stariha*, 509 N.E.2d 1117, 1121 (Ind. Ct. App. 1987).

11 *Kennedy v. Wood*, 439 N.E.2d 1367 (Ind. Ct. App. 1982).

12 *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

## The Current System of Public Defense:

Indiana is largely a county-based, county-funded system of public defense. In our state, counties choose what type of public defense delivery system is best for their communities. Attorneys may be hired in a full-time public defender office, where they are employees of the county, hired as independent contractors, or be appointed to individual cases and paid hourly for their work. This is in contrast to many other states, where public defenders are hired by the state and managed by a centralized state office.

Partial state oversight provided in Indiana is through the Indiana Public Defender Commission, which is tasked with recommending standards for the improvement of public defense in Indiana and providing reimbursement to counties that meet Commission standards related to the provision of public defense services. Rather than directly manage an office of attorneys, the Commission works with counties to provide reimbursement for a portion of the county's expenses. The reimbursement is provided for non-death penalty cases at the rate of forty percent, and covers all public defense expenses incurred by the county except for death penalty and misdemeanor cases. The Commission provides reimbursement for death penalty cases at the rate of fifty percent of defense costs. The Commission provides no reimbursement for misdemeanor costs because it is barred statutorily from doing so.

The Indiana model allows elected county officials to decide the type of public defense delivery system that best fits their county. Financial assistance from the state is dependent on compliance with state standards set by the Commission, which include the establishment of a public defender board, caseloads and experience of their attorneys, and the compensation provided to the attorneys.

## A system with opportunities for improvement:

*"I do believe without a doubt that the major problem facing indigent clients in this state is that they are appointed Public Defenders who often lack sufficient time, because of caseloads that are too high, and lack sufficient resources, financial and additional assistance, to provide an appropriate defense for their indigent clients."<sup>13</sup>*

Chief Public Defender of Noble County, James Abbs

Much of the current Indiana framework for providing public defense does not need to be changed if the systemic impediments to quality representation identified in previous studies and this report are addressed. However, if counties retain the authority to design and control their public defense system, it is imperative that the state recognize its responsibility to guarantee the right to counsel in all cases where it exist by constitutional provision, state statute, or case law. This responsibility includes oversight for quality and an increase in state funding for this vital public service.

## Findings of the Task Force:

To create its findings, the Task Force reviewed multiple Indiana-specific reports, including historic as well as contemporary assessments of public defense quality, the opinions and reports from national experts, a survey conducted on behalf of the Task Force by ISP Consultants, the testimony provided at a statewide listening tour and independent site observations by staff. A summary of findings are as follows:

- **Uneven access to counsel:** Many Hoosiers who would qualify for the assistance of a defense attorney are either unable to access

<sup>13</sup> Letter from James Abbs, Chief Public Defender of Noble County, to the Indiana Task Force on Public Defense 1-2 (on file with the Task Force).



counsel or encouraged to represent themselves, even when facing jail time and/or serious collateral consequences. According to a survey conducted by the Task Force, 76.34% of respondents agree there is pressure on courts to move through cases quickly due to time constraints.<sup>14</sup>

- **Excessive misdemeanor caseloads:**

Because the Commission does not provide reimbursement for misdemeanor cases, compliance with the misdemeanor caseload standards are not required. As a result, even in counties eligible for state reimbursement, many counties have excessive misdemeanor caseloads. Misdemeanors carry the possibility of incarceration and have significant collateral consequences. For more information, see page 46-48 for further discussion of the ongoing damage that may be caused by even seemingly minor convictions.

- **No uniform system for assessing and measuring quality of service:** The Indiana Public Defender Commission is tasked with recommending how best to improve public defense in the state. Yet the Commission does not audit for quality of any attorney performance because of a lack of standards, and a lack of staff to enforce the standards adopted. Currently, the Commission only audits a county system on three metrics: caseloads, compensation, and experience. These subject matters are not adequate to ensure lawyers are meeting minimum standards of representation.

- **A need for more attorney training requirements:** While there are many committed, experienced public defenders, and excellent trainings offered by the Public Defender Council, there are few *requirements* for ongoing qualification and training beyond certain minimal Commission standards, especially in non-capital defense.

<sup>14</sup> ISP Consultants, Indiana Task Force on Public Defense Stakeholder Survey: Executive Summary, 5 (2018), available at: <https://www.in.gov/publicdefender/files/Executive%20Summary%20Stakeholder%20Survey%20v2.pdf>.

- **Inadequate compensation:** The compensation paid to salaried and contractual public defenders is inadequate and creates economic disincentives to adhere to best practices, such as conducting an independent factual investigation prior to advising a client to enter a guilty plea.

- **The presence of conflicts of interest:**

Attorneys in some counties face a perceived conflict of interest because they are employed by the judge before whom they appear. This relationship has the potential to undermine the relationship between attorney and client.

- **A need for more investigators:** Given the rise in scientific techniques and new technologies, expert help is needed now more than ever for public defenders and appointed counsel. Independent investigation, including the use of experts and investigators—in addition to the efforts of the attorney—is a requirement set out in national practice standards.<sup>15</sup> Since 1977, Indiana has seen 35 people exonerated after being wrongfully convicted.<sup>16</sup> While not necessarily a direct cause of a lack of investigators, this fact illustrates the need to thoroughly and independently investigate cases.<sup>17</sup>

- **A need for interpreters and social workers:** Interpreters are essential to ensure defense attorneys are able to communicate with their clients; social workers are essential to ensure defendants are able to access treatment and to reduce recidivism. Yet these essential services are often beyond the reach of many public defenders and appointed counsel practicing in our state.

- **A need for greater service in child welfare:**

<sup>15</sup> American Bar Association, Criminal Justice Standards for the Defense Function, **Standard 4-4.1 Duty to Investigate and Engage Investigators (2015)**.

<sup>16</sup> National Registry of Exonerations, Indiana-specific records, <https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx?View={faf6eddb-5a68-4f8f-8a52-2c61f5bf9ea7}&SortField=Convicted&SortDir=Asc> (last visited July 9, 2018).

<sup>17</sup> American Bar Association, *supra*, note 15.

The significant increase in CHINS/TPR cases throughout the state requires greater public defense resources from the state.

- **A possible requirement for counsel to be present at initial (or detention) hearings:** According to some interpretations, Criminal Rule 25 requires counsel to be appointed for a juvenile prior to an initial or detention hearing.<sup>18</sup> The adoption of a new rule in Criminal Rule 26, and the creation of new evidence-based practices in pre-trial release, may require counsel to be present at the initial hearing and be prepared to be an advocate, if the risk assessment determination is held to be a critical stage of the proceeding. In the majority of counties, public defenders are not appointed until the initial hearing and are not present in-court to provide representation at this stage.
- **Inadequate Commission staff:** The size of the Commission's staff is insufficient to determine county compliance with standards and guidelines.
- **An uneven application of standards:** The Task Force found that there are standards for Commission counties, but none for non-Commission counties that did not seek reimbursement. This leads to an uneven landscape of public defense quality across the state.

## Recommendations:

These recommendations are submitted to address systemic deficiencies and other deficiencies present in the delivery of public defense services in Indiana.

### A. The Need for Immediate Change

The following three reforms are of the highest priority:

- The Commission should be authorized to reimburse misdemeanors.

The statutory prohibition of misdemeanor reimbursement has led to an unequal application of standards across the counties, and even within the Commission's participating counties. The collateral consequences associated with a misdemeanor conviction can be very severe. It is imperative that Indiana increase oversight of and support to public defenders who represent clients accused of misdemeanor crimes.

- The state should fund and manage a centralized state appellate office to provide direct services, oversight, and support.

The current system of providing appellate representation in Indiana does not ensure sufficient independence from the judiciary in all counties. In roughly one-third of counties, appellate counsel are selected and appointed by judges without any required training, experience or oversight. Appellate representation is a specialized area requiring specific skills, training, experience and standards. While the state has many excellent appellate lawyers, the experience and requirements for handling appeals in Commission counties are minimal, and there are no performance standards in place. Many counties do not have sufficient resources to ensure high quality appellate representation and oversight measures. One county, on the other hand, has a well-established appellate office which sets high standards for its lawyers, and works closely with the agency's trial lawyers.

Creation of a statewide appellate office to centralize appellate representation, including criminal, juvenile, CHINS/TPR cases, and other cases eligible for public defenders can and should remedy the disparities in current access to qualified counsel and should include the ability to contract services to qualified appellate advocates as needed and provide regional support as appropriate.

- Counties should be authorized to enter into agreements to create a multi-county public defense delivery systems with a regional Chief.

The Task Force found that the current system of public defender boards is not effective at ensuring

<sup>18</sup> Ind. R. Crim. Proc. 25.





quality or accountability in the provision of public defense services; further discussion of this issue is found beginning on page 65 of this report. The Task Force recommends amending I.C. § 33-40-7 to allow counties to develop multi-county public defense systems. If a multi-county system is developed, counties and the Commission should enter into a memorandum of understanding (MOU) specifying the cost-sharing by the counties. The multi-county system should be managed by a regional chief public defender.

**B. Additional reforms are needed at the state level.**

- The state should acknowledge a duty to provide effective and competent defense counsel for those who cannot afford representation.

It is ultimately the responsibility of the State of Indiana to provide for effective and competent defense counsel for those who cannot afford representation. Counties are a creation of the state, and the state may continue to delegate some responsibilities to the counties. However, the ultimate responsibility remains at the state level.

- The state should guarantee that counsel is provided at all critical stages of the proceeding where the right to counsel exists.

The guarantee of counsel is not applied consistently in Indiana courts. The initial hearing may soon require counsel to ensure due process is met. A new criminal rule, which is not yet mandatory, changes the practice of the initial hearing from the setting of money bail to the use of an evidence-based risk assessment tool to determine release conditions. Attorneys should be appointed and ready to interpret this risk-based tool at the initial hearing, and representation should continue through the appeal if necessary.

- The state should ensure every court that hears cases with a right to counsel meets Commission standards for quality.

In Indiana, there should be no “justice by geography.” Every Hoosier should have access to a quality public defense system. Every court in every county should be required to meet the standards for representation set out by the Public Defender Commission. To ensure county and court compliance with this obligation, the Commission should be given authority to oversee the quality of representation provided in all courts in all counties and given authority to enforce the standards.

- Greater state oversight, funding, and technical support should be provided in specialty areas such as parental representation in CHINS/TPR cases and juvenile delinquency cases.

The Task Force recognizes the increasing need for specialized representation, especially in the areas related to parental representation, juvenile representation, and mental health. To that end, more resources are necessary to meet client’s needs.

• ***CHINS/TPR***

The challenges of providing CHINS/TPR representation to parents include lack of independence, lack of oversight and compliance monitoring, high caseloads, and an overall lack of resources and time to adequately provide effective representation. Also, the civil nature of these cases (often coupled with long-term intensive family services, out of home placements, and the possibility of permanent severing of parent rights) requires specialized training, skills and resources not available in all public defender programs.

• ***Juvenile Defense***

Juvenile defense is a specialized area of practice which requires skilled, well-resourced and trained lawyers. Youth are entitled to early appointment of counsel and representation at all critical stages until the youth is no longer subject to dispositional orders. The establishment of a statewide juvenile defense office would be a large step toward creating lasting improvement in juvenile defense reform.

### C. Additional reforms are needed at the county level.

- County public defender boards should have no more than one judicial appointment and have strengthened requirements for Board training and standards.

Public defender boards should have strengthened requirements for composition, training, and standards for membership; the role of public defender boards should be limited to deciding how public defenders are hired, deciding who will manage the public defenders (whether a county-paid chief or supervision by a Commission-paid Regional Public Defender), and ensuring fiscal responsibility.

- The county or multi-county defense plan should include appointment from the private bar.

The active participation of the private bar is critical to the overall success of Indiana's public defense services and ensures that public defenders are not overloaded with cases.

- The Commission should consider how to implement regional support for investigators and social workers, and also consider pilot programs.

Current Commission standards should be strengthened to ensure support staff are provided to attorneys. Adequate staffing increases the efficiency of the attorney's time and allows the client to benefit from the specialized work of paralegals, social workers, and investigators.

### D. Additional reforms are needed to the Public Defender Commission.

- The Commission should have the authority to administer discretionary grants to spur innovation.

With approximately 30 non-Commission counties, the reforms recommended throughout this report will potentially place a significant

burden on local counties, both fiscally and from a technical implementation standpoint. By granting the Commission the authority to provide appropriate and targeted grants, opportunities for local innovation public defense services will be enhanced.

- The Commission should regularly update its attorney workload standards.<sup>19</sup>

The Task Force recognizes that the current Commission caseload standards need updating. The Task Force supports the efforts already underway at the Commission to pursue a workload study with the American Bar Association and the local office of the public accounting firm Crowe LLP. The Task Force recommends that the Commission pursue a regular review of the workload standards to ensure they remain a valid method of quality control.

- The Commission should track data on indigency appointments to ensure Commission standards are being followed.

The Commission currently requires each county in its program to set an indigency standard to govern who should be appointed a public defender. However, the Commission does not currently enforce the standard. The Task Force recommends that the Commission study the issue of indigency appointments further to ensure that people who need a public defender have access to counsel, and to ensure resources are not expended on people who could otherwise afford counsel.

- The Commission needs additional staff to develop new standards, coordinate with counties and/or regions, and implement data collection and quality controls.

Currently, the Commission employs five full-time employees, including two staff attorneys, one fiscal analyst, one research and statistics analyst, and one administrative assistant; to fully implement the reforms recommended by this report, more staff may be necessary to adequately audit all counties.

<sup>19</sup> The Commission is currently undergoing an evaluation of workloads for public defenders in conjunction with the American Bar Association and Crowe LLP, a public accounting firm with offices in Indianapolis.





- The Commission should explore remedies to help counties when they face funding shortages.

Funding of public defense remains a constant concern for Indiana’s counties, who must deal with several important areas of local government other than the right to counsel. The Task Force recommends that the Commission study what remedies are available to assist the counties in meeting their public defense funding needs.

- The Commission should increase compensation standards for attorneys who provide public defense services.

Currently, the Commission requires pay parity with prosecutors for equal work. However, the Commission has created a subcommittee to re-evaluate this standard, because it is often impossible to truly compare the work of the prosecutor with the public defender or appointed counsel. For example, prosecutors may receive fringe benefits, such as health insurance, that should not be used to calculate the hourly rate of pay of a lawyer who represents citizens on a case-by-case, appointed counsel basis. While the Commission’s calculation of minimum pay standards is flawed, there is an even larger concern in counties outside the Commission, where there are no minimum standards for attorney compensation.

**E. Independence is critical to public defense.**

- Public defense attorneys should be as independent as possible from the judge before whom they appear.

Judges have the inherent authority to appoint lawyers to represent people accused of crimes in Indiana. However, a direct employment relationship between a judge and a defense attorney may create a perceived or actual conflict of interest as the defense attorney appears to be an employee of the judge. This conflict is apparent even if judges and

attorneys have the best of intentions. Best practices for public defense require that independence of defense counsel is protected at the system-level by ensuring that public defenders are appointed and paid independently.

**F. More research is needed in several key areas of the criminal justice system.**

- City & Town Courts should be studied to ensure compliance with state standards.

Cities & Towns that retain misdemeanor jurisdiction encounter situations where the right to counsel applies. However, there was not enough time in this Task Force process to fully study the issue of how to ensure access to counsel in these courts. The Task Force urges that the Commission conduct further study of the subject, in conjunction with Accelerating Indiana Municipalities, to better understand how to ensure that the right to counsel is protected and to make certain that standards for misdemeanor representation are the same throughout Indiana, no matter where the charges are filed.

- Representation issues in Civil Commitments require further study.

Much like CHINS/TPR cases, involuntary civil commitments are a specialized area of civil law not necessarily analogous to the criminal practice of law. While civil commitment cases are currently in the Commission’s reimbursement program, this area is ripe for further study by the Commission and policymakers to explore methods to ensure appointments for those vulnerable Hoosiers entitled to counsel and to increase the quantity and quality of attorneys who work in this challenging area of law.

- Consolidation of functions in existing state public defender agencies should be studied further.

The Task Force recognizes the need to increase financial efficiency. Currently, there are three separate state agencies provide varying levels of



support to Indiana’s county-based system. There may be ways to streamline services to lower costs and increase effectiveness through the re-evaluation of current practices.

**The Benefits of Public Defense Reform:**

- **Fairer Administration of Justice:** A robust public defense system is the first line of defense when government seeks to remove a person’s liberty. But an overworked and underfunded attorney or absence of legal representation can tip the scales of justice unfairly.
- **Reduction in Jail Overcrowding:** Many counties are experiencing significant jail overcrowding. A well-trained and well-funded public defense delivery system is critical in assuring persons convicted of crimes receive the appropriate sentence, which often includes treatment or monitoring, not incarceration.
- **Reformation of Individuals/Recidivism Reduction:** Most would agree the ultimate test of the effectiveness of the criminal justice system is its ability to reform an individual into a productive and self-sufficient member of society. Criminal defense attorneys, both private and public, are the actors in the criminal justice system who seek reformation opportunities to serve the needs of their clients and contribute to the goals of lowering recidivism.
- **Workforce Development:** With record low unemployment rates and Indiana’s focused efforts on workforce development, arrest and incarceration are barriers to an individual participating in gainful employment. When an individual is arrested and subsequently spends weeks or months incarcerated in a county jail with no access to an attorney, the individual often shifts from an able-bodied member of Indiana’s workforce to a state taxpayer fiscal liability.

- **Family Preservation:** The recently-released evaluation of Indiana’s Department of Child Services contained found the number of court-involved cases in DCS is more than double the national average. Beyond the obvious harm to familial stability, the separation of parents from their children takes a dramatic fiscal toll on Indiana. Estimates show that returning a child to the home from foster care saves Indiana taxpayers at least \$8,135.85 per year.<sup>20</sup> While cost should never outweigh the safety or well-being of a child, it is the defense lawyer who is charged with the difficult, yet critical, task of representing the interests of parents in these court proceedings and to seek a just and fair resolution.
- **Reduced costs to State Prison System:** Individuals in counties currently following Commission standards receive on average 140 day shorter sentences in DOC facilities, as measured by the Net Fixed Term of Incarceration. Each prisoner costs the DOC \$55.55 per day, according to the 2017 DOC per diem report.<sup>21</sup>

**Indiana: An Emerging Leader in Criminal Justice Reform:**

The Task Force acknowledges the important reforms taking place thanks to efforts from the Indiana General Assembly, the Indiana Supreme Court, and the Executive Branch.

*“People often ask me the same question they are asking you: what can we do about this [opioid] crisis? I have only one answer: together, we must do everything. This is a situation where well-reasoned,*

<sup>20</sup> Based on the Indiana DCS published per diem rate for a child aged 5-13 in foster care of \$22.29, at <https://www.in.gov/dcs/2985.htm> (last visited 6/22/2018).

<sup>21</sup> Indiana Department of Correction, FY2016-2017 Expenditures All Facilities and Centers, 6, <https://www.in.gov/idoc/files/FY17%20Per%20Diem.pdf>.





*evidence-based judicial interventions can get people to treatment, give consequences, cut the supply, support families, and save lives.”*

Chief Justice of the Indiana Supreme Court,  
Loretta Rush.<sup>22</sup>

The Indiana Supreme Court has a number of programs underway to modernize and improve the state’s judicial system. Included among its projects are grant initiatives for court improvement, interpreters, family courts, and veteran’s courts. The Court has special projects focusing on juveniles through Juvenile Detention Alternative (JDAI) teams, as well as guardian *ad litem*/court appointed special advocate programs (GAL/CASA).

The Court has recognized the impact of the opioid epidemic on Indiana and has responded through a number of programs, including the expansion of problem solving courts. There are plans to have over 100 problem-solving courts within the state by the end of 2019.<sup>23</sup> As of 2018, there were 87 problem-solving courts in 45 counties.<sup>24</sup>

*“People with substance use disorder have a disease and they cannot overcome it alone. Recovery involves support, respect and growth in the community and the individual.”*

NextLevel Recovery, an initiative by the State of Indiana<sup>25</sup>

The Task Force acknowledges the work of the Executive Branch in responding to the opioid crisis through the creation of the Executive Director for Drug Prevention, Treatment, and Enforcement and NextLevel Recovery, an initiative to combat the opioid epidemic. The opioid epidemic has had

a large impact on criminal justice, causing a rise not only in drug cases, but also in child welfare cases. In Executive Order 17-01, Governor Eric Holcomb recognized that “since 1999, the State of Indiana has seen a 500% increase in the rate of drug overdose deaths, with thousands of Hoosiers losing their lives as a result of drug overdoses in recent years.”<sup>26</sup> The Governor’s office has been proactive in creating inter-agency, inter-disciplinary teams to tackle this ongoing epidemic. The NextLevel Recovery initiative provides “access to resources for prescribers, emergency personnel, community leaders, and persons with substance use disorder and their families.”<sup>27</sup> The Governor’s office has taken steps to increase treatment, access to funding, and to increase data collection efforts to effectively target initiatives to reduce opioid use disorder and to prevent abuse.<sup>28</sup>

The Indiana General Assembly is also to be commended for its continued efforts to increase funding to the Indiana Public Defender Commission and for its focus on criminal justice reform, starting with the enactment of HEA 1006 (2014). This legislation was a significant overhaul of Indiana’s criminal code with an eye toward criminal justice reform. Study of the effectiveness of HEA 1006 is ongoing.

The full report details many ways to modernize Indiana’s public defender system to become a force multiplier for the efforts already underway in the three branches of government.

<sup>22</sup> Loretta H. Rush, State of the Judiciary (Jan. 10, 2018), <https://www.in.gov/judiciary/supreme/files/sog-2018.pdf>.

<sup>23</sup> INDIANA SUPREME COURT, ANNUAL REPORT 2016-2017 53 (2017) [hereinafter Annual Report], <https://www.in.gov/judiciary/supreme/files/1617report.pdf>.

<sup>24</sup> *Id.*

<sup>25</sup> State of Indiana, NextLevel Recovery [hereinafter NextLevel Recovery], available at <https://www.in.gov/recovery/>.

<sup>26</sup> State of Indiana, Exec. Order 17-01 [hereinafter Exec. Order 17-01], [https://www.in.gov/gov/files/EO\\_17-01.pdf](https://www.in.gov/gov/files/EO_17-01.pdf).

<sup>27</sup> NextLevel Recovery, *supra* note 25.

<sup>28</sup> To see a full list of actions taken by the Executive Branch since January 2017, please visit: <https://www.in.gov/recovery/files/NLR%20accomplishments%2006.18.pdf>.



# Final Report

**Indiana Task Force on Public Defense**

*Findings and Recommendations of the  
Reporting Subcommittee to the  
Indiana Public Defender Commission*





## Introduction

A report authored by the Sixth Amendment Center entitled “The Right to Counsel in Indiana: Evaluation of Trial Level Indigent Defense Services” (*hereinafter* Sixth Amendment Center Report) issued in October 2016 was clear: the “Indiana Model” for public defense services needs strengthening.<sup>29</sup> The time has arrived to determine improvements to secure impactful and meaningful implementation of the right to counsel.

The debate over the right to counsel in Indiana takes place amid a national conversation over public defense reform. Historically, the right to counsel developed through state and federal court decisions. In Indiana, these decisions created an unfunded mandate on local jurisdictions, and counties have wrestled with how to fund public defense ever since.<sup>30</sup> There are a number of national studies have documented systemic failures common among states, including issues with misdemeanor representation, overwhelming caseloads for attorneys, insufficient training, and inadequate staff support.<sup>31</sup> Therefore, while we are identifying problems, our state is not an outlier in the need to modernize our public defense system. Other states, including Michigan and New York, are now undergoing reforms originally prompted by litigation.<sup>32</sup>

While Indiana grapples with its current problems, our State was once a pioneer in fulfilling the right to counsel long before *Gideon v. Wainwright* was decided by the United States Supreme Court.<sup>33</sup>

<sup>29</sup> See generally SIXTH AMENDMENT CENTER, THE RIGHT TO COUNSEL IN INDIANA: EVALUATION OF TRIAL LEVEL SERVICES I (2014), [http://sixthamendment.org/6ac/6AC\\_indianareport.pdf](http://sixthamendment.org/6ac/6AC_indianareport.pdf).

<sup>30</sup> For a full explanation of the development of public defense funding in Indiana, please see Appendix A.

<sup>31</sup> See generally NATIONAL ASSOCIATION OF CRIMINAL DEFENSE ATTORNEYS, VARIOUS REPORTS, available at <https://www.nacd1.org/reports/>; STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, AMERICAN BAR ASSOCIATION, GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE (2004) [hereinafter GIDEON’S BROKEN PROMISE].

<sup>32</sup> Presentations were made to the Task Force by representatives of the New York State Office of Indigent Legal Services (William Leahy) and Michigan Indigent Defense Commission (Judge Thomas Boyd). See also *Reforming Public Defense in New York State: Study, Litigation, Legislation, Agency Action*, [https://www.in.gov/publicdefender/files/Indiana%20Task%20Force%20NY%20chronology%20\(1\).pdf](https://www.in.gov/publicdefender/files/Indiana%20Task%20Force%20NY%20chronology%20(1).pdf); *Michigan’s Trial Level Indigent Defense System*, <https://www.in.gov/publicdefender/files/Michigan%20%20page%20summary.docx>.

<sup>33</sup> *Brunson v. State*, 394 N.E.2d 229 (Ind. Ct. App. 1979), *Frazier v. State*,

The Indiana Public Defender Commission was among the first of its kind. Despite those early accomplishments, the subsequent growth in complexity of the criminal justice system, along with rising caseloads in child welfare, juvenile justice, and criminal proceedings, now give cause for Indiana’s system to be reassessed.

The Indiana Task Force on Public Defense was created during the summer of 2017 in response to the Sixth Amendment Center Report. Created by the Indiana Public Defender Commission, the Task Force was asked to investigate the state’s systemic deficiencies and provide solutions to address the issues identified by the Sixth Amendment Center and other national reports. Initially under the leadership of Judge Larry McKinney, the Task Force was asked to examine the structure and functioning of Indiana’s public defense system, in order to create recommendations for a high quality, constitutionally sound and cost-effective system of defense. With the unfortunate and unexpected passing of Judge McKinney just after the first meeting of the group in September 2017, Judge John Tinder, retired from the Seventh Circuit Court of Appeals, assumed the role of Task Force chair.

All of the Task Force members participated extensively in the information gathering phase of the process. But for purposes of making findings and recommendations contained in this report, the Task Force was structured into two distinct groups. First, some members of the Task Force became the Reporting Subcommittee,<sup>34</sup> which is responsible for the findings and recommendations in this report. Second, with one exception, some of the members who presently serve in the judicial, executive and legislative branches of Indiana government comprised an Advisory Subcommittee<sup>35</sup> of the committee did not participate the determinations of what findings and recommendations to make in this report. A message from the Advisory Subcommittee is found in Appendix K of this report.

391 N.E.2d 1192 (Ind. Ct. App. 1979), *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>34</sup> *Id.*

<sup>35</sup> See *infra* App. C.



The work of the members of this Advisory subcommittee in the development of information and issues for the Task Force was substantial and invaluable. But the findings and recommendations of this report call for reformative steps by each of the three branches of Indiana government; so, the Advisory subcommittee members who serve in those branches were not asked to take positions on matters likely to come before their colleagues for definitive action.

• *The Right to Counsel in Indiana*

The right to counsel is enshrined in both the Indiana and federal constitutions. Article 1, Section 13 of the Indiana State Constitution provides that “[i]n all criminal prosecutions, the accused shall have the right to . . . be heard by himself and counsel.” The Sixth Amendment to the United States Constitution states that “[i]n all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense.” This right extends to misdemeanor cases as well as felonies.<sup>36</sup> This right also includes the appeal phase of a criminal case.<sup>37</sup> Juvenile defendants also have the right to counsel in juvenile delinquency proceedings.<sup>38</sup>

The complexity of the criminal justice system necessitates counsel be appointed in order to preserve due process. As the Court concluded in *Gideon v. Wainwright*, “reason and reflection require us to recognize that 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>39</sup>

Additionally, the right to counsel exists in other important areas:

- Representation of **incarcerated individuals** is provided in post-conviction proceedings through the State Public Defender.<sup>40</sup>

<sup>36</sup> Brunson v. State, 394 N.E.2d 229 (Ind. Ct. App. 1979), Frazier v. State, 391 N.E.2d 1192 (Ind. Ct. App. 1979).  
<sup>37</sup> Halbert v. Michigan, 545 U.S. 605 (2005); Douglas v. California, 372 U.S. 353 (1963); Ross v. Moffit, 417 U.S. 600 (1974).  
<sup>38</sup> In re Gault, 387 U.S. 1 (1967).  
<sup>39</sup> Gideon v. Wainwright, 372 U.S. 335, 344 (1963).  
<sup>40</sup> I.C. § 33-40-1-2 (2018); Ind. R. of Post-Conviction Remedies § 9.

- **Parents** have the right to counsel when facing Children in Need of Services and Termination of Parental Rights (CHINS/TPR) cases.<sup>41</sup>
- A right to counsel for **juveniles** in some non-delinquency cases.<sup>42</sup>
- A right to counsel when facing **mental health commitments** or when indigent and petitioning to have a person committed.<sup>43</sup>
- A right to counsel for parents when facing **child support contempt** proceedings.<sup>44</sup>
- A right to counsel in **paternity** cases.<sup>45</sup>

• *A Critical Constitutional Right, an Unfunded Mandate on Counties*

To understand why Indiana’s system has certain systemic deficiencies, it is essential to understand how the system was created. Since the 19<sup>th</sup> century, counties have been responsible for providing and paying attorneys to represent Hoosiers who cannot afford counsel. Since 1989, state funding has taken the form of partial reimbursement to counties, resulting in a “mixed” system of public defense funding in Indiana.<sup>46</sup> However, twenty-seven other states have primarily state-funded systems.<sup>47</sup> Indiana retains the “mixed funding” model in part because of how our state, and its various branches of government, grappled with the need to provide lawyers to those who needed them, while also ensuring those attorneys were compensated for their work.

<sup>41</sup> I.C. § 31-32-2-5 (2018); I.C. § 31-32-4-1(2)(2018); In re G.P., 4 N.E.3d 1158, 1163-65 (Ind. 2014).

<sup>42</sup> I.C. § 31-32-4-2(b) (2018) allows that a court may appoint counsel for a child in any proceeding other than delinquency (where the court should appoint). The reason children have representation at CHINS 6 hearings is because that is the one category where only the child can admit – the parent can’t admit on the child’s behalf. I.C. § 31-34-10-7(2018)

<sup>43</sup> I.C. § 12-26-2-2 (2018); I.C. § 12-26-2-5(c)(2018).

<sup>44</sup> In re Marriage of Stariha, 509 N.E.2d 1117, 1121 (Ind. Ct. App. 1987).

<sup>45</sup> Kennedy v. Wood, 439 N.E.2d 1367 (Ind. Ct. App. 1982).

<sup>46</sup> Tennessee Indigent Representation Task Force, Liberty and Justice For All: Providing Right to Counsel Services in Tennessee, 101 (2017) (discussing that eleven other states have a system of funding that is characterized by a combination of local and state funding).

<sup>47</sup> Id.





The Indiana Constitution divides power into three branches: the executive, legislative, and judicial.<sup>48</sup> The Constitution vests the judicial power in the Supreme Court of Indiana, the Court of Appeals, and circuit courts within the counties. The Constitution also gave the legislature the power to create more courts as needed, which have become our system of superior courts.<sup>49</sup> These courts are distributed among Indiana’s 92 counties, which are the local units of government whose names and boundaries are defined by law.<sup>50</sup> Indiana has a strong preference towards local governance and passed the “Home Rule Act” to grant counties “all the powers that they need for the effective operation of government as to local affairs.”<sup>51</sup> The county executive is required to provide the funding to maintain the county courthouse and jail.<sup>52</sup> The elected prosecutor, deputy prosecutor (if applicable) and judges are all state-paid positions.<sup>53</sup> However, the chief public defender, deputy public defenders, and appointed counsel are paid from county funds.

In 1853, some courts in Indiana would appoint attorneys to represent people charged with a crime as part of their duties “as an attorney of the Court.”<sup>54</sup> However, those attorneys were not paid for their services.<sup>55</sup> In one case, an attorney refused to accept an appointment without compensation, and he was held in contempt by the court for this refusal.<sup>56</sup> The Supreme Court of Indiana reversed that decision and held the attorney could not be held in contempt for refusing to work for free.<sup>57</sup>

Therefore, a tension was present between the right of the individual to be represented and the right of the individual lawyer to be paid for his services. As a result, the question arose whether a judge could

order the county to pay for the attorney’s services. In *Webb v. Baird* (1854), the Tippecanoe Circuit Court ordered payment of twenty-five dollars to an attorney for representing a person charged with burglary who could not employ counsel.<sup>58</sup> The county auditor refused to pay the \$25. The attorney filed a petition to order the county to pay.<sup>59</sup> The auditor responded by arguing the Circuit Court had no authority to order the attorney to represent the defendant or order the auditor to pay the attorney out of the county treasury.

The Indiana Supreme Court held the trial court could not demand Baird’s services as an attorney “without any reward,” because it would be unconstitutional under the Indiana Constitution, Art. 1 § 21. That provision of the Indiana Constitution states “[n]o person’s particular services shall be demanded, without just compensation.”<sup>60</sup> The Supreme Court also found the trial court had the power to order Baird be paid by Tippecanoe County. The Court reasoned the county was the responsible entity to pay the attorney’s fee.<sup>61</sup>

*“Yet is the defence of the poor an imperative duty resting somewhere. We have seen that it does not devolve upon the private citizen. It must, therefore, devolve upon the public or some portion of it. . . . It seems eminently proper and just, that the treasury of the county, which bears the expense of his support, imprisonment and trial, should also be charged with his defense.”*<sup>62</sup>

However, the Court also found the judge did not have authority to “fix the measure of compensation,” because “[it] is to be determined by due course of law.”<sup>63</sup>

<sup>48</sup> Ind. Const. art. 3, § 1.

<sup>49</sup> Ind. Const. art. 7, § 1.

<sup>50</sup> I.C. § 36-2-1-1 (2018).

<sup>51</sup> I.C. § 36-1-3-2 (2018).

<sup>52</sup> See I.C. § 36-2-2-24 (2018).

<sup>53</sup> “Judges are officers of the state, and the General Assembly establishes the salaries and benefits of judges.” *Tipton Cty. v. State ex rel. Nash*, 731 N.E.2d 12, 15 (Ind. Ct. App. 2000). See also I.C. § 33-39-6-5(d)(2018). (discussing annual minimum salaries); I.C. § 33-39-6-2(g) (2018) (discussing appointment and salary of deputy prosecutors).

<sup>54</sup> *Blythe v. State*, 4 Ind. 525 (1853).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Webb v. Baird*, 6 Ind. 13 (1854).

<sup>59</sup> *Id.*

<sup>60</sup> IND. CONST. art. 1, § 21.

<sup>61</sup> *Webb*, 6 Ind. at 18-19.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*



Thus, the combined holding of these early cases was that courts have inherent authority to appoint counsel in a criminal case, counsel had a right to “just compensation,” and courts had authority to order the county to pay attorney fees; but, courts did not have inherent authority to set the amount of compensation.

The decision in *Webb v. Baird* led to the enactment in 1899 of the County Reform Law, which stated the courts have no power to bind the county for fees to attorneys beyond the amount of the existing appropriation for that purpose.<sup>64</sup> The impact of the County Reform Law meant attorneys were once again at risk of not being paid for work they completed on behalf of the public. It would be almost forty years until this situation would be litigated again.

In *Knox County Council v. State ex rel. Kirk*, the Knox Circuit Court ordered payment to two attorneys appointed to defend a citizen charged with murder who could not afford counsel.<sup>65</sup> The Knox County auditor refused to pay. The Knox Circuit Court issued a mandate to compel the county council to appropriate sufficient funds to pay the warrants. The County Council responded, arguing under the County Reform Act of 1899 there could be no allowance or recovery against the county unless there was an existing appropriation by the county council at the time. There was no such appropriation.

The Indiana Supreme Court held the County Reform Act denying courts power to bind county for fees to attorneys beyond amount of existing appropriation for that purpose was unconstitutional. The court recognized the citizen had the right to representation, and the lawyer providing the service deserved to be paid:

... it is the duty of courts to see that criminal cases are tried; that these cases cannot be legally tried unless the defendant, if he is a pauper, is provided with counsel; that

attorneys cannot be compelled to serve without compensation; and therefore that, in order to conduct a legal trial, the court must have power to appoint counsel, and order that such counsel shall be compensated if necessary; and that the right to provide compensation cannot be made to depend upon the will of the Legislature or of the county council.<sup>66</sup>

Therefore, after the *Knox County Council* decision, the inherent authority of the trial court to appoint counsel in criminal cases, approve the amount of “just compensation,” and mandate funds if necessary was clearly established. This entire debate over fundamental rights to representation, the provision of counsel, and the right to be paid for one’s services all took place decades before much of the country grappled with the right to counsel, and importantly, these cases were decided under the Indiana Constitution’s right to counsel rather than the federal right.

#### • *The Public Defender Commission Today*

Since 1989, the Commission has been authorized to recommend standards for public defense in capital cases, to adopt guidelines of salary and fee schedules for individual county reimbursement eligibility, and to review and approve requests for reimbursement in capital cases.<sup>67</sup> In 1993, the General Assembly amended the Commission’s statute in P.L. 283-1993 and authorized reimbursement from the public defense fund of 25 percent of a county’s net expenditures in non-capital cases. Effective July 1, 1997, in P.L. 202-1997, the reimbursement level in non-capital cases was amended to provide 40 percent reimbursement of defense services in non-capital cases, except misdemeanors.

The Commission is comprised of 11 members: 3 are appointed by the Governor; 3 are appointed by the Chief Justice; 1 member is appointed by the Indiana Criminal Justice Institute; 2 are members

<sup>66</sup> *Id.* at 413.

<sup>67</sup> To learn more about the Commission, read minutes from prior meetings, and see a detailed report of reimbursements to counties, please visit [www.in.gov/publicdefender](http://www.in.gov/publicdefender).

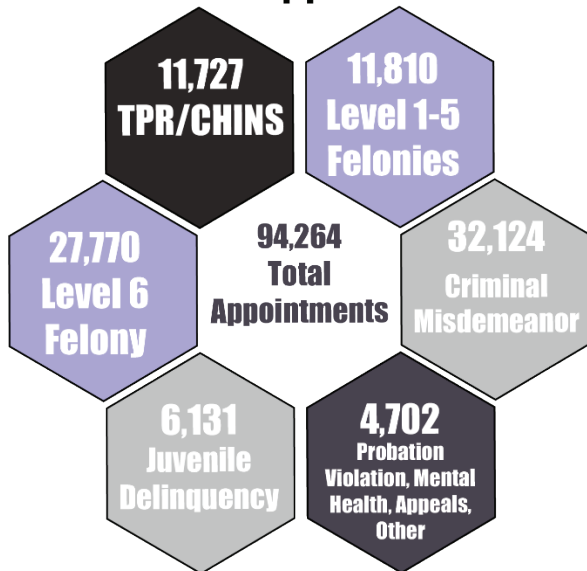
<sup>64</sup> Ind. Stat. Ann. § 2248 (1926).

<sup>65</sup> *Knox Cty. Council v. State*, 29 N.E.2d 405 (Ind. 1940).



of the House of Representatives appointed by the Speaker of the House; and 2 are members of the Senate appointed by the President Pro Tempore of the Senate. The Commission meets quarterly to review claims, authorize reimbursements to eligible counties and review issues related to providing high quality public defense.

## 2017 Reported Public Defender Appointments\*



\*As reported to the Public Defender Commission by participating counties

In death penalty cases, counties may receive reimbursement for 50 percent of applicable expenses. In accordance with Criminal Rule 24(C) (1), the hourly rate for capital cases is adjusted on a biennial basis by the Chief Administrative Officer of the Indiana Office of Judicial Administration. To date, since 1989, the Commission has reimbursed counties **\$13,873,544** for the cost of death penalty defense representation.

In adult felony cases, juvenile delinquency cases, CHINS/TPR cases, and civil commitment cases, eligible counties may receive up to 40 percent reimbursement for their public defense costs conditioned upon compliance with guidelines and caseload standards. The fund began with an appropriation of \$650,000. Today, appropriations to the Public Defense Fund total \$22.25 million. Currently, 68 of 92 counties have comprehensive

plans approved by the Commission for delivery of indigent services and 62 of those counties are eligible for reimbursement in non-capital cases. Currently, some counties that have submitted a comprehensive plan are not seeking reimbursement. The reasons for this decision vary, but may include (1) primary decision makers in a county, including commissioners and council members, may not know about the Commission reimbursement program; (2) concern that the program would cost more to comply with state standards; (3) judges' objections to surrendering control of certain aspects of public defense to a public defender board and/or office. Over 70% of the state's population resides in counties eligible to receive reimbursements in non-capital cases under the program. Since it began reimbursements in 1990, the Commission has reimbursed counties **\$255,873,044** for the cost of non-capital public defense expenses.

Currently, the Commission has promulgated standards in the following areas, as required by law:

- **Eligibility for representation** (Standard C);<sup>68</sup>
- The **qualifications of attorneys** selected to provide public defense (Standards E and F);<sup>69</sup>
- **Compensation** amounts for attorneys providing public defense (Standard G);<sup>70</sup>
- Minimum and maximum **caseloads** allowed for "public defender offices and contract attorneys" (Standard J);<sup>71</sup>
- Collection from defendants of **repayment of public defender costs** (Standard D)<sup>72</sup>

Commission standards require comprehensive plans to address these requirements.<sup>73</sup> The Sixth Amendment Center Report examined how the

<sup>68</sup> Indiana Public Defender Commission, *Standards for Indigent Defense Services in Non-Capital Cases* [hereinafter Non-Capital Case Standards], <https://www.in.gov/publicdefender/files/indigent-defense-non-cap.pdf>.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

Commission has used its authority to bring counties into compliance with its standards.<sup>74</sup> The report concluded the Commission does not have sufficient staff resources to ensure that its standards are adhered to in Indiana counties.<sup>75</sup>

Today, the Commission allows for counties to choose from three separate types of service delivery models for public defense as defined in statute at I.C. § 33-40-7-5: (1) a public defender office; (2) contracts with “an attorney, a group of attorneys, or a private organization,” or (3) “an assigned counsel system of panel attorneys for case by case appointments.” In this report, “public defenders” refers to full-time employees that represent indigent clients.<sup>76</sup> Contract attorneys, on the other hand, are hired by the county on a full or part-time basis. Attorneys are paid an annual amount and are subject to caseload limits. The compensation to the attorney should reflect the lack of those employee benefits and compensate the attorney for his or her time.

Under the appointed model, the court appoints attorneys on a case-by-case basis and pays them an hourly rate. These attorneys are also subject to caseload restrictions. This model does not require ongoing contracts and gives counties the ability to be flexible in the attorneys that work in the system. The current appointed counsel rate of payment for attorneys working in Commission counties is \$90/hour. There is no minimum rate for attorneys outside the Commission.

Finally, a county may choose to establish a public defender office that can employ not only attorneys but investigators, social workers, and other key support staff. The issue of payment for full-time public defenders—which remains a concern for retention and recruitment of attorneys—is discussed later in this report, on page 79.

<sup>74</sup> SIXTH AMENDMENT CENTER, *supra* note 29, at 45.

<sup>75</sup> *Id.* at 46.

<sup>76</sup> Within Commission standards, “full-time” public defenders may still have an unregulated private practice beyond the public cases they are assigned. This is an issue recognized by the Task Force and on page 71-72 the Task Force recommends that full-time and part-time public defenders and assigned counsel account for their entire caseloads, both public and private, to prevent workload overages. The ABA has long recommended that all public defenders receive reasonable compensation and be full-time employees without private practice. See AMERICAN BAR ASSOCIATION, *supra*, note 15, at Std. 5-4.2.

### • *The Case for Reform*

In 2014, the legislature began the process of evaluating and reforming the state’s criminal code, spurring a movement towards criminal justice innovation that has since gained momentum. House Enrolled Act 1006-2014 included a number of provisions designed to increase public safety, reduce recidivism, and provide access to treatment for those in need. The current effort to reform public defense services builds on the reforms that began with a review of the criminal code.

As part of its fact-finding process, the Task Force reviewed key findings from several sources and relied heavily on the advice of nationally recognized experts to develop a set of findings and recommendations. The Task Force would like to thank Dean Emeritus Norman Lefstein, who was a special advisor to the Task Force, and provided a wealth of resources to help inform the Task Force due to his extensive background in public defense matters. The Task Force is also grateful to the National Association of Criminal Defense Lawyers (NACDL), which conducted a series of on-the-ground court observations and provided a summary of those observations to the Task Force in a 2018 memorandum.

Through a statewide listening tour and an extended survey, the Task Force also conducted fact finding of its own, and is grateful to the attorneys and members of the public who appeared at several locations around the state to share stories from their practice and on behalf of their clients. Several key findings emerged, demonstrating while the Commission is an effective vehicle for developing statewide standards consistent with the importance of home rule, significant systemic deficiencies remain in the current system.

1. **Many Hoosiers who qualify for the assistance of a defense attorney are either unable to access counsel or encouraged to represent themselves, even when facing jail time or serious collateral consequences.**





“[W]hen I practice in court and I hear the judges questioning a defendant about their finances as to whether or not they qualify for a public defender . . . for many people it’s a mystery, this is their first time actually being in court . . . and everybody knows what’s going on but that person.”<sup>77</sup>

“[A]t the misdemeanor level I was amazed at how many of my clients, they kind of get by. They basically have housing. They have some kind of work. But just a day or two in jail, and they lose their job. Then they don’t have money for housing or health care. Misdemeanors really are catastrophic for people that are trying to get by.”<sup>82</sup>

The Sixth Amendment Center, in their year-long evaluation of Indiana’s system, found “some counties encourage defendants to negotiate directly with prosecutors before being appointed counsel, accept uncounseled pleas at initial hearings, and/or use non-uniform indigency standards to deny counsel to defendants who would otherwise qualify in another county.”<sup>78</sup> This is not only a problem in Indiana, but nation-wide.<sup>79</sup> The Task Force received additional reports of such practices through the NACDL, which in a memorandum sent to the Task Force in June 2018, reported in some counties, defendants plead guilty without a lawyer the first time they appear in court before a judge.<sup>80</sup>

The Public Defender Commission is statutorily prohibited from reimbursing counties for the cost of misdemeanor representation. The Commission has historically chosen not to enforce caseload standards on attorneys who only represent defendants in misdemeanor cases, since it is unable to reimburse counties for associated costs. As a result, the Sixth Amendment Center found systemic deficiency in the provision of misdemeanor representation in Indiana.<sup>83</sup> Per Commission records, 7 counties have misdemeanor attorneys that exceed the maximum caseload allowed to a full time attorney (Allen, Cass, Clark, Howard, Marion, Shelby, St. Joseph, and Vanderburgh). For example, in Vanderburgh County in 2017, the misdemeanor attorneys had an average of about 1.5 times the allowable caseload for full time attorneys, despite all being nominally part time attorneys. As another example, in Marion County, multiple attorneys exceed 2.5 times the allowable caseload for a full time attorney.

The lack of available counsel is compounded by an inconsistent application of indigency standards.<sup>81</sup> Defendants who could otherwise afford an attorney are at times provided counsel at no cost, while those who cannot afford an attorney are left unable to obtain one. The result is an inappropriate use of public funds in some cases and a denial of the right to counsel in others.

Several of these counties comprise the most populous in Indiana, so a large portion of the misdemeanors in the state are being handled in these courts. Even more so when considering Lake County, which does not report misdemeanors to the commission but is likely similar in character to these counties based on available information. But even ignoring Lake County, these 7 counties comprise 27% of all misdemeanors in the state according to the 2016 Office of Court Services Trial Court Statistics Report. In addition to these 7 counties, there are at least 4 additional counties

**2. The Commission does not reimburse counties for the expenses of misdemeanor cases, despite these cases comprising a significant portion of the overall caseload volume.**

<sup>77</sup> Barbara Boling-Williams, Testimony at the Task Force’s Gary Listening Tour 26, <http://www.in.gov/publicdefender/files/Gary%20Listening%20Tour%2003312018.pdf>.

<sup>78</sup> SIXTH AMENDMENT CENTER, *supra* note 29, at VI.

<sup>79</sup> See NAT’L ASSOC. OF CRIM. DEF. LAWYERS, *MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA’S BROKEN MISDEMEANOR COURTS* (2009).

<sup>80</sup> Memorandum from the Nat’l Assoc. of Crim. Def. Lawyers on Indiana Public Defense Observations to the Indiana Task Force on Public Defense [hereinafter NACDL Memo], 15 (on file with Task Force).

<sup>81</sup> SIXTH AMENDMENT CENTER, *supra* note 29, at VI.

<sup>82</sup> Lucy Frick, Testimony at the Task Force Indianapolis Listening Tour 67, <https://www.in.gov/publicdefender/files/020918Listening%20Tour>.

<sup>83</sup> SIXTH AMENDMENT CENTER, *supra* note 29, at I.



that have part time misdemeanor attorneys that routinely exceed the maximum caseload for part time attorneys, but not at such a level that they also exceed the allowable caseload for full time attorneys.

While misdemeanors carry the lowest criminal penalty, a conviction for even a minor crime can have lifetime consequences. There are 229 “collateral consequences” in Indiana when one is convicted of a misdemeanor.<sup>84</sup> Any one of these 229 collateral consequences could lead to loss of employment and create instability for the individuals, their families, and the communities in which they live.

For example, a student in college receiving federal student aid will become ineligible for further aid for a period of time if convicted of any drug offense, even a misdemeanor.<sup>85</sup> For a first-time college student paying his own way through school, such collateral consequences could prevent him from finishing his education and earning the marketable skills to become a productive community member. An attorney could help such a young person determine if any diversion programs are available or help negotiate a plea or resolution to keep the student eligible for aid and able to finish school.

The issue of misdemeanor representation is so pervasive the United States Senate held hearings on the issue of misdemeanor representation. In that hearing, Republican Senator Chuck Grassley emphasized the importance of representation in these cases: “[w]hen misdemeanor defendants aren’t given counsel, no one can challenge the legality of a traffic stop or to make the prosecution prove every element of an offense beyond a reasonable doubt. So innocent people may be going to jail. In locations where lawyers are provided at every stage of the process, about 25% of all cases are dismissed.”<sup>86</sup>

<sup>84</sup> NACDL Memo, *supra* note 80, at 18, n. 51.

<sup>85</sup> 20 U.S.C.S. § 1091 (2018).

<sup>86</sup> Prepared Statement by Senator Chuck Grassley of Iowa Chairman, Senate Judiciary Committee. Hearing on “Protecting the Constitutional Right to Counsel for Indigents Charged with Misdemeanors” May 13, 2015. Available at: <https://www.grassley.senate.gov/news/news-releases/grassley-statement-judiciary-committee-hearing-protecting-constitutional-right>.

Further explanation of the need for misdemeanor representation is discussed in this report at page 46, in which the Task Force supports additional funding for misdemeanor representation.

### 3. No Commission standards address the quality of services provided to clients. The Commission does not audit the quality of representation provided by attorneys who work in Commission counties. The only audits are for caseloads, compensation, and experience.

The Commission is tasked with promulgating standards to improve county public defense systems. In Commission counties, participation in the reimbursement program is associated with a positive effect on lowering jail populations.<sup>87</sup> However, some standards such as workload limits need reform, as explained further in this report on page 70.<sup>88</sup> Even with the need to update some Commission standards, one-third of the state has no oversight at all because those counties choose not to partake in the Commission reimbursement program. It is unknown whether these counties meet these standards, and the Commission has no statutory authority to audit them. A “majority” of respondents to a survey administered by the Task Force “indicated that they believed representation is inconsistent across the state, pointing to disparity of resources and different mechanisms of delivering public defense as the cause.”<sup>89</sup>

The Sixth Amendment Center Report makes clear in its recommendations that Commission oversight is key: “[c]ounties are free to – and do – forgo state money in order to avoid state oversight. With no state oversight, counties actually and constructively deny counsel for the indigent accused.”<sup>90</sup>

<sup>87</sup> For example, counties that participate in the Commission reimbursement program have a 16% lower jail population than counties that do not follow the quality standards after controlling for relevant county characteristics. For a full explanation of the methodology of how the Commission determines its effectiveness, please see Appendix F.

<sup>88</sup> See discussion *infra* pp. 70-71 Section D, “The Commission should regularly update their attorney workload standards” at 53.

<sup>89</sup> ISP Consultants, *supra* note 14 at 2.

<sup>90</sup> SIXTH AMENDMENT CENTER, *supra* note 29, at 2.





- 4. **While there are many committed, experienced public defenders, there are no specific, ongoing requirements for qualification and training other than for a few specific case types.**

Evaluations by the Sixth Amendment Center, the NACDL, and the National Juvenile Defender Center all identified passionate and dedicated public defenders working throughout the state. The public defenders and appointed attorneys who testified at the Task Force listening tours were powerful advocates for their clients and their profession. However, because there is no ongoing assessment of qualifications or training for specific case types, the quality of service in Indiana varies greatly. As the Sixth Amendment Center Report points out, “even an attorney newly graduated from law school and having just passed the bar examination can be assigned to represent an indigent defendant charged with murder and facing life without parole if convicted” in counties that choose not to join the Commission program.<sup>91</sup> Employment of an attorney with this lack of experience would violate Commission standards.

Cases with high penalties—such as death cases and serious felony offenses—require special training and experience. However, there is also recognition among national experts that other specialty areas, such as juvenile and CHINS representation, require specialized knowledge to adequately represent clients.<sup>92</sup>

The Commission sets educational requirements for CHINS and appellate attorneys, but these trainings are only required once in an attorney’s career in order to become qualified under Commission standards. Criminal Rule 24 requires ongoing educational requirements for attorneys representing persons facing the death penalty. Beyond these provisions, however, the Commission does not set further standards, nor does it evaluate the effectiveness of the education provided by various entities such as the Public Defender Council.

<sup>91</sup> *Id.* at 206.

<sup>92</sup> See, e.g., ABA STANDARDS OF PRACTICE FOR REPRESENTING PARENTS IN ABUSE AND NEGLECT CASES (2006), which calls for specific and ongoing training for attorneys who practice in this area.

- 5. **In many counties, compensation paid to salaried and contractual public defenders is inadequate and creates economic disincentives to follow best practices such as conducting an independent factual investigation prior to advising a client to enter a guilty plea. This problem is compounded by excessive caseloads.**

The practice of payments to lawyers in fixed contract amounts for an unlimited number of cases was identified as a critical flaw in the Sixth Amendment Center Report: “[w]hat Indiana counties have realized is that they can contract with private counsel on a flat fee basis for less money than it would cost them to comply with state standards (even factoring in the state reimbursement).”<sup>93</sup>

The Task Force survey found high caseloads were an issue “even for the most experienced attorneys.”<sup>94</sup> This issue was identified in several different areas, including juvenile and CHINS/TPR. Essentially, the structural deficiencies identified by the Sixth Amendment Center Report serve to “give the accused a lawyer in name only because the lawyer has too many cases or operates under too many financial conflicts to be effective.”<sup>95</sup> This creates a “constitutionally deficient” system.<sup>96</sup>

- 6. **Attorneys in some counties face a conflict of interest because they are employed by the judge before whom they appear; this employment relationship undermines the relationship between the attorney and client.**

In Indiana, attorneys are sometimes directly employed by judges to represent defendants and are paid directly out of court funds for their services. Direct employment by judges has the potential to create conflicts. Judges have an important place in providing views of the attorneys working in their courtrooms, but a direct employment relationship should be expressly prohibited.

<sup>93</sup> SIXTH AMENDMENT CENTER, *supra* note 29, at 2.

<sup>94</sup> ISP Consultants, *supra* note 14, at 7.

<sup>95</sup> SIXTH AMENDMENT CENTER, *supra* note 29, at IX.

<sup>96</sup> *Id.*



*“[I]t is never possible for a judge presiding over a case to properly assess the quality of a defense lawyer’s representation, because the judge can never, for example, read the case file, question the defendant as to his stated interests, follow the attorney to the crime scene, or sit in on witness interviews.”<sup>97</sup>*

The American Bar Association has determined independence from the judiciary the first and most important principle of a well-functioning public defense system.<sup>98</sup>

### **7. Public Defenders and counsel lack access to investigators, experts, social workers, and interpreters.**

In order to provide a full and vigorous defense, an attorney requires more than just legal acumen. It is imperative he or she investigate potential witnesses and follow leads that may exonerate a defendant or lead to evidence mitigating the alleged offense. However, in Indiana, funding these services remains a significant concern, as it does nationwide.<sup>99</sup> More than half of attorney respondents to the task force survey indicated they did not have enough resources to do their jobs to the level they aspire.<sup>100</sup>

Only four out of every 1,000 criminal cases in Indiana (0.4%) are disposed of by jury trial, and 1.0% by bench trial. In their analysis of Indiana, the NACDL found the use of investigators was actively discouraged in some jurisdictions due to cost.<sup>101</sup> Further, the NACDL also found even the most basic of investigative techniques—depositions—were not being used by lawyers, again because of cost.<sup>102</sup>

<sup>97</sup> *Id.* at 100.

<sup>98</sup> AMERICAN BAR ASSOCIATION, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002) [hereinafter ABA Ten Principles], [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_tenprinciplesbooklet.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf).

<sup>99</sup> See, e.g., *Public defenders nationwide say they’re overworked and underfunded*, NBC News (12/11/2017), <https://www.nbcnews.com/news/us-news/public-defenders-nationwide-say-they-re-overworked-underfunded-n828111>.

<sup>100</sup> ISP Consultants, *supra* note 14 at 5.

<sup>101</sup> See INDIANA OFFICE OF COURT SERVICES, Trial Court Statistics (2016) [hereinafter 2016 Trial Court Statistics], <http://www.in.gov/judiciary/iocs/3692.htm>; NACDL Memo, *supra* note 82, at 20.

<sup>102</sup> NACDL Memo, *supra* note 80, at 20.

*When asked if public defender caseloads are manageable, 59.38% of all respondents disagreed with that statement.*

*Source: Survey, Indiana Task Force on Public Defense Executive Summary, p. 5*

Modern forensic and investigative techniques require defense attorneys to draw on resources that did not exist until recent years, i.e. social media, reviews of body camera videos, DNA evidence, etc. Since 1977, Indiana has had 35 people exonerated after being wrongfully convicted.<sup>103</sup> While it would be improper to extrapolate from the number of overturned convictions that lack of investigators was the direct cause, it is clear their assistance can reduce the risk exonerating evidence is missed. The ABA Standards for the Defense Function require the use of investigators—not simply the attorney’s efforts to investigate—as part of their standards for the defense function: “[d]efense counsel should determine whether the client’s interests would be served by engaging fact investigators, forensic, accounting or other experts, or other professional witnesses such as sentencing specialists or social workers, and if so, consider, in consultation with the client, whether to engage them.”<sup>104</sup> The standards also state this assessment should be re-evaluated throughout the case and attorneys should seek the assistance of public funds if the client is unable to pay for the use of experts.<sup>105</sup> In fact, ABA Standards for the Defense Function, Standard 4-6.1, states that defense counsel should not recommend a plea agreement except if a complete factual investigation has not been conducted, unless that disposition would be in the best interest of the client.

<sup>103</sup> National Registry of Exonerations, Indiana-specific records, <https://www.law.umich.edu/special/exoneration/Pages/detailist.aspx?View={faf6eddb-5a68-4f8f-8a52-2c61f5bf9ea7}&SortField=Convicted&SortDir=Asc> (last visited 7/9/2018).

<sup>104</sup> AMERICAN BAR ASSOCIATION, *supra*, note 15, at 4-4.1(d).

<sup>105</sup> *Id.* at 4-4.1(d) and (e).





**8. The creation of new evidence-based practices in pre-trial release requires counsel to be present at the initial hearing.**

The Indiana Supreme Court promulgated Criminal Rule 26 in order to use evidence-based tools and practices. The impact of this rule will facilitate appropriate release of low-risk individuals from jail, reduce jail expenses, and enable many individuals to return to work and support their families earlier than in the current system. However, this new rule may require counsel’s presence at initial hearings to challenge evidence of risk of flight or danger to self or others and argue for appropriate release conditions, if the risk assessment determination is held to be a critical stage.<sup>106</sup>

Robust, well-trained public defense can make a significant difference in a release decision. Attorneys can call witnesses that may be present in court and elicit testimony demonstrating the defendant has a safe and stable place to live and has employment. If successful in advocating for the release of their client, attorneys can help ensure the defendant maintains employment and stability. A number of states have enacted rules requiring defense attorneys to be present at pretrial release determinations, and Indiana would be well-served to follow suit.

**9. National and local litigation over public defense.**

During the past decade especially, numerous states have been sued for systemic failures to provide adequate public defense services resulting in the “constructive denial of counsel.”<sup>107</sup> Overall, at least 38 lawsuits have been brought since the ruling

<sup>106</sup> IND. R. OF CRIM. PROC. 26.  
<sup>107</sup> Strickland v. Washington, 466 U.S. 668 (1984). See summaries of recent litigation in New York, Pennsylvania, California, Washington, Georgia, Missouri, Louisiana, and Idaho at <https://www.nacdl.org/pdlitigation/> alleging the constructive denial of counsel using the factors in *United States v. Cronin*. The Department of Justice has entered Statements of Interest in public defense litigation including, but not limited to: *Hurrell-Harrington v. State of New York*, *Kuren v. Lucerne County, N.P. v. State of Georgia*, *Tucker v. State of Idaho*, and *Wilbur v. City of Mount Vernon*. These statements of interest are available at: <https://www.in.gov/publicdefender/2333.htm>.

in *Strickland v. Washington* in 1984.<sup>108</sup> In some instances, litigation against state or local officials has been the driving factor leading reforms.<sup>109</sup> Given the systemic deficiencies noted in the Sixth Amendment Center Report, litigation in Indiana remains a distinct possibility.<sup>110</sup>

**10. The Public Defender Commission has inadequate staff resources to determine compliance with standards and guidelines.**

Currently, the Commission only employs two attorneys and a total staff of five to monitor compliance with its standards and guidelines. At the time of publication, 62 counties are receiving reimbursement, and subject to fourteen separate non-capital Commission standards. This is in addition to capital attorneys’ compliance with Criminal Rule 24, which applies to all 92 of Indiana’s counties. The Sixth Amendment Center Report found understaffing at the Commission “undermine[s] the state’s intent to construct public defense systems that provide minimal constitutional effectiveness.”<sup>111</sup>

**• Strong Public Defense Helps Heal Communities**

**1. Public Defense Helps Maintain a Fair Criminal Justice System**



In a recent opinion piece published throughout Indiana, Larry Landis, who founded and served as the Executive Director of the Indiana Public Defender Council for over 40 years, explained why public defense is so critical to a well-functioning criminal justice system.<sup>112</sup> His observations help illustrate

<sup>108</sup> Lauren Sudeall Lucas, *Public Defense Litigation: An Overview*, 51 IND. L. REV. 89 (2017).  
<sup>109</sup> For example, in 2007, the State of New York and five counties were sued by the New York State Civil Liberties Union (NYCLU), in *Hurrell-Harrington v. State of New York*, which claimed indigent criminal defense services were underfunded and failed to meet constitutionally-required standards.  
<sup>110</sup> For a further discussion of systemic public defense litigation, please see *Justice Denied*, available at: <https://constitutionproject.org/wp-content/uploads/2012/10/139.pdf>.  
<sup>111</sup> Sixth Amendment Center, *supra* note 29, at 200.  
<sup>112</sup> Larry Landis, Public Defenders help protect liberty, Evansville



how a functioning criminal justice system requires public defenders to protect liberty.

*“Liberty. It’s a word that invokes strong feelings and is deeply-rooted in our nation’s history. The most severe actions the government can take to remove that liberty from a citizen include detention, imprisonment, or death. When it attempts to do so, the government must be held to a high standard. The people who have the duty [to] protect the liberty of citizens against the government are called public defenders. They also protect and serve, because public safety means more than freedom from crime. It also means freedom from unlawful and unjust arrest, detention, and conviction. It also means freedom from abuse of power.”<sup>113</sup>*

Public defenders are the true advocate for their client’s interests, standing by their side as they face an often confusing and intimidating criminal justice system. Every time a public defender zealously defends their client, they are also defending the Indiana and U.S. Constitutions:

*“The right to a lawyer is guaranteed by the state and federal constitutions. It is the bedrock of all constitutional rights in criminal cases. Nevertheless, it is a right that is easily undermined by inadequate funding, overworked lawyers, and lack of independence and oversight. In a system that relies on checks and balances, the right to counsel is provided and funded by the same government that seeks to deprive the citizen of his liberty. There must*

*be adequate checks and balances, transparency, and accountability for quality. If eternal vigilance is the price of liberty, then a close examination of Indiana’s indigent defense services is critical.”<sup>114</sup>*

Well-trained public defenders with adequate staff support are essential, and there is a vital role for private lawyers as well.<sup>115</sup> The Task Force believes in the importance of this constitutional right, and has proposed solutions that help to rectify the deficiencies in Indiana’s system, and ensure “adequate checks and balances” exist to keep our justice system strong.

## 2. Public Defense Can Assist in Reduced County Jail Overcrowding



Because of the policy efforts to transition low-level, non-violent offenders from state incarceration to community-based sanctions, many county jails are experiencing significant overcrowding. Approximately 73% of the jails in Indiana exceed the operating maximum of 80% capacity, with 48% over 100% capacity.<sup>116</sup> Both of these percentages are increasing.<sup>117</sup> A well-trained and well-funded public defense delivery system is critical in assuring persons convicted of crimes receive the most appropriate sentence, which often includes treatment or monitoring options without the need for incarceration. 81.05% of respondents to a survey conducted by the Task Force agree a strong public defender system may reduce jail overcrowding.<sup>118</sup> Certainly, the capital and operational costs to counties for increasing jail bed capacity is significant and, in many cases, beyond the ability of a local unit of government to fund. Counties following the current, voluntary standards for public defense services have a 16% lower jail

Courier & Press (Mar. 13, 2018), <https://www.courierpress.com/story/opinion/readers/2018/03/13/commentary-public-defenders-help-protect-liberty/421463002/>.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> The importance of the private bar is discussed further in this report, at page 66.

<sup>116</sup> INDIANA CRIMINAL JUSTICE INSTITUTE, Annual Evaluation of Indiana’s Criminal Code Reform 75 (2017), [https://www.in.gov/cji/files/Research\\_1006\\_Criminal\\_Evaluation\\_2017.pdf](https://www.in.gov/cji/files/Research_1006_Criminal_Evaluation_2017.pdf).

<sup>117</sup> *Id.*

<sup>118</sup> ISP Consultants, *supra* note 14, at 9.





population than counties that do not adhere to the same quality standards.<sup>119</sup>

Reducing jail population is especially important given the disproportionate impact of incarceration on Indiana’s minority communities: “[a]ccording to data from the U.S. Census Bureau, 50.7% of Indiana’s population is female and 85.6% of the population is white. According to information from the Prison Policy Initiative, while blacks make up just over 9% of Indiana’s population, they account for 34% of its prison and jail population.”<sup>120</sup>

### 3. Public Defense Can Help Reduce Recidivism

*“The penal code [of Indiana] shall be founded on the principles of reformation, and not of vindictive justice.”<sup>121</sup>*



Despite the problems in Indiana with public defense enumerated above, public defense representation contributes to effective results. Most would agree the ultimate test of the effectiveness of the criminal justice system is its ability to reform an individual into a productive and self-sufficient member of society. Criminal defense attorneys, both private and public, are important actors in the criminal justice system who not only serve the needs of their clients but also contribute to the goals of lowering recidivism. Commission counties currently have a 20% lower rate of low-recidivism-risk individuals incarcerated in Department of Correction facilities.<sup>122</sup> One potential mechanism for this difference is that robust public defense enables low-risk individuals to be placed in alternative sentences allowing them to continue to contribute to society.

### 4. Public Defense Can Help Increase Workforce Development

<sup>119</sup> See *infra* App. F: Methodology.

<sup>120</sup> NACDL Memo, *supra* note 80, at 7. (citing U.S. Census Bureau, Quick Facts About Indiana, population estimates for July 1, 2017, <https://www.census.gov/quickfacts/IN> (last visited June 15, 2018); Prison Policy Initiative, Indiana Profile, <https://www.prisonpolicy.org/profiles/IN.html> (last visited June 15, 2018)).

<sup>121</sup> IND. CONST. art. 1, § 18.

<sup>122</sup> See *infra* App. F: Methodology of original research by Commission staff.

*“And I have seen these people go from being drug addicts, from getting NARCAN two or three times, to being very productive members of our society. They go to work every day. They are there on time. They work hard. They bring home a paycheck. They take care of themselves. That’s a big difference from where they are now.”<sup>123</sup>*



With low unemployment rates and Indiana’s ongoing efforts to focus on workforce development, arrest and incarceration are barriers to an individual participating in gainful employment.<sup>124</sup> In testimony to the Task Force, a representative from the Indianapolis Urban League noted many of the individuals in their workforce development program have criminal histories “serve as a barrier to finding gainful and lasting employment.”<sup>125</sup> When an individual is arrested and subsequently spends weeks or months incarcerated in a county jail with no access to an attorney, that individual has a strong potential to shift from an able-bodied member of Indiana’s workforce to a state taxpayer fiscal liability.

### 5. Public Defense Helps Preserve Families



The recently-released evaluation of Indiana’s Department of Child Services contained the finding that number of court-involved cases in DCS is more than double the national average. Beyond the obvious harm to familial stability, the separation of parents from their children takes a dramatic fiscal toll on Indiana. Estimates show returning a child to the home from foster care saves Indiana taxpayers at

<sup>123</sup> Jack Gay, Testimony at the Indiana Task Force Indianapolis Listening Tour 87-88, <https://www.in.gov/publicdefender/files/020918Listening%20Tour.pdf>.

<sup>124</sup> As of June 2018, Indiana’s unemployment rate was at 3.3%. UNITED STATES DEPARTMENT OF LABOR, BUREAU OF JUSTICE STATISTICS, ECONOMY AT A GLANCE, <https://www.bls.gov/eag/eag.in.htm> (last visited July 31, 2018).

<sup>125</sup> Letter from Tony Mason, President & CEO, Indianapolis Urban League, to the Task Force (on file with the Task Force). Letter from James Abbs, Chief Public Defender of Noble County, to the Indiana Task Force on Public Defense 1-2 (on file with the Task Force).

least \$8,135.85 per year.<sup>126</sup> While cost should never outweigh the safety or well-being of a child, it is the attorney who is charged with the difficult, yet critical, task of representing the interests of parents in these often heartbreaking court proceedings and to seek a just and fair resolution. Parents involved in these cases are frequently less sophisticated at maneuvering through the court system, therefore legal advocacy on their behalf can make a substantial difference. Children in out-of-home care due to CHINS proceedings are kept there for a 9% (50 day) shorter time period in Commission counties as compared to non-Commission counties.<sup>127</sup>

#### 6. *Investments in Public Defense Result in Reduced Costs to State Prison System*



Individuals in counties following Commission standards receive on average 140-day shorter sentences in DOC facilities, as measured by the Net Fixed Term of Incarceration (FTI).<sup>128</sup> Each prisoner costs the DOC \$55.55 per day, according to the 2017 DOC per diem report. In 2017 the DOC admitted 9,020 new prisoners according to the 2017 Offender Population Statistical Report.<sup>129</sup>

These are only a few of the collateral benefits the State of Indiana will reap by following the recommendations in this report for enhancing Indiana's public defense services. This report makes findings and recommendations to address overall structural concerns with the current state and local delivery systems, as well as the impact on right to counsel at all critical stages and quality of representation. Areas of specialization are separately addressed along with recommendations as to how best to improve access and quality in juvenile defense, CHINS/TPR cases, and post-trial services.

<sup>126</sup> Based on the Indiana DCS published per diem rate for a child aged 5-13 in foster care of \$22.29, retrieved 6/22/2018 at <https://www.in.gov/dcs/2985.htm>.

<sup>127</sup> See *infra* App. F: Methodology of original research by Commission staff.

<sup>128</sup> *Id.* The FTI is a measure of the true time-to-be-spent associated with a prisoner's sentence after accounting for concurrent sentences. IND. DEPT. OF CORRECTION, ADULT OFFENDER CLASSIFICATION POLICY MANUAL 13 (2015), [https://www.in.gov/idoc/files/01-04-101\\_Adult\\_Offender\\_Classification\\_11-1-2015.pdf](https://www.in.gov/idoc/files/01-04-101_Adult_Offender_Classification_11-1-2015.pdf).

<sup>129</sup> IND. DEPT. OF CORRECTION, THE OFFENDER POPULATION STATISTICAL REPORT, 9, (2017), The Offender Population Statistical Report Calendar Year 2017, p. 9, <https://www.in.gov/idoc/files/2017%20Year%20End%20Review.pdf>.

#### • *The Broader Movement Toward Criminal Justice Reform*

The American Bar Association found “[e]fforts to reform indigent defense systems have been most successful when they involve multi-faceted approaches and representatives from a broad spectrum of interests.”<sup>130</sup> The Task Force acknowledges the important reforms are taking place thanks to efforts from the Indiana General Assembly, the Indiana Supreme Court, and the Executive Branch.

The Indiana Supreme Court has a number of ongoing programs to modernize and improve the state's judicial system. Among the many projects currently underway include grant initiatives for court improvement, interpreters, family courts, and veteran's courts. The Court has special projects focusing on juveniles through the Juvenile Detention Alternative (JDAI) teams as well as guardian *ad litem*/court appointed special advocate programs (GAL/CASA).

The Court has recognized the impact of the opioid epidemic on Indiana and has responded through a number of programs, including the expansion of problem solving courts. There are plans to have over 100 problem-solving courts within the state by the end of 2019.<sup>131</sup> As of 2018, there were 87 problem-solving courts in 45 counties. Additionally, the Court has committed to early intervention and treatment for people suffering from addiction.

Indiana is a participant in the Evidence-Based Decision Making in State and Local Criminal Justice Systems Initiative. This effort, founded by the National Institute of Corrections, has worked to promote “the practice of using research findings to inform or guide decisions across the justice system.”<sup>132</sup> The Supreme Court was instrumental in ensuring Indiana was awarded funding to implement reforms in Indiana's courts. There are currently eleven counties with pilot programs

<sup>130</sup> GIDEON'S BROKEN PROMISE, *supra* note 31, at 40.

<sup>131</sup> ANNUAL REPORT, *supra* note 23.

<sup>132</sup> Nat'l Inst. Of Corrections, <https://info.nic.gov/ebdm/> (last visited July 31, 2018).





dedicated to using new and innovative pre-trial practices that will increase court attendance and create better outcomes for those in need.<sup>133</sup>

*“People with substance use disorder have a disease and they cannot overcome it alone. Recovery involves support, respect and growth in the community and the individual.” – NextLevel Recovery<sup>134</sup>*

The Task Force would also like to acknowledge the work of the Executive Branch in responding to the opioid crisis through the creation of the Executive Director for Drug Prevention, Treatment, and Enforcement and NextLevel Recovery. In Executive Order 17-01, Governor Eric Holcomb recognized “since 1999, the State of Indiana has seen a 500% increase in the rate of drug overdose deaths, with thousands of Hoosiers losing their lives as a result of drug overdoses in recent years.”<sup>135</sup> The Governor’s office has been proactive in creating inter-agency, inter-disciplinary teams to tackle this ongoing epidemic. The NextLevel Recovery initiative provides “access to resources for prescribers, emergency personnel, community leaders, and persons with substance use disorder and their families.”<sup>136</sup> The Governor’s office has taken steps to increase treatment, access to funding, and to increase data collection efforts to effectively target initiatives to reduce opioid use disorder and to prevent abuse.<sup>137</sup>

The Task Force would also like to recognize the innovative work being implemented by the Public Defender Council in the area of public defense advocacy and training. In 2017, the Public Defender Council conducted numerous trainings in both large and small-group format, including 20 regional CLEs on topics ranging from Evidence & Ethics

to DNA training to resilience training for public defenders. The Council also conducts statewide specialized training on topics such as appeals and juvenile law as well as an Annual Update drawing public defenders and defense attorneys from across the state. The Council also conducts an annual seminar on Capital Defense, a New Lawyer Training, and a “Train the Trainer” seminar to improve in-house public defense trainers in offices around the state. The Council also conducted outreach to the Madison and Hamilton County Bar Associations as well as Legislative Services through Case law updates. In addition, the Council provides individual assistance for lawyers through their legal help line, and conducted 22 individual case reviews for attorneys throughout that year who requested assistance preparing their cases for trial. The efforts by the Council increase education and awareness of the importance of public defense reform throughout the state.

### Findings and Recommendations

Over the past several decades, a majority of states have moved to statewide defense programs headed by boards or commissions that have authority over all facets of public defense.<sup>138</sup> According to one report, “the majority of states (28) now essentially fully fund public defense (i.e., provide more than 90% of the funding).”<sup>139</sup> Since 2009, three more states have created statewide bodies with full or partial authority over the delivery of public defense services. Michigan, Idaho, and Utah have enacted laws providing for a state commission for public defense services. Now, a clear majority of states have created programs placing total control of public defense at the state level. In fact, there is only two states in the country that provide no financial support for public defense, i.e. Pennsylvania and South Dakota.<sup>140</sup>

Indiana is one of minority of states with a statewide commission but with only partial oversight of public

<sup>133</sup> INDIANA SUPREME COURT, PRE-TRIAL RELEASE: AN INDIANA SUPREME COURT PROJECT (2018), <https://www.in.gov/judiciary/iocs/files/pretrial-informative-handout.pdf>.

<sup>134</sup> NextLevel Recovery, *supra* note 25.

<sup>135</sup> Exec. Order 17-01, *supra* note 26.

<sup>136</sup> NextLevel Recovery, *supra* note 25.

<sup>137</sup> For a full list of actions taken since January 2017, please visit: <https://www.in.gov/recovery/files/NLR%20accomplishments%2006.18.pdf>.

<sup>138</sup> Norman Lefstein, *Will We Ever Succeed in Fulfilling Gideon’s Promise?*, 51 Ind. Law Rev. 1, 48 (2018).

<sup>139</sup> The Constitution Project, *Justice Denied* 53 (2012), <https://constitutionproject.org/wp-content/uploads/2012/10/139.pdf>.

<sup>140</sup> TENNESSEE INDIGENT REPRESENTATION TASK FORCE, *supra* note 46, at 102.

defense within the state. However, the Indiana Public Defense Commission should be continued, with increased funding, oversight, authority, and responsibility for public defense within the state's 92 counties. By doing so, Indiana can make significant, measurable progress in improving its public defense services without a fully state-managed system.

### A. The Task Force identified key areas for immediate reform.

- *The Commission should be authorized to reimburse misdemeanors.*

#### Background:

The State of Indiana provides the right to counsel in “criminal misdemeanor[s].”<sup>141</sup> In 1993, the General Assembly authorized the Commission to reimburse counties 25% of their expenditures in non-capital cases, including misdemeanors, if the services complied with standards adopted by the Commission.<sup>142</sup> In 1998, the legislature increased non-capital reimbursement from 25% to 40% but eliminated reimbursement for misdemeanor cases.<sup>143</sup>

State funding kept pace with the increasing number of counties eligible for reimbursement until 2001, when the Commission prorated the reimbursement amount pursuant to statute due to a lack of state funding.<sup>144</sup> Since 2008, funding has been adequate to fully reimburse all counties that voluntarily choose to comply with Commission standards.<sup>145</sup>

While the Commission has caseload standards that include misdemeanors, the Commission does not enforce caseload limits on attorneys who practice exclusively in misdemeanor cases, because the Commission is unable to provide reimbursement in those cases.

<sup>141</sup> Brunson v. State, 394 N.E.2d 229 (Ind. Ct. App. 1979).

<sup>142</sup> P.L. 283-1993.

<sup>143</sup> I.C. § 33-40-6-4 (2018).

<sup>144</sup> INDIANA PUBLIC DEFENDER COMMISSION, <https://www.in.gov/publicdefender/2337.htm> (last visited 8/16/2018).

<sup>145</sup> *Id.*

### Findings and Recommendations:

The statutory prohibition of misdemeanor reimbursement has led to an unequal application of standards across the counties, and even within the Commission's participating counties. As the Sixth Amendment Center Report said: “misdemeanors matter.”<sup>146</sup>

Misdemeanors are by far the largest volume of cases in the criminal courts in Indiana. The Indiana Supreme Court online data system for 2016 reports a total of 144,136 new misdemeanor cases filed, more than double the number of felony cases. Approximately 8 out of every 10,000 misdemeanors (0.08%) are disposed of by jury trial, and approximately one out of every 100 (1.2%) by bench trial.<sup>147</sup> Counsel was appointed in only 36% of misdemeanor cases.<sup>148</sup> The high volume of misdemeanor cases in many courts can result in pressure for speedy dispositions and “assembly line justice.”<sup>149</sup> The consequences of a misdemeanor conviction can be significant, including loss of liberty, driving privileges, denial of educational loans, housing, and employment opportunities or professional licenses.<sup>150</sup> Defendants may bear the cost of heavy fees and fines as a result of misdemeanor proceedings, without regard to whether or not the individual is able to afford to pay.<sup>151</sup>

While national organizations have recognized the collateral consequences of misdemeanors nationwide, in Indiana, the consequences are also significant. For example, a person experiencing homelessness may be tempted to take food from a grocery store. They may be offered a time-served

<sup>146</sup> SIXTH AMENDMENT CENTER, *supra* note 29, at 1.

<sup>147</sup> 2016 Trial Court Statistics, *supra* note 101.

<sup>148</sup> OFFICE OF COURT SERVICES, INDIANA JUDICIAL SERVICE REPORT 74, 717 (2016) [hereinafter Judicial Service Report], <https://www.in.gov/judiciary/iocs/files/rpts-ijs-2016-judicial-v2-statistics.pdf>.

<sup>149</sup> *Argersinger v. Hamlin*, 407 U.S. 25, 36 (1972).

<sup>150</sup> See ROBERT C. BORUCHOWITZ, MALIA BRINK & MAUREEN DIMINO, NAT'L ASSOC. OF CRIMINAL DEFENSE LAWYERS, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICAN'S BROKEN MISDEMEANOR COURTS, 12-13 (2009), <https://www.nacdl.org/reports/misdemeanor/> 12-13. See also *Hopper v. State*, 957 N.E.2d 613, 625 (Ind. 2011) (Noting that certain misdemeanor convictions “carry devastating collateral consequences ranging from deportation, to eviction from public housing, to barriers in employment.” (Rucker, J., dissenting)).

<sup>151</sup> *Id.* at 13.





plea agreement, which resolves the case quickly. However, if they commit the very same act again, even if the theft is something as small as a candy bar, that person will be facing a felony, because the crime of criminal conversion is a Level 6 felony on the second offense.<sup>152</sup> With competent representation, the defendant may be assisted by a social worker, or directed into a diversion program that can prevent a conviction from ever being entered.

The consequences of misdemeanor convictions also affect other important rights, such as the Second Amendment. For example, it is not a requirement to have a permit to carry an unlicensed firearm on one's own property.<sup>153</sup> However, if a person was to be arrested for carrying a handgun without a license because the officer was unaware that the person resided at the property, it would be unlikely for the average citizen to represent himself well enough to ensure that his innocence was protected in court. He would then lose his privilege of gun ownership if convicted of the offense even though he had a valid defense.

This concern has been noted by organizations within Indiana as well: “[t]he reality of legal representation without competent counsel is very troubling to the Indianapolis Urban League because there are real consequences and losses to persons who are incarcerated such as losing their job, homes, spouses, and child custody, in certain cases.”<sup>154</sup> Granting the Commission the statutory authority and funding to reimburse for misdemeanors is critical to ensure counties can afford to have adequate counsel in these important cases.

- *The state should fund and manage a centralized state appellate office to provide direct services, oversight, and support.*

## Background:

The Sixth Amendment Center Report recommended

<sup>152</sup> I.C. § 35-43-4-2 (2018).

<sup>153</sup> I.C. § 35-47-2-1(b) (2018).

<sup>154</sup> Letter from Tony Mason, Indianapolis Urban League, to the Indiana Task Force on Public Defense (on file with the Task Force).

the creation of a statewide appellate defender office for Indiana.<sup>155</sup> In response, the Task Force created a Subcommittee centered on how Indiana's current system of appellate and other post-trial services is structured, funded and delivered, and what strengths and deficiencies may exist within the system. In addition to multiple interviews, document reviews and examination of other state systems, the Subcommittee also relied on various national standards to determine the key attributes of an effective system of appellate and post-conviction representation.<sup>156</sup>

Indiana's appellate indigent defense representation is county-based and county-funded, subject to reimbursement by the Commission. Approximately 1,200 public defender appeals are litigated annually when combining all of the areas where there is a right to appointed counsel.<sup>157</sup> Marion County has an appellate office with full time attorneys, and it uses several contract attorneys to handle additional cases. In other counties, the practice ranges from experienced lawyers who handle mostly appellate cases, sometimes for multiple counties, to lawyers with relatively no experience, sometimes handling cases in which they served as trial counsel. The lack of experience at the appellate level compounds the issues of representation that may have arisen at the trial stage.

## Findings and Recommendation:

The quality of appellate representation varies widely, as confirmed by discussions with appellate judges and lawyers from the Attorney General's office. Currently the only requirement is a one-time, six-hour training requirement for attorneys handling appellate cases for reimbursement—and no requirements in non-Commission counties.

<sup>155</sup> SIXTH AMENDMENT CENTER, *supra* note 29, at IX.

<sup>156</sup> These include the *ABA Ten Principles of a Public Defense Delivery System, Standards and Evaluation Design for Appellate Defender Offices*, and the *ABA Criminal Justice Standards for the Defense Function*.

<sup>157</sup> Information is reported through the Indiana Court of Appeals Annual Report (2017) which notes 1117 criminal cases received and fully briefed. See <https://www.in.gov/judiciary/appeals/files/2017-coa-annual-report.pdf>. See also Annual Report, *supra* note 134 (indicating 484 criminal cases disposed of. While there is no data indicating how many of these are appointed counsel cases, it is estimated that 80- 90% of criminal appeals are pauper appointments).

Appellate practice is specialized and requires regular training and supervision to be effective. With rare exceptions, there is no supervision by an experienced appellate attorney, consultation on issues, feedback on briefings, or the filing of other motions. Lawyers in some counties are appointed (and at the mercy for future appointments) by the very same judge whose reversal they are seeking on appeal. The development of Indiana criminal law and procedure suffers, creating future problems for litigants and trial courts confronted with inconsistent opinions or poorly litigated claims.

Creation of a statewide appellate office to centralize appellate representation, including criminal, juvenile, CHINS/TPR cases, and other cases eligible for public defenders can and should include the ability to contract services to qualified appellate advocates as needed and provide regional support as appropriate. The Chief Public Defenders and the Indiana Public Defender Council Board unanimously recommended a centralized appellate office, which they believe would increase the quality of representation. The Task Force was impressed by the collaborative approach in Marion County, where appellate lawyers offer advice and assistance to trial lawyers throughout a case, which can improve trial-level outcomes and ensure a well-developed record for appeal. The Marion County model could easily be broadened through regional offices or a centralized office with specialized appellate counsel. Separate standards are needed for appellate practice which can meet national standards for supervision, training, mentoring of new lawyers, and specific performance measures for attorneys' work product. Also, removing the burden of appeals from counties will free up additional resources to be used in existing public defense systems.

Finally, a statewide appellate office can save money. Well-trained staff can perform administrative tasks, such as collecting documents and compiling the Appendix, with far greater efficiency and at less cost than appellate lawyers spread throughout the state who are currently doing the work.

Experienced and well-trained appellate lawyers are able to write more effective briefs in less time than someone asked to do an appeal for the first time, or a lawyer who has never dealt with the issues being raised.

Further information may be found in the Report of the Appellate Subcommittee located in Appendix I.

- *Counties should be authorized to enter into agreements to create a multi-county public defense delivery system with a regional Chief.*

### **Background:**

There are 92 counties in Indiana.<sup>158</sup> As is not surprising for a state whose motto is the “Crossroads of America,” our counties contain a wide variety of population and geography; the largest county in Indiana had an estimated 950,082 residents in 2017 while the smallest had an estimated population of 5,828.<sup>159</sup> Currently, each county must individually apply to receive reimbursement from the Commission.<sup>160</sup> In order to be eligible for reimbursement, counties must pass an ordinance to create a Public Defender Board, and then submit a Comprehensive Plan for how public defense will be provided in their counties.<sup>161</sup> According to state law, the Public Defender Board The Board's first duty is to decide the method of providing public defense under I.C. § 33-40-7-5. The Chief Public Defenders currently serve terms of not more than four years but may be reappointed. They may be removed from the office only by a showing of good cause.<sup>162</sup>

<sup>158</sup> I.C. § 36-2-1-1 (2018).

<sup>159</sup> STATS INDIANA, [http://www.stats.indiana.edu/population/popTotals/2017\\_cntyest.asp](http://www.stats.indiana.edu/population/popTotals/2017_cntyest.asp).

<sup>160</sup> I.C. § 33-40-7-3 (2018).

<sup>161</sup> I.C. § 33-40-7-5 (2018).

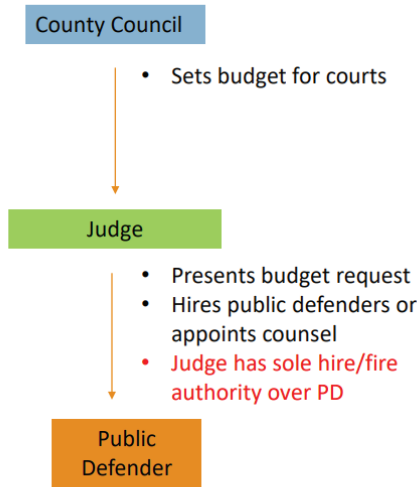
<sup>162</sup> I.C. § 33-40-7-6 (b) (2018).



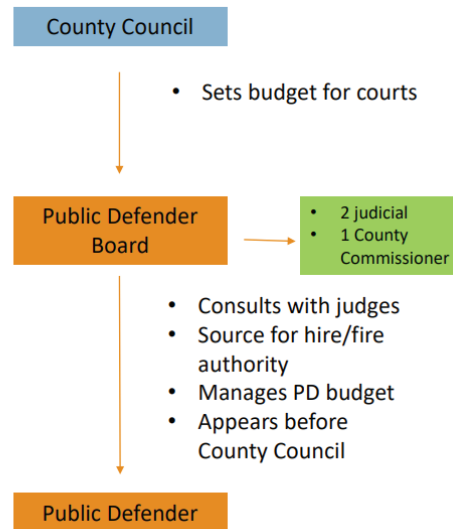


# County Public Defense Structure

## Typical Non-Commission County



## Commission Counties



Counties with a population of less than 12,000 are exempted from the requirement of having a Public Defender Board at all.<sup>163</sup> There are no current provisions to allow for counties to create a multi-county Board or share attorneys, even though attorneys may work in multiple counties in their private practices. Other practices in court innovation, such as in Indiana’s Family Courts, are promoting information sharing and coordination as a way to create more positive outcomes for persons within the family court system.<sup>164</sup>

### Findings and Recommendations:

The Task Force recommends counties continue to retain the authority over which type of public defense delivery system is right for their community, i.e., public defender office, contracts, or an assigned counsel system. The Task Force also determined it is helpful to retain county boards to ensure the primary funder of public defense maintains a pivotal role in making local policy decisions. The proposed changes to the county boards increase independence from the

judiciary while recognizing counties will remain primary funders of public defense.

The Task Force recommends amending I.C. § 33-40-7 to allow counties to develop multi-county public defense systems. If a multi-county system is developed, counties and the Commission should enter into a memorandum of understanding (MOU) specifying the cost-sharing by the counties. The multi-county system should be managed by a regional chief public defender. If the multi-county system would not want to fund a county-paid regional chief, they should be provided with a state-paid chief employed by the Commission.

Every county, whether in a multi-county system or individually, should have a person monitoring and managing the quality of counsel in the jurisdiction. Even under the proposed change to allow multi-county systems, there may still be counties that elect to work individually with the Commission and forego a Chief or other local manager of quality. Further study should be made to determine how best to ensure every county has someone accountable for the quality of public defense. As part of this issue, the Commission should explore whether the exemption for counties with a population of less than 12,000 should remain exempt from the requirement for a public defender board. The

<sup>163</sup> Non-Capital Case Standards, *supra* note 68, at 3. (stating that a county with a population over 12,000 persons shall establish a county public defender board).

<sup>164</sup> FRANCES G. HILL & LORETTA A. OLEKSY, INDIANA SUPREME COURT, VISION AND EVALUATION: THE INDIANA FAMILY COURT PROJECT, <https://www.in.gov/judiciary/family-court/2361.htm>.

Commission should also study whether there should be increased standards for county-paid Chief public defenders.

## **B. The Task Force recognizes the need for independence in an effective public defense system.**

- *Public defense attorneys should be as independent as possible from the judge before whom they appear.*

### **Background:**

In Indiana, judges have the inherent authority to appoint lawyers to represent people accused of crimes who cannot otherwise afford an attorney. In counties with a population of less than 400,000, judges are authorized to contract with an attorney or group of attorneys to provide public defense services.<sup>165</sup> These practices create a direct employment relationship between the judge and lawyer who is being paid to represent the client. While a lawful practice, it may give the appearance of a conflict of interest. The Sixth Amendment Center Report determined the lack of independence of the public defense system from the judiciary is a systemic deficiency in Indiana's current system.<sup>166</sup> Counties are not required to join the Commission reimbursement program, and at this time, only 62 of 92 counties participate.<sup>167</sup>

### **Recommendations:**

An attorney representing a client at public defense should be a zealous advocate for their client. As one practicing attorney stated, “[i]t takes courage to be a public defender.”<sup>168</sup> Although judges may continue to make indigency determinations, judges should not make direct appointments of individual attorneys in criminal cases. Attorneys practicing public defense should not be directly employed by judges. This principle is also supported by the

American Bar Association and its Ten Principles of a Public Defense Delivery System and in prior recommendations. These Principles were created to give guidance on how to create a well-functioning and constitutionally-sound public defense system. The very first of the Ten Principles recommends the “public defense function, including the selection, funding and payment of defense counsel, [be] independent.”<sup>169</sup> The principles further recommend the public defense function “should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel.”<sup>170</sup>

In any employment scenario, there is a natural and justified inclination for an employee to wish to please their supervisor. However, an attorney's primary duty must be to his client. A key aspect of an effective attorney-client relationship is trust. It is essential clients know the public defender system is free from any actual or perceived judicial management in the adjudication of their case.

The independence of counsel is constitutionally protected, and a lack of independence can “violate[ ] the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.”<sup>171</sup> It is a vital attribute of an effective public defense system and essential to zealous representation. High-quality legal advocacy should be uniformly provided through independent advocates regardless of whether services are organized at the state, regional, or local level.<sup>172</sup>

In the vast majority of cases in which judges directly hire counsel, local judges are acting in good faith. Nevertheless, the systemic issues have led to judges being in control of local public defense services require statutory reform. Removing the administrative burden of managing public defense services from the duties of local judges will likely be seen as a welcomed respite by the courts.

<sup>165</sup> I.C. § 33-40-8-1 (2018).

<sup>166</sup> See SIXTH AMENDMENT CENTER, *supra* note 29, Ch. 11.

<sup>167</sup> Indiana Public Defender Commission, <https://www.in.gov/publicdefender/2383.htm> (last visited Aug. 1, 2018). See also *infra* p. 51 (discussing the issue of independence).

<sup>168</sup> Written Testimony of Stacy Uliana, on file with the Task Force.

<sup>169</sup> ABA TEN PRINCIPLES, *supra* note 98, Principle 1.

<sup>170</sup> *Id.*

<sup>171</sup> *Strickland v. Washington*, 466 U.S. 668, 686 (1984). See also, *Powell v. Alabama*, 287 U.S. 45, 62 (1932).

<sup>172</sup> NAT'L LEGAL AID AND DEFENDER ASSOC., GUIDELINES FOR LEGAL DEFENSE SYSTEMS 145; IND. R. OF PROF. CONDUCT 5.1 – 5.2.



## C. Reforms are needed at the state level.

- *The state should acknowledge a duty to provide effective and competent defense counsel for those who cannot afford representation.*

### Background:

Article 1, Section 13 (a) of the Indiana Constitution guarantees the right for all Hoosiers “to be heard by himself and counsel.” United States Supreme Court case law says the right to counsel found in the federal constitution is ultimately a duty to be discharged by the states.<sup>173</sup> Although early case law placed the responsibility of providing and funding public defense services on Indiana counties, neither the legislature nor the courts have shifted this responsibility to the state, except for providing county reimbursements through the Public Defender Commission.

### Findings and Recommendations:

Indiana statutes and regulations do not make clear the ultimate responsibility for the provision of public defense services lies with the state, although the obligation is deeply enshrined in constitutional jurisprudence.<sup>174</sup>

While the Commission was established to create standards and guidelines for reimbursement of public defense services for counties choosing to participate in the reimbursement program, counties are not required to participate or comply with its standards. Roughly one-third of counties are not receiving reimbursement because they choose not to participate in the state reimbursement system which requires compliance with Commission standards.<sup>175</sup> But in counties that do not participate, the State still has a duty to ensure that defense services are effective and competent.

<sup>173</sup> Gideon v. Wainwright, 372 U.S. 335 (1963).

<sup>174</sup> “We accept *Betts v. Brady*’s assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is ‘fundamental and essential to a fair trial’ is made obligatory upon the States by the Fourteenth Amendment. We think the Court in *Betts* was wrong, however, in concluding that the Sixth Amendment’s guarantee of counsel is not one of these fundamental rights.” *Gideon*, 372 U.S. at 342.

<sup>175</sup> INDIANA PUBLIC DEFENDER COMMISSION, ANNUAL REPORT 8 (2017). <https://www.in.gov/publicdefender/files/Annual%20Report%202016%202017%20FINAL.pdf>.

Meanwhile, the Commission has been placed in the awkward position of having to balance the needs for compliance with standards while simultaneously working to keep counties involved in the reimbursement program when they are otherwise free to leave. The Commission has no authority to impose remedial consequences for counties that systemically deny access to counsel, and/or fail to provide effective representation, other than to withhold reimbursement. The Sixth Amendment Center Report identified the lack of uniformity as one of the key issues facing Indiana:

Though the procedures and forms to apply for reimbursement are the same for every county participating in the non-capital reimbursement program, the Commission applies the rules differently to the 55 participating counties. There is one main reason for this: the Commission by statute has only the modest offer of partial reimbursement of some expenses to use as an enticement to counties to meet standards.<sup>176</sup>

It is ultimately Indiana’s responsibility to provide for effective and competent defense counsel for those who cannot afford representation. Since counties are a creation of the state, the state may continue to delegate some responsibilities to the counties. However, the ultimate responsibility rests at the state level and, if counties discharge the duty, they are bound to furnish effective and competent services, lest the State ultimately is held liable for county deficiencies.

- *The state should guarantee that counsel is provided at all critical stages of the proceeding.*

### Background:

All persons in Indiana who are charged with a felony or misdemeanor and not able to hire a lawyer are entitled to counsel at public expense at trial and on appeal.<sup>177</sup> Additionally, under a Criminal Rule

<sup>176</sup> SIXTH AMENDMENT CENTER, *supra* note 29, at 52.

<sup>177</sup> SIXTH AMENDMENT CENTER, *supra* note 29, at 8 (citing to U.S. CONST. AMEND. VI; IND. CONST. art. 1, § 13(a); *Gideon v. Wainwright*, 372 U.S. 335 (1963)).

26 of the Indiana Rules of Criminal Procedure, “[i]f an arrestee does not present a substantial risk of flight or danger to themselves or others, the court should release the arrestee without money bail or surety subject to such restrictions and conditions as determined by the court,” with certain exceptions for murder, treason, or if the person is already on supervised release.<sup>178</sup> To determine whether a defendant should be held before trial, “the court should utilize the results of an evidence-based risk assessment approved by the Indiana Office of Court Services, and such other information as the court finds relevant.”<sup>179</sup>

The use of an evidence-based risk assessment tool is a departure from the current practice in most Indiana counties. The use of this tool may require a defense attorney to be present to advocate for the defendant’s release.

The vast majority of criminal cases do not go to trial. According to the 2016 Trial Court Statistics Report published by the Office of Court Services, only 0.4% of all criminal cases are disposed by jury trial, with an additional 1.0% being disposed by bench trial. When broken out by case type, 1.1% of felony cases go to trial, and 0.6% to bench trial. Conversely, the majority of criminal cases are disposed by guilty plea, at 61.5% of cases. The remaining cases are disposed by bench disposition (1.8%), dismissal (23.6%), diversion (10.9%), and “other” (0.7%).<sup>180</sup>

The United States Supreme Court recognizes the importance of counsel for plea negotiations.<sup>181</sup> Therefore, the “negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.”<sup>182</sup> In setting guidelines for effective representation, the Public Defender Council lists twelve different factors defense counsel should be “completely familiar with” including, but not limited to, the

implications of foregoing trial; the benefit of a negotiated sentence range; the possibility of parole, and the right to a sentence modification in the future.<sup>183</sup> Absent a defense lawyer, an unrepresented defendant is unlikely to be able to cope with this range of issues.

### Findings and Recommendations:

The guarantee of counsel is not applied consistently in Indiana courts; attorneys should be appointed and ready to advocate on behalf of their client at the initial hearing, and representation should continue through appeal if necessary. The Sixth Amendment Center Report identified “uncounseled pleas at initial hearings” as a major issue within the state.<sup>184</sup> This is troubling as the acceptance of the plea at the initial hearing means it is unlikely the defendant ever had time to speak to an attorney to learn fully the consequences of conviction.

An attorney should be present for any proceedings after the right to counsel attaches unless there is a valid waiver of the right.<sup>185</sup> Data compiled by the Commission from the Indiana Office of Court Services shows in 2016, only 36% of misdemeanor defendants received appointed counsel, while 75% of low-level (Level 6) felony cases and 85% of major (Level 1-5) felony cases received appointments.<sup>186</sup>

The Office of Court Services collects information about unrepresented litigants from all courts in the state, but this information is often underreported, with many courts reporting 0 unrepresented litigants in most or all case types. Despite this, there is still evidence of counties with many unrepresented litigants in criminal cases. In the 2016 report (the most recent currently available), at least 20 counties demonstrate non-representation rates of at least

<sup>178</sup> IND. R. CRIM. PROC. 26(A)

<sup>179</sup> IND. R. CRIM. PROC. 26(B).

<sup>180</sup> 2016 Trial Court Statistics, *supra* note 101.

<sup>181</sup> See *Laffler v. Cooper*, 566 U.S. 156(2012); and *Missouri v. Frye*, 566 U.S. 134, 143-144(2012).

<sup>182</sup> *Frye*, 566 U.S. at 144.

<sup>183</sup> INDIANA PUBLIC DEFENDER COUNCIL, PERFORMANCE GUIDELINES [hereinafter IPDC PERFORMANCE GUIDELINES], 6.2(b) (2012).

<sup>184</sup> SIXTH AMENDMENT CENTER, *supra* note 29, at VI.

<sup>185</sup> *State v. Taylor*, 49 N.E.3d 1019, 1024 (Ind. 2016). Waiver of counsel during custodial interrogation, which was at issue in the *Taylor* case, does not mean that a defendant has waived their right to counsel when their case comes to court.

<sup>186</sup> 2016 Trial Court Statistics, *supra* note 101. The appointment of counsel necessary for submission of statistics, and thus the trial court numbers on this may not be entirely accurate as reported.





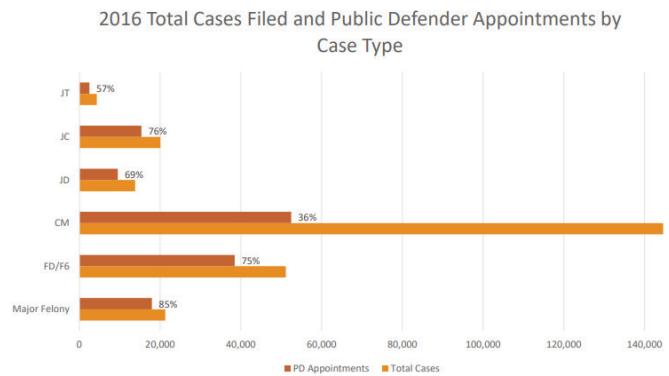
20% in misdemeanors. At least seven demonstrate the same in minor felonies (F6 and FD), and at least six demonstrate the same in major felony cases.<sup>187</sup> It is estimated nationally that over 80% of those charged with felony cases in the country’s largest jurisdictions are without the means to hire lawyers.<sup>188</sup> Some studies have estimated the number to be as high as 90%.<sup>189</sup>

The importance of counsel cannot be emphasized enough; however, the performance guidelines issued by the Public Defender Council help to demonstrate the depth of knowledge that defense counsel should present to each and every client. In Guideline 6.2, The Contents of the Negotiation, the Council states “counsel should be aware of, and make sure the client is fully aware of” the following items before developing a strategy for the resolution of the case:

- (1) the maximum term of imprisonment and fine or restitution that may be ordered, and any mandatory punishment or sentencing guideline system;
- (2) the possibility of forfeiture of assets;
- (3) other consequences of conviction such as deportation, denial of naturalization or refusal of reentry into the United States and other civil disabilities;
- (4) any possible and likely sentence enhancements or parole consequences;
- (5) the possible and likely place and manner of confinement;
- (6) the effect of good-time credits on the sentence of the client and the general range of sentences for similar offenses committed by defendants with similar backgrounds;

- (7) possible loss or suspension of driver’s license;
- (8) possible adverse consequences on the client’s employment or education;
- (9) Sex Offender Registration Act (I.C. 11-8-8 et. seq.)
- (10) the possibility or lack thereof of future modifications.<sup>190</sup>

Without qualified counsel, few defendants would be able to weigh these issues and make informed legal decisions.



The right to counsel in Indiana attaches at all critical stages of the proceeding.<sup>191</sup> A critical stage are those instances in the proceeding in which “the defendant is confronted with the intricacies of the law or the advocacy of the public prosecutor or prosecuting authorities.”<sup>192</sup> Under current law, and the current practice, the initial hearing is not such a “critical stage.”<sup>193</sup> However, changes to the initial hearing procedure may soon convert that event into a critical stage.

Lawyers in most counties are not appointed at initial

<sup>187</sup> *Id.* We specify “at least” this many counties because we excluded any counties that we judged as likely to have inaccurate data, e.g., reporting more unrepresented litigants than total filings. Due to this, as well as the potential underreporting of unrepresented litigants, the actual number of counties with high rates of unrepresented litigants in these case types are likely to be higher.

<sup>188</sup> CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, DEFENSE COUNSEL IN CRIMINAL CASES (2000), <https://www.bjs.ov/content/pub/pdf/dccc.pdf>.

<sup>189</sup> BUREAU OF JUSTICE ASSISTANCE, U.S. DEPT. OF JUSTICE, CONTRACTING FOR INDIGENT DEFENSE SERVICES: A SPECIAL REPORT (2000), <https://www.ncjrs.gov/pdffiles1/bja/181160.pdf>.

<sup>190</sup> IPDC PERFORMANCE GUIDELINES, *supra* note 183, at Guideline 6.2(a).

<sup>191</sup> Indiana case law has a broader scope of when counsel is necessary than the United States Constitution. See *Taylor v. State*, 689 N.E.2d 699, 703–04 (Ind. 1997), (noting that pursuant to Ind. Const. art. I, § 13 “the Indiana right provides greater protection because it attaches earlier—upon arrest, rather than only when “formal proceedings have been initiated” as with the federal right.”). However, *Taylor* also states: “The Indiana Constitution does not require a lawyer to be present during custodial interrogation irrespective of the suspect’s wishes. If the suspect requests counsel, that is the end of the matter until counsel is finished. But it is up to the suspect to make that request [for counsel] after being advised of his right to do so.” *Id.*

<sup>192</sup> *Williams v. State*, 555 N.E.2d 133, 136 (Ind. 1990)

<sup>193</sup> *Benner v. State*, 580 N.E.2d 210 (Ind. 1991).



hearings or when bail is set.<sup>194</sup>

However, it is critical lawyers be present and ready to argue at the initial hearing. This is a national issue pervasive enough it compelled Professor Lefstein, who is leading a committee to update the Ten Principles of a Public Defense Delivery System, to suggest the Ten Principles make clear effective public defense begins at the initial hearing:

*“Even though the law favors pretrial release of defendants pending an adjudication of guilt, defendants charged with nonviolent offenses, who are not flight risks or dangerous to their community, routinely remain in jail due to money bonds that they cannot afford, sometimes losing their employment as a result.”<sup>195</sup>*

Without lawyers at the initial hearing, individuals may make decisions, unguided by counsel, that cause lasting damage. The Sixth Amendment Center Report noted the half-measure in one county in which lawyers served as informal advisors at the initial hearing, but were not actually appointed to represent individuals. The report emphasized how dangerous this practice was, and in doing so illustrated why counsel is so critical to help a defendant make the best decision for their case:

*“[t]he problem is that the defendants who plead guilty at initial hearings think they have a lawyer when in fact they do not. The lawyer is not securing discovery from the state, interviewing witnesses, examining evidence, reviewing statutes, or negotiating directly with the prosecutor on behalf of the defendant – all of the things lawyers should do to determine if the plea offer is good or bad.”<sup>196</sup>*

Criminal Rule 26 is a departure from the current practice in which bail is set according to a bail schedule and counsel is rarely present when this occurs. It will be essential to have counsel present

when this rule becomes effective. Further, given that a very large majority of defendants plead guilty in our system, it is essential lawyers be appointed to ensure individuals do not make life-altering decisions without adequate information and legal advice.

- ***The state should ensure every court that hears cases with a right to counsel meets Commission standards for quality.***

**Background:**

Under current practice, participation in the Commission reimbursement program is voluntary. Unless a county participates in the Commission reimbursement program, there is no guarantee minimum standards of representation are met.

**Findings and Recommendations:**

In Indiana, there should be no “justice by geography.” Every Hoosier in Indiana should have the same access to a quality public defense system. Every county should be required to meet the standards for representation set out by the Public Defender Commission. This recommendation draws from the recognition that the state ultimately is responsible for the quality of public defense. If the state retains ultimate responsibility, it must also retain the means to ensure quality is achieved through enforcement mechanisms. The Task Force supports further research and study into the best way to ensure uniform standards across the state.

In the current Commission framework, the sole remedy available to address county non-compliance is to withhold reimbursement. This remedy is a half-measure at best. For this method to be effective, it requires (1) the county currently participate in the Commission reimbursement program, and (2) the value of reimbursement outweigh the consequences of simply leaving the reimbursement program.

<sup>194</sup> SIXTH AMENDMENT CENTER, *supra* note 29, at 111.

<sup>195</sup> NORMAN LEFSTEIN, TIME TO UPDATE THE ‘ABA TEN PRINCIPLES’ FOR THE 21<sup>ST</sup> CENTURY, THE CHAMPION 46 (2016).

<sup>196</sup> SIXTH AMENDMENT CENTER REPORT, *supra* note 29, at VI.



*75.03% of respondents to a survey administered by the Task Force agree that the State should impose mandatory standards for indigent defense statewide.*

*Indiana Task Force on Public Defense Survey Executive Summary, p. 9*

The Sixth Amendment Center identified the lack of a mechanism to guarantee minimum standards as a critical flaw to the current system.<sup>197</sup> For some jurisdictions, the cost of compliance may be more than local leaders are willing or able to spend, even if the funding level renders the system constitutionally inadequate. Without a mechanism beyond the threat of withholding reimbursement, some counties may still fail to adequately fund their public defense services due to myriad commitments for local funding beyond public defense.

The Task Force considered a number of different methods to ensure compliance on the public defense delivery system. Several remedies were considered, taking into consideration a combination of factors to assist a county in achieving constitutionally adequate levels of funding and staffing. No particular recommendations for enforcement are endorsed by the Task Force. However, the Task Force encourages the Commission to ensure that enforcement is a part of the compliance plan.

The Task Force recognizes that while the achievement of uniform standards statewide is not an immediate goal, the Commission should create a timeline with a phase-in period to bring the entire state into compliance with Commission standards, to prevent the goal from remaining an indefinite aspiration.

- ***Greater state oversight, funding, and technical support should be provided in specialty areas such as parental representation in CHINS/TPR cases and juvenile delinquency cases.***

## Children in Need of Services & Termination of Parental Rights

### Background:

When the Indiana Department of Child Services determines it must intervene in the familial relationship between a parent and child because the child may be in danger, that case is called a Child in Need of Services (CHINS) case.<sup>198</sup> When the state determines the parent cannot be rehabilitated and the relationship between parent and child should be terminated, the state will file a Termination of Parental Rights (TPR) case.<sup>199</sup> For many, the loss of a child would be as significant as the loss of one's liberty.

The dramatic increase over the last five years of CHINS/TPR filings has required the appointment of many more public defenders to represent parents, and sometimes children. From 2012-2016, for example, the number of children in foster care in Indiana increased by 60%, the fourth highest rate in the country.<sup>200</sup> Like every other part of the system, public defenders have felt the impact in rising caseloads and escalating costs.

The cost for defense representation is also absorbed by the counties, with 40% state reimbursement for eligible counties. Based on caseload statistics reported to the Commission, many county public defender programs across the state have struggled to stay within caseload standards and to meet the demand for counsel.<sup>201</sup>

The challenges of providing CHINS/TPR representation to parents include many of the same challenges identified throughout this report: lack of independence, lack of oversight and compliance monitoring, high caseloads, and an overall lack of resources and time to adequately provide effective representation. Also, the civil nature of these

<sup>198</sup> I.C. §§ 31-34-1-1 to 16 (2018) (circumstances under which a child is a child in need of services).

<sup>199</sup> I.C. §§ 31-35-2-1 to 8 (2018).

<sup>200</sup> Emily Forman, *Number of Kids in Child Welfare System Strains Public Defenders*, WTIU (Feb. 19, 2018), [https://indianapublicmedia.org/news/number-kids-child-welfare-system-strains-public-defenders-141413\\_\(last\\_visited\\_August\\_16,\\_2018\).](https://indianapublicmedia.org/news/number-kids-child-welfare-system-strains-public-defenders-141413_(last_visited_August_16,_2018).)

<sup>201</sup> *Id.*

<sup>197</sup> SIXTH AMENDMENT CENTER REPORT, *supra* note 29, at 52.

cases (often coupled with long-term intensive family services, out of home placements, and the possibility of permanent severing of parent rights) requires specialized training, skills and resources not available in all public defender programs. For full-time public defender offices, such as Marion County, representing parents in CHINS/ TRP cases poses frequent conflicts with juvenile delinquency cases. In smaller counties, these attorney conflicts are much more difficult to manage due to the small pool of attorneys with the specialized training necessary to manage these cases.

The data available on appointment rates in CHINS/ TPR cases comes primarily from the office of Court Services as reported by counties. Based on this dataset, 23.5% of parents facing a CHINS proceeding are not represented by appointed counsel, and 42.7% of parents are unrepresented by appointed counsel in TPR cases.<sup>202</sup> Some proportion of these may have hired their own private counsel, but it is unlikely to represent the entirety of the unrepresented individuals.

For those who are appointed counsel, the timing of the appointment often occurs after critical events have already happened, including removal of the child from the home. A delay in the appointment of counsel may place both the parent(s) and the child(ren) at a disadvantage throughout the rest of the proceedings.

Parent representation in CHINS/ TPR cases is subject to minimal standards, mostly related to caseloads, with minimal required training. Outside Marion County, there is little-to-no use of social workers or other interdisciplinary team members. There is minimal formalized state technical assistance available. Performance standards, both in and out of court, are not currently required. These key elements, if incorporated into standards which are monitored and enforced, can provide better outcomes for children and families, result in lower removal rates, and return children home sooner

<sup>202</sup> The appointment of counsel is not a mandatory field for completion; as such, the trial court numbers on this may not be entirely accurate as reported. See 2016 Trial Court Statistics, *supra* note 104.

from out of home placement.<sup>203</sup>

### Findings and recommendations:

Greater oversight and funding for CHINS/TPR parent representation is particularly timely and can help to address multiple concerns recently raised by the Child Welfare Policy and Practice Group in the recent Evaluation of the Indiana Department of Child Services.<sup>204</sup> The report notes Indiana's out-of-home placement rates have risen almost 90% in recent years, and is one of the highest in the country. While a multitude of recommendations are made by evaluators, it is clear diverting many cases from child welfare involvement is key to lowering rates, finding better alternatives, and narrowing the category of cases which require involvement by the Department of Child Services.<sup>205</sup> The report also supports the need for strong representation of all parties in CHINS/TPR cases.<sup>206</sup>

The representation of parents in CHINS/TPR civil cases is not synonymous with the practice of criminal law. While the Task Force stops short of recommending the separation of these cases from public defense work, all major recommendations in this report regarding greater support efforts that impact criminal law should also be construed to apply equally to this practice area.

A division within the Commission should be established to launch a pilot program to improve the quality and quantity of legal representation for parents in CHINS/TPR cases. This is particularly timely based on the reforms that will likely be proposed by the Department of Child Services based on the recently-completed evaluation. The goal of this pilot program would be to increase the involvement of specialty-trained lawyers and social workers in key counties throughout the state currently experiencing high out-of-

<sup>203</sup> ADMINISTRATION FOR CHILDREN AND FAMILIES, U.S. DEPT. OF HEALTH AND HUMAN SERVS., HIGH QUALITY LEGAL REPRESENTATION FOR ALL PARTIES IN CHILD WELFARE PROCEEDINGS 10-11 (Jan. 17, 2017) [hereinafter High Quality Legal Representation], <https://www.acf.hhs.gov/sites/default/files/cb/im1702.pdf>.

<sup>204</sup> See CHILD WELFARE POLICY AND PRACTICE GROUP, EVALUATION OF THE INDIANA DEPARTMENT OF CHILD SERVICES (2018), <https://www.in.gov/dcs/files/IndianaEvaluationReportCWGFinal.pdf>.

<sup>205</sup> *Id.* at 6-10.

<sup>206</sup> *Id.* at 17.





home placement rates. The desired outcome of this demonstration project would be to improve outcomes for families by offering parents higher quality legal representation. A reduction in out-of-home placements could also result in reduced expenditures by DCS from the Children and Family Fund.

Further information may be found in the CHINS/TPR Subcommittee Report located in Appendix H.

## Juvenile Delinquency

### Background

Since 2015, Indiana has been receiving federal grant funding from the Office of Juvenile Justice and Delinquency Prevention (OJJDP) to develop a state plan to improve the juvenile public defense system. The Indiana plan called for a statewide juvenile defense office to consolidate juvenile defense training, policy work, post-dispositional and trial level support and technical assistance.<sup>207</sup> It also called for greater accountability of juvenile defense practices through standards, additional oversight, and improved data collection and performance indicators.<sup>208</sup>

There are promising practices in some jurisdictions which recognize the specialized nature of juvenile defense and have well-trained, highly qualified defenders doing this work. A federal grant from OJJDP to the Indiana Public Defender Council is providing quality intensive training on juvenile issues to rural defenders and technical assistance to lawyers on juvenile cases throughout the state. This juvenile project is also working with youth in the Department of Correction to screen for appellate and other relief. Continuation of this work is important to maintain improvements in our juvenile defense delivery system realized through the federal grant.

Juvenile defense is a specialized area of practice

which requires skilled, well-resourced and trained lawyers.<sup>209</sup> Youth are entitled to early appointment of counsel and representation at all critical stages until the youth is no longer subject to dispositional orders.<sup>210</sup> Effective representation should be client-centered, developmentally-appropriate and bias free.<sup>211</sup> Juvenile defenders should have access to expert and ancillary services to provide quality services, including mental health experts, education specialists, social workers, paralegals, interpreters, and forensic experts.<sup>212</sup>

In January 2015, the Indiana Supreme Court enacted Criminal Rule 25 which requires mandatory appointment of counsel in certain delinquency proceedings and prohibits waiver of counsel unless made in open court, on the record and confirmed in writing in the presence of the child's attorney.<sup>213</sup> Even after the enactment of Criminal Rule 25, in 2016, 30% of delinquency cases saw no attorney appointed.<sup>214</sup> The OJJDP Implementation Grant staff has identified a number of youth at the Department of Corrections since April 2017 who were committed without having had the benefit of counsel. Lawyers are often not assigned to be present with youth at the initial hearings, particularly when youth are not detained.

### Findings and recommendations:

The study of appellate and other post-dispositional advocacy for youth in Indiana requires further development. From January 2010 through 2015, there were 298 appeals of delinquency cases, 58% of which came from Marion County. Among the remaining 91 counties, a combined total of 124 appeals were filed in six years. Nearly half of counties had no appeals during the six-year period studied.<sup>215</sup>

<sup>207</sup> INDIANA PUBLIC DEFENDER COUNCIL, INDIANA STATEWIDE PLAN FOR JUVENILE DEFENSE IMPROVEMENT 29 (2016).

<sup>208</sup> *Id.* at 57.

<sup>209</sup> Nat'l Juvenile Def. Cent., Nat'l Juvenile Def. Stds. 1.1, 1.3 (2013) [hereinafter Juvenile Standards].

<sup>210</sup> *Id.* at 1.1, 6.1; I.C. §§ 31-32-2-2, 4-1; D.H. v. State, 688 N.E.2d 221, 223 (Ind. Ct. App. 1997). See also *In re Gault*, 387 U.S. 1 (1967); IND. CONST. art. 1, Sec. 13; IND. CRIM. R. 25; I.C. § 31-32-4-2.

<sup>211</sup> IND. R. PROF. CONDUCT 1.2; Juvenile Standards, *supra* note 209, at 1.2.

<sup>212</sup> Juvenile Standards, *supra* note 209, at 1.3; *Ake v. Oklahoma*, 470 U.S. 68 (1985).

<sup>213</sup> IND. CRIM. R. 25.

<sup>214</sup> 2016 Trial Court Statistics, *supra* note 101.

<sup>215</sup> These numbers were calculated based upon the number of JD appeals



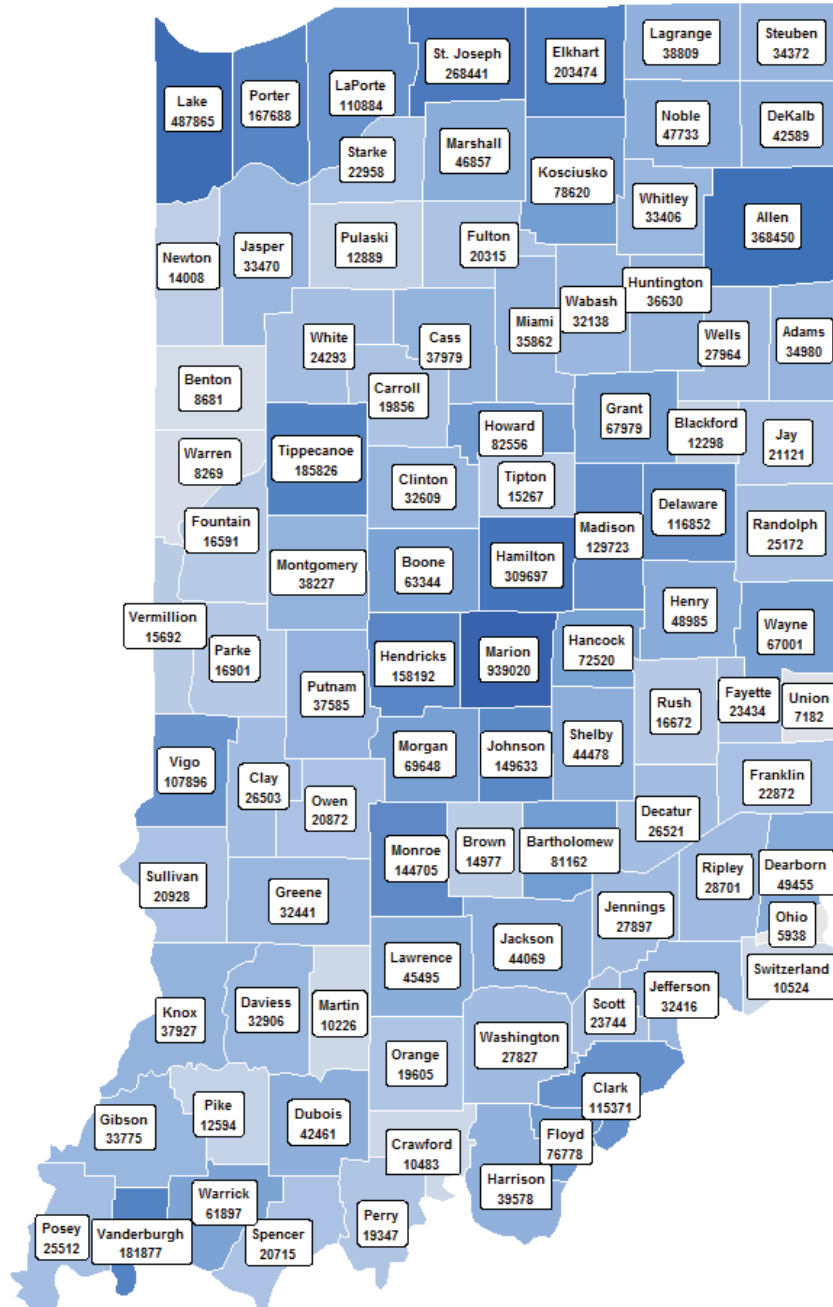
An increased focus on juvenile-specific training for public defenders is needed. This is particularly problematic in rural areas where part time public defenders handle fewer juvenile cases and may lack critical support services. Access to ancillary services such as social workers, education advocates and other experts is particularly important to obtain support needed by youth as part of the rehabilitative process. The current Commission standards for juvenile defense do not require any juvenile specific training for public defenders handling delinquency cases.

The Task Force recommends a permanent specialty office be created to facilitate centralized oversight and application of specific juvenile defense standards and training requirements; opportunities for regional, juvenile specific training; increased access to counsel; increased access to experts, investigators, social workers and other litigation support; and the collection of annual reporting of data and juvenile specific performance indicators. Ideally, this state level juvenile office would be able to provide direct representation for youth post-disposition. Further information may be found in the Juvenile Subcommittee Report located in Appendix G.

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filed according to Indiana Supreme Court and Court of Appeals decisions and dockets.





*Population by County (2015)*

*In considering changes to Indiana’s current system, the Task Force reviewed current population estimates for Indiana’s counties.*

*Source: <http://www.stats.indiana.edu/population/popTotals/2015-county-estimates.asp>. Stats Indiana Public Data Utility, sourced from the US Census Bureau.*

### C. Reforms are needed at the county level.

- *County Public Defender Boards should have no more than one judicial appointment and have strengthened requirements for Board training and standards.*

#### Background:

The enactment of I.C. §§ 33-40-7-1 and 33-40-7-12 in 1991 authorizing the creation of county public defender boards created an opportunity for public defense attorneys to be removed from the direct employment by judges. I.C. § 33-40-7-3 requires one member of a local board be appointed by the county executive, and two members appointed by the felony and juvenile court judges, the latter which cannot be from the same political party. Board members cannot be prosecutors, law enforcement officers, or other court employees, and should have a “demonstrated interest in high quality legal representation for indigent persons.”<sup>216</sup> The public defender board has the sole authority to determine the method by which defense services are provided to local courts, to select the attorneys who provide services, and to recommend the necessary budget to the county.<sup>217</sup>

In counties that do not participate in the Commission reimbursement program, judges may be directly involved in the hiring, compensation, and appointment decisions for lawyers. Even in counties participating in the Commission reimbursement program, the local public defender boards may still be directly or indirectly influenced by local judges who appoint a majority of the board members.

#### Findings and Recommendations:

The Sixth Amendment Center Report found the current administration of public defender boards are not effective in managing the quality of appointed counsel and public defenders in the county. In fact: “[t]he Commission does not require counties to provide information about whether a board is

actually meeting regularly, or at all, and limited staff prevents the Commission from conducting independent audits. Despite this, there have been many instances when it was discovered counties’ plans did not reflect day-to-day realities.”<sup>218</sup> The Task Force also heard testimony from the president of one county public defender board, who stated his board “doesn’t really work.”<sup>219</sup> He advocated for major changes to his system, including full-time public defenders, better staffing, and supervision.<sup>220</sup>

To remedy this systemic deficiency, public defender boards should have strengthened requirements for composition, training, and standards for membership; the role of public defender boards should be limited to deciding how public defenders are hired, deciding who will manage the public defenders (whether a county-paid chief or supervision by a Commission-paid Regional Public Defender), and ensuring fiscal responsibility.

Under the proposed changes to the Commission program, the counties would retain a public defender board. However, the composition could be re-organized to include more county stakeholders. The Task Force recommends at least one appointment to the board be a Commission appointment, with the opportunity for the county to expand the board further. Adding more members will increase the amount of input into the quality of the public defense system in the county. Community advocates should be an important voice on the board to greater reflect the community it serves. Diversity of thought and backgrounds is an important factor to consider when selecting members. There is precedent for this practice in civil legal aid, where members of the Legal Services Board include former clients.<sup>221</sup>

<sup>218</sup> SIXTH AMENDMENT CENTER, *supra* note 29, at 47.

<sup>219</sup> Jack Gay, *supra* note 123, at 90.

<sup>220</sup> *Id.* at 91.

<sup>221</sup> INDIANA LEGAL SERVICES, BYLAWS § 1.5.4, (stating “at least one-third of the directors serving on the Board of Directors shall be eligible clients of the Corporation when appointed, and shall be appointed by a variety of appropriate groups (and never less than two) designated by the Board that reflect, to the extent possible, the variety of interests within the client community, and that may include, but are not limited to, client and neighborhood associations and community-based organizations which advocate for or deliver services or resources to the client community served by the Corporation.”), <https://www.indianalegalservices.org/sites/>

<sup>216</sup> I.C. § 33-40-7-3(b) (2018).

<sup>217</sup> I.C. §§ 33-40-7-6(a)(1), 33-40-7-8(b), (c) (2018).





- *The county or multi-county defense plan should include appointment of the private bar.*

**Background:**

In many counties throughout Indiana, the private bar is being utilized on an assigned counsel basis, either appointed directly by judges or by a Chief Public Defender. However, there are no current Commission standards nor statutes requiring the private bar be used alongside full-time or contract public defenders.

**Findings and Recommendations:**

The active participation of the private bar is critical to the overall success of Indiana’s public defense services. Indeed, “[o]nly if private lawyers are substantially involved in providing defense representation is it usually ever possible for fulltime defenders to maintain reasonable caseloads.”<sup>222</sup>

The use of the private bar creates an “*elastic supply of lawyers*” able to help ensure full-time public defenders are not overburdened.<sup>223</sup>

The ABA Standards for Providing Defense Services states “[e]very system should include the active and substantial participation of the private bar.”<sup>224</sup> There are several successful programs in other states that closely include the private bar as part of their overall public defense delivery system in what may be called a “mixed system of representation.”<sup>225</sup>

The ABA Eight Guidelines regarding excessive caseloads specifically state a public defense plan should include an option for a public defense provider to assign cases to members of the private

bar “in return for reasonable compensation of their services.”<sup>226</sup>

As local defense plans are created for approval by the Commission, the plan should demonstrate how and when the private bar will participate to address excessive caseloads. The private bar also has a critical role in addressing multiple defendant cases, particularly in CHINS and TPR representation. The private bar is often well-suited to address those and other matters (such as mental health commitments) due to the civil nature of those proceedings and the alternative legal specialization and experience required. The plan should also outline the management structure to be utilized when private members of the bar are assigned to individual cases, avoiding a process requiring judicial appointment.

Although a robust use of the private bar has many potential benefits, there are also potential concerns that should be addressed in the local defense plan. Private attorney caseloads should be monitored to ensure compliance with similar standards as full-time public defenders. Compensation and monitoring should both be robust enough to allow either the local public defense management structure to exclude members of the private bar who have exhibited a pattern of providing inadequate representation to public defense clients.

- *The Commission should study how to implement regional support of social workers and investigators, and consider pilot programs.*

**Background:**

While Commission Standards require the participating counties have “adequate facilities and equipment, such as computers, telephones, facsimile machines, photocopying, and specialized equipment required to perform necessary investigations,” there is no auditing by Commission staff to ensure

[indianalegalservices.org/files/ILS%20Bylaws%20as%20amended%2003.15.13.pdf](http://indianalegalservices.org/files/ILS%20Bylaws%20as%20amended%2003.15.13.pdf).

<sup>222</sup> Norman Lefstein, Time to Update the ‘ABA Ten Principles’ For the 21<sup>st</sup> Century, *The Champion* (2016), 44.

<sup>223</sup> NORMAN LEFSTEIN, AMERICAN BAR ASSOCIATION, SECURING REASONABLE CASELOADS 231 (2011). [hereinafter *Securing Reasonable Caseloads*], [https://www.americanbar.org/content/dam/aba/publications/books/ls\\_sclaid\\_def\\_securing\\_reasonable\\_caseloads.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_securing_reasonable_caseloads.authcheckdam.pdf).

<sup>224</sup> AMERICAN BAR ASSOCIATION, *supra*, note 15, at Standard 5.1-2.

<sup>225</sup> See also Norman Lefstein, *supra* note 222, at 43-44 (citing the Massachusetts Committee for Public Counsel Services, the District of Columbia Public Defender Service, the San Mateo County, California, Private Defender Program. “In each, including the two public defender programs, there is an ample supply of private lawyers available to accept cases, which enables the public defenders and the private lawyers in San Mateo County to maintain reasonable caseloads.”). P. 43-44; *Securing Reasonable Caseloads, supra* note 223, at ch. 8.

<sup>226</sup> AMERICAN BAR ASSOCIATION, EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS Guideline 5 (Dec. 2009) (stating that public defense providers should consider taking prompt actions such as arranging for some cases to be assigned to private lawyers in return for reasonable compensation for their service).



these requirements are actually met.”<sup>227</sup> Inadequate resources has been identified as an issue by public defenders practicing in Indiana.<sup>228</sup> The use of experts and investigators, while a reimbursable expense for Commission counties, is an area ripe for justified expansion. Under current standards, “adequate staffing” allows for attorneys to have a caseload approximately 20-25% higher than if not provided support staff because the attorney is free to be more efficient.

### Findings and Recommendations:

*“From my perspective as a social worker . . . we are trained to not only be able to identify needs within individuals, we’re also taught different perspectives in school than what attorneys are. So we come at things from a strength-based perspective usually, and so we are looking at what are the things that are going to help this person to succeed based on the strength ideology.”<sup>229</sup>*

Current Commission standards should be strengthened to ensure support staff are provided to attorneys. Adequate staffing increases the efficiency of the attorney’s time and allows the client to benefit from the specialized work of paralegals, social workers,<sup>230</sup> investigators, and interpreters.

Investigators are crucial to determining whether the prosecutor has developed a case against a defendant. Without investigation, the lawyer is left with only one side of the story, and important facts may be overlooked without sufficient investigation. This duty is so important the ABA created a standard that states “[d]efense counsel should conduct a prompt

<sup>227</sup> Non-Capital Case Standards, *supra* note 68, Standard I, Commentary.

<sup>228</sup> See Jim Abbs, *supra* note 13 (discussing resources).

<sup>229</sup> Abbie Rust, Testimony at the Indiana Task Force Indianapolis Listening Tour 106, <https://www.in.gov/publicdefender/files/020918Listening%20Tour.pdf>.

<sup>230</sup> Notably, social workers have demonstrated faster permanency rates in the case of parental representation in family courts. Mark E. Courtney, Jennifer Hook, & Matt Orme, *Evaluation of the Impact of Enhanced Parental Legal Representation on the Timing of Permanency Outcomes for Children in Foster Care*, 1 PARTNERS FOR OUR CHILDREN 1 (2011).

investigation” and “explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.”<sup>231</sup>

The Sixth Amendment Center Report found that in some counties, attorneys must request funds from the court to hire an expert, justify it, and in some cases, pick from a list of approved experts.<sup>232</sup> Standards should be set to ensure experts are used and audits should be conducted on a quarterly basis to ensure counties are monitoring their use. The NACDL, in their report on Indiana, found serious issues with the use of investigators.

*“Records show that while some counties had multiple investigators other counties have no investigators on staff. Moreover, even when investigators are available, NACDL staff was informed that some offices discourage the frequent use of investigators due to cost concerns. A similar practice is employed with regard to use of expert testimony.”<sup>233</sup>*

The ABA Standards explain how attorneys should have adequate resources and support staff in order to render quality legal representation.<sup>234</sup> Sufficient resources and support staff include “secretarial, investigative, and expert services, which include assistance at pre-trial release hearings and sentencing and specialized equipment required to

<sup>231</sup> AMERICAN BAR ASSOCIATION, *supra* note 15, at Standard 4-4.1.

<sup>232</sup> SIXTH AMENDMENT CENTER, *supra* note 29, at 166-167 (noting that in Blackford County, “To use an investigator or an expert in a case, the attorney should file a motion with the court requesting one, and the court conducts a hearing to determine whether the expenditure is necessary. Prosecutors participate in these hearings, primarily out of concern for the county’s budget. One defense attorney said he had rarely ever requested an expert, but had never been denied the use of one when requested, primarily for medical or psychiatric issues. To select the particular expert to be hired, the defense attorney said, “the judge has a list to pick from.” Similar problems were noted in Scott County, where lawyers reported they rarely ask for experts or investigators, and in one case, the lawyer noted that he uses his client to investigate their own case.).

<sup>233</sup> NACDL Memo, *supra* note 80, at 20.

<sup>234</sup> AMERICAN BAR ASSOCIATION, *supra* note 15, at Standard 5-1.4 Commentary.





perform necessary investigations.”<sup>235</sup>

In addition to investigators, social workers provide a critical link between services a client may need and the attorney representing that client in the courtroom. As discussed earlier on pages 61-63, social workers are critical for public defenders and appointed counsel working in specialty areas such as CHINS/TPR and juvenile defense, and may even have a demonstrable positive effect on client outcomes. Yet access to these resources remains difficult, especially in rural areas of our state.

Foreign language interpreters are also critical. In one Indiana courtroom an attorney reported that “Spanish interpreters are only available once a month, so Hispanic [d]efendants often wait weeks for initial hearings.”<sup>236</sup> Translators should be made available for public defenders so they can have confidential discussions with clients and ensure lawyers maintain their duty of communication as required in the rules of professional conduct.<sup>237</sup>

In a letter provided by Luis E. Franco, Consul of Mexico, the Consul reported the following practices, as reported by their citizens to the consulate: “[r]egarding the Public Defenders, they do not have the opportunity to visit the Mexican inmates due to their need of having an interpreter. In fact, the attorneys do not meet their non-English speaking defendants until the second or third hearing, which sometimes causes legal gaps affecting the due process.”<sup>238</sup>

The Supreme Court Language Access Task Force is working to ensure all courts meet a defendant’s right to due process by having an interpreter present. Public Defenders should also ensure defense interpreters are available so that attorneys can communicate with their clients who can then make informed decisions. Given the immigration consequences of criminal convictions, it is essential that public defense systems ensure access to these

important resources.

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<sup>235</sup> *Id.*

<sup>236</sup> Letter from John Little to the Task Force (on file with the Task Force).

<sup>237</sup> AMERICAN BAR ASSOCIATION, MODEL RULES OF PROF. CONDUCT 1.4 Commentary.

<sup>238</sup> Letter from the Consul of Mexico, Indianapolis, to the Task Force (on file with the Task Force).

## D. Reforms re: Public Defender Commission

- *The Commission should regularly update its attorney workload standards.*

### Background:

Current Commission caseload standards are based on caseload limits developed in 1972 by the National Advisory Commission on Criminal Justice Standards and Goals (NAC), which was a creation of the federal government.<sup>239</sup> However, the NAC itself acknowledged these standards were an estimate at best, and have subsequently warned against the continued reliance on their estimates.<sup>240</sup> Further, “it is clear that no empirical study in support of [the NAC] recommended caseloads was ever undertaken. In fact, it appears the NAC did not actually do any work of its own in order to come up with the caseload standards attributed to it for so many years.”<sup>241</sup> Instead, the NAC used the results developed by a working group of the “defender committee” at a previous meeting of the National Legal Aid and Defender Association.<sup>242</sup>

The current Commission standards allow for a full-time, adequately staffed attorney to be assigned up to 120 major felony cases a year. Current Commission standards for misdemeanors allow a maximum allowable caseload for adequately staffed attorneys of up to 400 cases per year.<sup>243</sup>

### Findings and Recommendations:

After nearly 30 years and a recent criminal code revision, the Commission has acknowledged the need for updated standards by pursuing a workload study in conjunction with the American Bar Association and the local office of the public accounting firm Crowe Inc. The current state of the caseload standards, which weigh all major felonies the same, was noted as an issue by a major

felony public defender at the Indianapolis Listening Tour.<sup>244</sup> The ABA has successfully partnered with other accounting firms in Colorado, Louisiana, Missouri and Rhode Island, to successfully reform those states’ workload standards.<sup>245</sup> Using the Delphi Method, developed in the 1960s by the Rand Corporation, the Commission and its partners are determining what tasks are essential for attorneys to complete during the life of a case, and from rounds of surveys and one lengthy in-person meeting will develop new workload standards. This study should allow the Commission to update its workload standards, with an evaluation method that is far more rigorous than any previously developed.

The issues affecting full-time public defenders also affect attorneys who represent persons on a part-time basis:

*“While the most frequent and worst examples of out-of-control caseloads are among public defenders, private lawyers who provide indigent defense services sometimes take on way too much work as well. When adequate oversight of assigned counsel programs is lacking, the lawyers, in an effort to maximize their incomes, sometimes accept too many cases, because they are poorly compensated on a per case basis for their services. Similarly, when representation is provided pursuant to contracts, the lawyers sometimes are awarded contracts to provide defense services because they have furnished the lowest bid as a result of their willingness to accept an excessive number of cases.”<sup>246</sup>*

<sup>239</sup> NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, Standard 13.12 (1973). Securing Reasonable Caseloads, *supra* note 223, at 43.

<sup>240</sup> Securing Reasonable Caseloads, *supra* note 223, at 44.

<sup>241</sup> *Id.* at 45.

<sup>242</sup> *Id.*

<sup>243</sup> Non-Capital Case Standards, *supra* note 68, Standard J.

<sup>244</sup> Laura Pitts, Testimony at the Task Force Indianapolis Listening Tour 49, <https://www.in.gov/publicdefender/files/020918Listening%20Tour.pdf>.

<sup>245</sup> To learn about the other workload studies completed by the ABA, please see their reports published online. Rhode Island: [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_ri\\_project.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_ri_project.authcheckdam.pdf); Colorado: [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_co\\_project.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_co_project.authcheckdam.pdf); Louisiana: [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_louisiana\\_project\\_report.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_louisiana_project_report.authcheckdam.pdf).

<sup>246</sup> Securing Reasonable Caseloads, *supra* note 223, at 14.



The Task Force recommends the Commission study how to require reporting of private caseloads of part-time public defenders and appointed counsel to ensure the private bar also avoids the issue of excessive caseloads.

- *The Commission should track data on indigency appointments to ensure Commission standards are being followed.*

### Background:

The Commission currently requires each county in its program to set an indigency standard to govern who should be appointed a public defender. However, the Commission does not currently enforce the standard. Commission Standard C, “Eligibility for Appointment of Council,” uses the “substantial hardship” test set out in *Moore v. State*, 401 NE2d 676 (Ind. 1980). In determining eligibility, the county should include the following factors: (1) costs of private counsel; (2) income; (3) expenses; (4) disposable income; and (5) liquid assets.<sup>247</sup>

While each comprehensive plan requires the county consider how to determine indigency, current Commission audit procedures do not monitor or collect information on how the indigency standard is applied in each county.<sup>248</sup> The Sixth Amendment Center Report found no standardized colloquy or questions asked by Indiana judges to determine if an individual is constitutionally entitled to appointed counsel,<sup>249</sup> although the Judges’ criminal bench book provides recommendations.<sup>250</sup> While the bench book inquires as to the individual’s income and assets, it does not provide an inquiry into the expenses and liabilities of the individual.<sup>251</sup>

### Findings and Recommendations:

The timing of when indigence is determined

<sup>247</sup> Non-Capital Case Standards, *supra* note 68, Standard C.

<sup>248</sup> “The Commission does not, however, require counties to report any information about the criteria actually used by judges, during the period for which reimbursement is sought, to determine whether a person is indigent and entitled to appointment of counsel.” SIXTH AMENDMENT CENTER, *supra* note 29, at 119.

<sup>249</sup> *Id.* at 116.

<sup>250</sup> *Id.* (citing Indiana Criminal Benchbook § 19.60.000).

<sup>251</sup> *Id.* at 120.

is critical to the uniform application of the standard across the state. Indiana has no presumptive indigence determination to support early involvement in the case prior to an initial hearing. Such determinations can be made by others, including a public defender office or pre-trial officer, subject to final approval by a judge. In order to have meaningful representation at an initial hearing or bond hearing, the lawyer’s early entrance into the case necessitates such preliminary determinations be made. To achieve this, Standard C should be audited on a regular basis to ensure counties are applying the indigency standard uniformly.

The Brennan Center for Justice set out guidelines for the appointment of counsel, and in Standard 5-7.3 “Determination of Eligibility,” stressed the importance of a “neutral” party in making the indigency determination:

To ensure the legitimacy of the screening process, several general principles are important. First, it is essential that screeners be free of any conflict of interest or other ethics violation. Second, the screening process should not overly empower the prosecutor’s office. And third, the screening process should not cast doubt on the defense counsel’s loyalty to his or her client or on the presiding judge’s impartiality.<sup>252</sup>

Conflicts of interest should be avoided, and the determination remain confidential if made by any party other than the court.

To ensure attorneys enter the case early, the Task Force recommends the collection of data to determine where improvements could be made, and to identify areas of need where resources could be directed to ensure counsel are ready to advocate for their client at the initial hearing.

<sup>252</sup> BRENNAN CENTER FOR JUSTICE, NEW YORK UNIVERSITY SCHOOL OF LAW, ELIGIBLE FOR JUSTICE: GUIDELINES FOR APPOINTING DEFENSE COUNSEL Guideline 3 (2008), <https://www.brennancenter.org/sites/default/files/legacy/publications/Eligibility.Report.pdf>, **Guideline 3: Ensure that screening is performed by someone who does not have a conflict of interest.**



- *The Commission should explore remedies to help counties when they face funding shortages.*

**Background:**

Funding of public defense remains a constant concern for Indiana’s counties, who must deal with several important areas of local government other than the right to counsel. The Sixth Amendment Center aptly described the problem of funding public defense at the county level:

*“The primary source of revenue available to local government is property taxes, but even there the amounts local governments are allowed to assess are stringently limited by the state. Worse yet, factors that in many instances lead to higher crime rates -- low property values, high unemployment, high poverty rates, limited house-hold incomes, limited higher education, etc. – are often the exact same factors that limit counties’ revenues. And those same counties often have a greater need for broader social services, such as unemployment or housing assistance, meaning the amount of money to be dedicated to upholding the Sixth Amendment to the Constitution is further depleted.”<sup>253</sup>*

With the advent of the opioid crisis, the need for social services has only increased in Indiana.

Funding shortages most often manifest in staffing shortages. These staffing shortages result in excessive caseloads. Standard K of the Indiana Public Defender Commission, “Excessive Caseloads,” requires all county comprehensive plans to “contain policies and procedures regarding

excessive caseloads and requires both the practicing attorney to “inform the county public defender . . . or other authorities designated by the plan” in the event excessive cases may cause a “breach of professional obligations.”<sup>254</sup> The Standard also requires the chief public defender to “inform the appropriate judges and refuse to accept the appointment of additional cases” in the event “the acceptance of additional cases or continued representation in previously accepted cases will lead to the furnishing of representation lacking in quality or to the breach of professional obligations.”<sup>255</sup>

**Findings and Recommendations:**

No matter which type of service delivery model is selected by the county or regional system, there should be adequate funding to comply with all standards. The most pressing standard, and area in which the Sixth Amendment Center saw the greatest need, was in the controlling of public defender caseloads.<sup>256</sup> The Commission has extensive caseload standards that dictate the maximum number of cases an attorney may handle at any given time in Standard J of its Guidelines. Standard J mandates “[t]he comprehensive plan shall insure that all counsel appointed under the plan are not assigned caseloads which, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations.” Caseload guidelines are different depending on whether the attorney is provided support staff.<sup>257</sup> These standards are reported by the counties on a quarterly basis to the Commission. The counties account for every public defense case assigned to an attorney working in the county.

Currently, the Commission may withhold reimbursement for consistent caseload overages; however, it takes this action at least three months after the overage occurs, because the Commission only becomes aware of the issue upon receipt of the quarterly report.

<sup>253</sup> Non-Capital Case Standards, *supra* note 68, at Standard K.

<sup>254</sup> Non-Capital Case Standards, *supra* note 68, at Standard K.

<sup>255</sup> *Id.*

<sup>256</sup> See SIXTH AMENDMENT CENTER, *supra* note 29, Ch. 6.

<sup>257</sup> Indiana Public Defender Commission, Standard J.



The recent development of an ethics opinion from the ABA and discipline of a public defender for an excessive workload are signs there are ethical implications for individual lawyers who work in public defense systems.<sup>258</sup> Attorneys should not be placed in a system where they may violate ethical norms because of pressures from an inadequate system.

One remedy proposed by the Task Force is to require the Chief Public Defender to refuse cases if the county has not adequately funded the system for the entire year. This remedy is already outlined in Standard K of the Commission Standards. For example, if the volume of cases in a county's court system would require four public defenders to adequately handle all the cases assigned over the course of the year, but the county only provides funding for three, the Chief Public Defender would be required to refuse cases once the three public defenders have reached maximum capacity.

Without the caseload cutoff remedy, the local jurisdiction may choose to exceed the Commission caseload standards, and continue to assign public defenders more cases in order to meet demand. This creates a systemic deficiency as the public defenders will assuredly not have enough time to devote to each case. After the Chief begins to refuse more cases, the courts would be required to appoint counsel on a case-by-case basis. The counsel would be paid at the then-current rate, which is presently \$90/hour.

This remedy provides an immediate reaction to constitutional violations rather than waiting several months for the Commission to review caseload reports from previous quarters. The drawback to this remedy is the challenge of ensuring appointed counsel are subject to the same standards and training requirements as the public defenders working under the approved system.

However, caseload standards are just one of the Commission's recommendations. The Task

Force recommends multi-county or individual jurisdictions ensure funding is adequate to meet all standards promulgated by the Commission.

- *The Commission should have the authority to administer discretionary grants to spur innovation.*

#### **Background:**

Currently, the Public Defender Commission is limited in its economic incentives to providing reimbursement to counties for a portion of their expenses.

#### **Recommendation:**

Many of the proposed reforms contained throughout this report may require additional innovation and expenditures at the county level. Therefore, the Commission should be granted statutory authority and funding to make discretionary grants to spur innovation.

A potential model for this program exists within the Texas Indigent Defense Commission.<sup>259</sup> These grants are targeted toward (1) innovative pilot programs, (2) actual extraordinary expenses, (3) promoting compliance with standards, and (4) providing technical support to establish processes or programs that may be replicated in other jurisdictions.

The New York State Office of Indigent Defense Legal Services<sup>260</sup> also administers a competitive grant program “designed to encourage indigent legal services providers to develop solutions to specifically designated needs or shortcomings in the statewide provision of indigent legal services.”<sup>261</sup>

With approximately 30 non-commission counties, the reforms recommended throughout this report will potentially place a significant burden on local counties, both fiscally and from a technical implementation standpoint. By granting the Commission the authority to provide appropriate and targeted grants, opportunities for local innovation public defense services will be greatly enhanced.

<sup>258</sup> ABA Comm'n on Prof'l Ethics and Prof'l Responsibility, Formal Op. Opinion 06-441 (2006); Malia Brink, *An Ethics Warning for Public Defenders*, 33 CRIM. J. MAG. 2, 37 (Summer 2018).

<sup>259</sup> TEXAS INDIGENT DEFENSE COMMISSION, <http://www.tidc.texas.gov/>.

<sup>260</sup> NYS OFFICE OF INDIGENT LEGAL SERVICES, <http://www.ils.ny.gov/>.

<sup>261</sup> *Id.*

- *The Commission needs additional staff to develop new standards, coordinate with counties and/or regions, and implement data collection and quality controls.*

### **Background:**

Currently, the Commission has five employees: two staff attorneys, one fiscal analyst, one statistics and data analyst, and one administrative assistant. The Sixth Amendment Center stated “although the state is obligated to ensure effective representation to the indigent accused facing a potential loss of liberty in its five appellate districts, 91 circuit courts, 177 superior courts, and 67 city and town courts, for most of its history, the Commission operated with only a single staff member. In 2014, another staff position was added. No two people, no matter how talented, could ever possibly ensure compliance with standards in so many jurisdictions.”<sup>262</sup>

### **Findings and Recommendations:**

Current standards established by the Commission should be strengthened to ensure effective quality of public defense representation across the state, and the Commission should have a greater capacity to implement these standards and track their effectiveness. It is important to note the purpose of standards is to ensure barriers to effective representation by individual attorneys are removed. Standards and uniformity are not the end goal-- they are just a means to provide attorneys working at public expense with a working environment allowing for the devotion of sufficient time to each case to provide all defendants with effective representation.

Expanded data collection is essential to effective improvement of public defense in Indiana. Currently, datasets about attorney appointments, court proceedings, incarcerations, and related topics are available piecemeal from many different local and state agencies. Moreover, even when data collection is more centralized (as in the presently-expanding Odyssey court records system) disparities in recording at the local level yields varying degrees of

reliability across different courts and jurisdictions. All this means that identifying problems, assessing potential solutions and evaluating alternative systems becomes much more difficult, as these irregularities must be identified and accounted for as best as possible. This can also lead to wasteful duplication of effort when data must be recollected to ensure accuracy. Going forward, the state must make it a priority to increase communication, training, and infrastructure regarding data collection at all levels of government. Adequate data infrastructure will allow policy to track and respond to changes, and ensure existing policy is as effective and efficient as possible.

#### **a. Attorney Qualifications, Training and Supervision**

While Standard E and F of the Commission set minimum standards for attorney qualifications, those standards fall short of accurately auditing the performance of individual attorneys. Further, these qualification requirements are not ongoing; once an attorney achieves a certain minimum level of experience, there is no requirement of ongoing training outside of capital cases. For example, once an attorney is qualified to handle a CHINS case by taking a single 6-credit-hour CLE, he or she is qualified for life under current Commission standards. There are no ongoing training requirements and there is no review as to whether the approved course, which changes content every year, is appropriate for first-time CHINS lawyers versus seasoned CHINS lawyers who primarily need to be updated on changes in the law and changes in Department of Child Services policy.

The NACDL has noted a lack of institutionalized standards as well:

*“While the Commission and the Indiana Code set forth experience-based and/or educational requirements for attorneys to be eligible to handle various degrees of felony offenses and specialized case types, there are no institutionalized standards of performance that provide guidelines and expectations such as*

<sup>262</sup> SIXTH AMENDMENT CENTER, *supra* note 29, at III.



*how quickly attorneys should make contact with incarcerated clients or what types of pretrial motions attorneys should consider filing.”<sup>263</sup>*

The Indiana Rules of Professional Conduct require that “lawyer[s] provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”<sup>264</sup> National standards dictate “to provide quality representation, counsel must be familiar with the substantive criminal law and the law of criminal procedure and its application in the particular jurisdiction. Counsel has a continuing obligation to stay abreast of changes and developments in the law.”<sup>265</sup> In counties not participating in the reimbursement program, there are no requirements for training, supervision or qualifications.<sup>266</sup> The Commission should reconsider Standard E and F to create ongoing training requirements.

The need for ongoing training is even more important as the development of problem-solving courts and specialty areas such as juvenile and CHINS/TPR (discussed *infra* in Section C) require an entirely different approach to the practice of law, and require the public defender to work in a multi-disciplinary team very different from the traditional adversarial process. As problem-solving courts increase, the amount of training needed to ensure attorneys are familiar with the process grows ever more necessary.

### **b. Compensation and Resources**

The Commission should set clear standards for compensation and resources that ensure adequate pay. Currently, there is no statewide uniform definition of pay parity, leading to confusion among participating counties. Currently, the Commission Standard G dictates “[t]he comprehensive plan shall provide that the salaries and compensation

of full-time salaried public defenders shall be the same as the salaries and compensation provided to deputy prosecutors in similar positions with similar experience in the office of the Prosecuting Attorney.” This standard is not applied in any uniform fashion within Commission counties and does not apply to non-participating counties.

ABA standards require “counsel be paid a reasonable fee in addition to actual overhead and expenses.”<sup>267</sup> Further, “contracts with private attorneys for public defense services should never be let primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow of funding mechanism for excess, unusual or complex cases, and separately fund expert, investigative and other litigation support services.”<sup>268</sup>

The system of public defense in many Indiana counties is reliant upon attorneys agreeing to assume flat fee contracts without adequate compensation for time, experts, investigative and other support. Such systems have the potential to invite conflicts of interest between the defendant’s right to effective representation and the lawyer’s self-interest in maintaining a separate and independent practice.

### **c. Appointment at all critical stages of the court case, including initial hearings**

Commission standards should reflect the need for appointment of counsel at all critical stages of the proceeding. This change reflects the potential change brought by Criminal Rule 26 and will ensure counsel is available at the time the right attaches. All persons in Indiana who are found to be indigent and facing possible incarceration on misdemeanors or felonies are entitled to public counsel at trial and on appeal.<sup>269</sup> Counsel should be appointed and present for any proceedings after the right attaches unless there is a valid waiver of the right.

<sup>263</sup> NACDL Memo, *supra* note 80, at 13.

<sup>264</sup> IND. R. OF PROF. CONDUCT 1.1.

<sup>265</sup> NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION Guideline 1.2(a) (1995).

<sup>266</sup> SIXTH AMENDMENT CENTER, *supra* note 29, at 137-141.

<sup>267</sup> ABA TEN PRINCIPLES, *supra* note 98, Principle 9.

<sup>268</sup> *Id.* at Commentary to Principle 9.

<sup>269</sup> SIXTH AMENDMENT CENTER, *supra* note 29, at 8, (citing to U.S. CONST. AMEND. VI, IND. CONST. art. 1, Section 13(a)); *Gideon v. Wainwright*, 372 U.S. 335 (1963).



- *The Commission should consider changes to salary requirements to help retain public defenders*

**Background:**

Currently, the Commission requires pay parity with prosecutors for equal work. However, the Commission has created a subcommittee to re-evaluate this standard. Additionally, minimum pay standards do not exist outside the Commission.

**Findings and Recommendations:**

Public defenders and appointed counsel be paid a wage commensurate with the value of their services. One attorney observed the following: “Judges, and even county boards, will hire the attorneys who charge the least amount for their services. This system rewards lazy and uncaring representation. The local public defender contracts become a race to the bottom. Although I understand that public defender work will never be lucrative, an attorney should be able to bill the hours necessary to do a good job.”<sup>270</sup>

The NACDL found it was essential to ensure “pay parity” exists between the state and the defense; it “not only serves to attract and retain high quality, experienced defenders and staff, but sends a vital message to all facets of the criminal justice system and the communities they serve that the defense function is considered as important and valued as the prosecution. It is only where there is balance in resources, experience, and expertise that the adversarial system can properly perform its role.”<sup>271</sup>

The Commission should continue its ongoing work re-evaluating pay standards for public defenders and ensure that attorneys are compensated adequately for their work and ensures that quality lawyers will pursue roles as public defenders and appointed counsel.

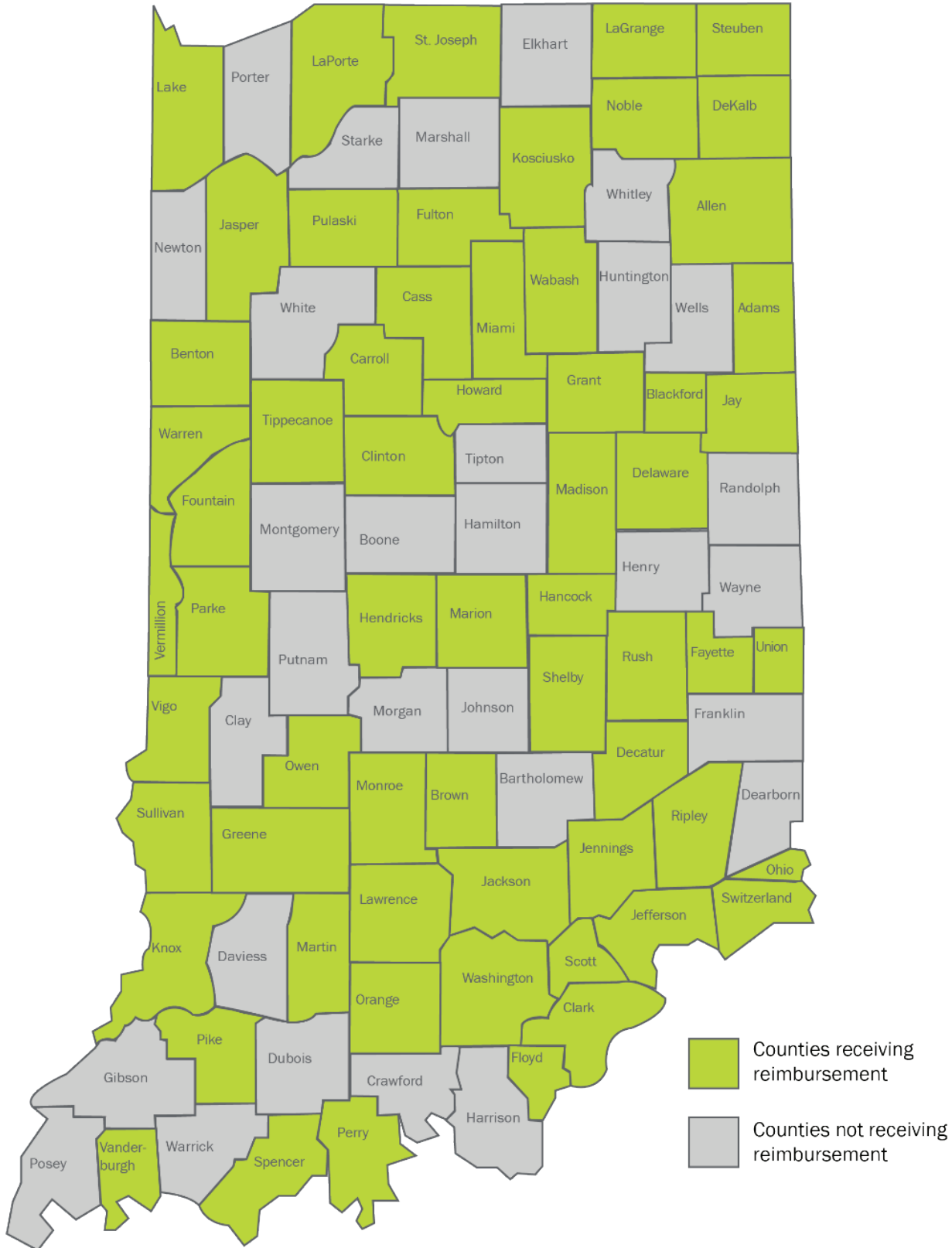
<sup>270</sup> Written testimony of Stacy Uliana (on file with Task Force).

<sup>271</sup> NACDL Memo, *supra* at 81, p. 12.





### Counties Current Participating in the Public Defender Commission Reimbursement Program



## E. Further study is needed in the following areas

- *City & Town Courts with criminal jurisdiction require further study to bring them within Commission standards.*

### Background:

Because the Commission's statutory authority only extends to reimbursement of counties, City & Town courts are not included in the comprehensive plan required by the Commission. This means the Commission does not audit City & Town courts, their caseloads, or the quality of their representation. In 2016, there were approximately 65 city and town courts; 37 of which handled over 30,000 misdemeanor cases in total. Approximately one-in-five new misdemeanors are filed in City & Town Courts.<sup>272</sup>

In the 30,000 City & Town court misdemeanor cases filed in 2016, 17 of the 37 courts reported zero appointments of counsel or representation by a public defender (known as "pauper appointments"), and only 20% of all city and town court misdemeanors saw any pauper appointments.<sup>273</sup>

The rate of public defender appointments for city and town courts is very low compared to other courts: in 2016 according Office of Court Services data, city and town courts had a 20% public defender appointment rate, versus 40% for misdemeanors in other courts.<sup>274</sup>

### Findings and Recommendation:

The right to counsel in City & Town Courts throughout Indiana is not being fully protected. And yet, the right to counsel applies just the same in these courts as in superior and circuit courts in our state. Yet, the lower rate of public defender appointments gives concern the right to counsel may not be protected at the same rate as in misdemeanor courts, which already face concern

of overwhelming caseloads, even in those courts subject to Commission oversight.

Nevertheless, due to time limitations, the Task Force stops short of making specific recommendations in this subject area. But the Task Force urges that the Commission conduct further study of the subject, in conjunction with aim (Accelerating Indiana Municipalities), to better understand how to ensure that the right to counsel is protected and to make certain that standards for misdemeanor representation are the same throughout Indiana, no matter where the charges are filed.

- *Representation issues in Civil Commitments require further study*

### Background:

Civil commitments involve the loss of one's physical freedom and accompanying serious social consequences and stigma.<sup>275</sup> The Indiana Code grants Hoosiers with mental health challenges the right "[t]o be represented by counsel" in commitment proceedings.<sup>276</sup> Public defenders are appointed regularly to represent respondents in some counties, but appointment data is difficult to interpret and access.<sup>277</sup> According to the Office of Court Services, there were 13,477 Mental Health filings in the State of Indiana.<sup>278</sup> Unfortunately, our Task Force did not have sufficient time or resources to adequately evaluate this critical area.

Much like CHINS/TPR cases, involuntary civil commitments are a specialized area of civil law not necessarily analogous to the criminal practice of law. While civil commitment cases are currently in the Commission's reimbursement program, this area is ripe for further study by the Commission and policymakers to explore methods to ensure appointments for those vulnerable Hoosiers entitled to counsel and to increase the quantity and quality of attorneys who work in this challenging area of law.

<sup>275</sup> T.K. v. Dep't of Veterans Affairs, 27 N.E.3d 271, 273 (Ind. 2015).

<sup>276</sup> I.C. § 12-26-2-2(b)(4) (2018).

<sup>277</sup> Indiana Task Force on Public Defense, Indianapolis Listening Tour Transcript 59-60, <https://www.in.gov/publicdefender/files/020918Listening%20Tour.pdf>.

<sup>278</sup> 2016 Trial Court Statistics, *supra* note 101.

<sup>272</sup> Judicial Service Report, *supra* note 148, at 74.

<sup>273</sup> *Id.*

<sup>274</sup> 2016 Trial Court Statistics, *supra* note 101. <https://www.in.gov/judiciary/iocs/3692.htm>.





**Findings and Recommendations:**

Public defenders are routinely tasked with representing individuals in civil commitment cases. The Commission should investigate further whether specific training, specialized caseloads, or other standard modifications are necessary. We also recommend that a study group be appointed to carefully examine the process of civil commitments and the related public defense needs. The group should include, at a minimum, experts from the field of mental health treatment, the courts, public defenders, law enforcement and family members of those who have experienced mental health commitment proceedings.

- *Consolidation of functions in existing state public defender agencies should be studied further.*

**Background:**

The Task Force recognizes the need to increase financial efficiency. Currently, there are three separate state agencies provide varying levels of support to Indiana’s county-based system. In addition to the Commission, there are two other state funded public defense agencies in Indiana, although none deliver trial or direct appeal services, and none have the authority to ensure quality across the board in all cases and in all courts. The State Public Defender is charged with providing representation in post-conviction proceedings (i.e., indigent adults and youth challenging a commitment or sentence and who are incarcerated in a state penal institution).<sup>279</sup> The Indiana Public Defender Council serves as a support center providing training, publications, and research assistance to county public defender and assigned counsel programs across the state.<sup>280</sup> In addition, the Council maintains liaison contact with study commissions, organizations, and agencies of all branches of local, state, and federal government that benefit criminal defense as part of the fair administration of justice in Indiana.

State Public Defender	Public Defender Commission	Public Defender Council
<ul style="list-style-type: none"> <li>• IN Supreme Court agency</li> <li>• <b>Represents people in PCR representation</b></li> <li>• Assists in finding appellate representation if requested</li> </ul>	<ul style="list-style-type: none"> <li>• Independent judicial agency</li> <li>• <b>Provides reimbursement to counties</b></li> <li>• Drafts and adopts standards</li> </ul>	<ul style="list-style-type: none"> <li>• Independent judicial agency</li> <li>• <b>Advocates for public defenders</b></li> <li>• Provides research, training and publications</li> </ul>

Each separate agency requires separate overhead, and make separate appeals to the legislature for funding. The Sixth Amendment Center Report recognized the inefficiencies created through the current division of services:

Because the Indiana Public Defender Council already provides training, it seems to be the appropriate place to develop and house the new mandatory training needs. However, because much of the new training will be based on standards promulgated by the Commission, it may be appropriate to merge the two independent government entities. This will allow for a seamless transition from training to compliance enforcement.<sup>281</sup>

**Finding and Recommendations:**

The Task Force encourages further examination at whether certain processes are duplicated in these agencies such that a consolidated effort would be a more efficient use of taxpayer funds. The Task Force does not make a specific recommendation of any particular re-alignment of existing agencies in this report.

<sup>279</sup> I.C. § 33-40-1-2 (2018); Ind. R. of Post-Conviction Remedies § 9.

<sup>280</sup> I.C. § 33-40-4-5 (2018).

<sup>281</sup> SIXTH AMENDMENT CENTER, *supra* note 29, at 207.



## Conclusion

*“Right to counsel reform can be accomplished in any state if it is tailored to the political, geographic, and historic nuances in each locality while simultaneously elevating the voices of legal service providers.”<sup>282</sup>*

After nearly a year of comprehensive evaluation and due diligence, the Task Force believes the recommendations contained in this report will dramatically improve the quality, accountability, and transparency of public defense services in Indiana. The Task Force understands these recommendations may need to be phased in to allow for local service providers to efficiently prepare for the changes and for the State of Indiana to make the statutory and fiscal adjustments necessary to achieve the recommendations’ goals.

The recommendations contained throughout this document are intended to be a road map for strategic improvements to Indiana’s public defense services. Only through a collaborative process involving state and local governments will the stated goals be achieved.

This much is clear: Indiana will be a stronger and more just state if it enacts bold and significant public defense reforms as part of an overall criminal justice reform strategy. The collateral consequences on Indiana’s citizens – unemployment, family disintegration, over-crowded jails, strains on local county budgets, recidivism – are too costly to ignore for another generation. Beginning with the adoption of our Indiana Constitution, we recognized that our criminal justice system should be based on the principles of reformation rather the vindictiveness. Not only does justice demand that policymakers make comprehensive reforms, public confidence in Indiana’s judicial system depends on it as well.

<sup>282</sup> William Leahy, *The Right to Counsel in the State of New York: How Reform was Achieved after Decades of Failure* 165 51 IND. L. REV. 145, 165 (2018).



# Appendix A: History of Public Defense Reports in Indiana

## 1974: NLADA Report

In 1974, a report prepared by the National Legal Aid and Defender Association (NLADA) noted major structural problems with Indiana’s public defense system, including political patronage, undue judicial influence, inefficiencies, and lack of standards.<sup>283</sup>

## 1986: Evaluation of Partial State Funding for Public Defense Services in Indiana

In 1986, the Spangenberg Group prepared a report in support of legislation to provide for partial state funding of public defense. The report noted the absence any statewide standards for the operation of public defense, public defenders lacked independence because of the appointment process, public defense was underfunded, support services were not routinely available, caseload controls were not in place, an increase in claim of ineffective assistance of counsel, and the absence of any reliable data on public defense services.<sup>284</sup>

## 1991: Report on the Commission on Public Defenders of the Indianapolis Bar Association

Before the creation of the Marion County Public Defender Agency, the Indianapolis Bar Association Commission on Public Defenders conducted an assessment of public defense in Indianapolis. The report found “[b]ecause the responsibility for providing and funding public defender services falls upon the counties and there is no state statute or county ordinance prescribing how these services should be provided, each court system in Marion County has had to develop its own

system for providing public defense services.”<sup>285</sup> The report found systemic deficiencies, uneven quality of services, and inadequate “administration, supervision, and support services.”<sup>286</sup>

Among the recommendations in the report was a recommendation for an “Independent and Coordinated County-wide Delivery System” as well as an emphasis on the Chief Public Defender having “continuing responsibility for seeking adequate funding for the delivery of public defender services in Marion County.” The report also recommended the establishment of an independent Board and an integration of the disparate public defense systems into one coordinated system.<sup>287</sup>

## 1993: In Re: Request for Rule Making concerning the Marion County Public Defense System

In 1993, Indiana Legal Services brought suit against Marion County, alleging systemic deficiencies in public defense services. In response to the suit, the Indiana Public Defender Council submitted their response and support for changes to the system. This lawsuit was one of the precipitating causes of the creation of the Marion County Public Defender Agency.

## 1996: Management Audit of the Marion County Public Defender Agency

In 1996, American University conducted an audit of the performance of the Marion County Public Defender Agency. The report found although there had been a great deal of improvement in public defense in Marion County, there were several areas needing improvement. The report noted caseloads remained higher than Commission standards for several types of cases, and “the growing caseload of termination of parental rights (TPR) cases and children in need of services (CHINS) cases in the Juvenile Court” impaired the Agency’s ability to handle them adequately at present staffing

<sup>283</sup> NAT’L LEGAL AID AND DEFENDER ASSOC., THE STRUCTURE AND FUNDING FOR CRIMINAL DEFENSE OF INDIGENTS IN INDIANA 25 (1974), <https://www.in.gov/publicdefender/files/Structure%20and%20Funding%20for%20Criminal%20Defense%20of%20Indigents.pdf>.

<sup>284</sup> SPANGENBERG GROUP, <https://www.in.gov/publicdefender/files/Eval%20of%20Partial%20State%20Funding.pdf>.

<sup>285</sup> COMM’N ON PUBLIC DEFENDERS, INDIANAPOLIS BAR ASSOC. 14 (1991), <https://www.in.gov/publicdefender/files/Report%20of%20Commission%20of%20PD.pdf>.

<sup>286</sup> *Id.* at 15.

<sup>287</sup> *Id.* at 17.



levels.<sup>288</sup> The report made several organizational recommendations, including staff training and development. The report also noted indigency determinations remained an issue and made recommendations to standardize the indigency screening process.<sup>289</sup>

In spite of the numerous recommendations in the cited reports re: the structure, funding, and oversight of Indiana’s public defense services, little change has occurred to relieve counties of their obligation to provide for the cost of public defense, or to ensure the state meet its obligation of ensuring effective assistance of counsel is provided to those who need it.

### **2016: Sixth Amendment Center Report**

The Sixth Amendment Center assessment of public defense services was invited by the Commission in the fall of 2014. A description of the findings of this report are discussed *infra*, in “The Case for Reform.”

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<sup>288</sup> AMERICAN UNIVERSITY, MANAGEMENT AUDIT OF THE MARION COUNTY PUBLIC DEFENDER AGENCY 10 (1996).

<sup>289</sup> *Id.* at 22.



## Appendix B: Task Force Process

Nine regular Task Force meetings were scheduled between September of 2017 and August of 2018 to complete a fact finding process, reach agreement on key principles, and produce this written report with recommendations to present to the Commission. A set of preliminary questions were developed to help guide the fact finding process. These included:

- What is the current cost of providing public defense in Indiana?
- What do the state and local counties provide for this cost to meet constitutional requirements for public defense, and how it is administered? (Adult criminal, juvenile, CHINS/TPR cases, trial level and appeals, and post-conviction)
- What are the statutory, structural and/or policy and practice changes which can be made to improve the delivery of public defense in Indiana?
- What are other cost effective ways of delivering services which can improve upon quality, accountability, and transparency, while meeting standards for public defense delivery?
- Which changes should Indiana adopt, and what should be the priorities?
- What is the needed infrastructure to support changes?
- Where do we have support from stakeholder groups?
- What will the challenges be?

Task Force members reviewed the findings of the Sixth Amendment Center Report and the report completed for OJJDP, but developed their own fact finding process to validate as well as expand the information which would be considered. Three subcommittees were formed to examine issues not addressed in detail by the Sixth Amendment

Center Report: juvenile defense, appellate and post-conviction services, and parent representation in Children in Need of Services (CHINS) and Termination of Parental Rights (TPR) cases. Each of the three subcommittees was charged with examining key attributes of an effective system, evaluating how Indiana compared to these attributes, identifying other effective state models, and making findings and recommendations in their respective areas. The group also examined in greater detail misdemeanor representation, including city and town courts, mental health commitments, and capital representation.

The group studied a number of relevant articles and publications from national sources regarding public defense systems, including standards, best practices, litigation trends, structure, funding data, and the impact of public defense practices on minority communities. A listing of those articles is contained on the Task Force website at <https://www.in.gov/publicdefender/2333.htm>.

To elicit public comment, Task Force members conducted a Listening Tour in five locations around the state in February and March: Indianapolis, Ft. Wayne, Evansville, Jeffersonville, and Gary. An additional special meeting was called with the Chief Public Defenders and members of the Board of Directors of the Indiana Public Defender Council. Two focus groups with adult clients were conducted in March through the Duvall Center, focusing on their experience with public defenders. Similarly, 29 youth interviews were conducted within the Department of Corrections to document their experiences with lawyers, and to provide an opportunity for them to give advice to the Task Force about what effective lawyering means to them. Other individual meetings were held with stakeholder groups including local and state defender organizations, county officials, judges and others involved in criminal justice.

Commission staff provided invaluable assistance throughout the process including data analysis, coordination of listening tour sites, technical assistance to Task Force members, and coordination



of Task Force meetings. The Commission published a webpage which posted the materials and minutes from all Task Force meetings, as well as a large repository of articles, professional standards, news clips, litigation, and other public defender information. The webpage included additional opportunities for the submission of public comments. Several comments were received and considered.

The use of national experts was critical to the work of the Task Force, as they provided a wealth of information on national standards, state trends, and effective service delivery models. In addition to David Carroll from the Sixth Amendment Center, Dean Emeritus Norman Lefstein served as special advisor to the group throughout the course of the year. Mimi Laver, Director, Legal Representation for the Center on Children and the Law through the American Bar Association, was an invaluable resource on parent representation issues. Tim Curry, Director of Training and Technical Assistance for the National Juvenile Defender Center, also provided much needed consultation in the area of juvenile defense.

From these experts, the Task Force and its subcommittees also examined several other state systems, specifically in areas of parent representation in child welfare cases, juvenile defense, and appellate and post-conviction services. Representatives from New York and Michigan joined the April meeting of the Task Force to provide information on reforms and incentives in their respective states around public defense.<sup>290</sup>

Finally, through ISP Consultants,<sup>291</sup> information was gathered from a wide variety of stakeholder groups to gauge support for reforms, evaluate perceptions of current practice, and identify areas for potential

impact in a broader campaign for change. Over 440 individuals including public defenders, prosecutors, judges, corrections staff, CASAs, probation staff and others participated and provided comment.

While the Sixth Amendment Center Report provided an important impetus for the work of the Task Force, the group's robust fact finding process has added substantial insight and depth into its understanding of public defense in Indiana. From that thorough and diligent process, this report provides a series of findings and recommendations to fulfill the state's constitutional obligations to ensure effective assistance of counsel to those without sufficient means to hire a lawyer.

<sup>290</sup> The Task Force would like to thank Bill Leahy and Judge Boyd from Michigan for their presentations on their states' public defense reforms at the April 20, 2018 meeting of the Task Force.

<sup>291</sup> IPS Consulting, LLC, is a Cleveland based consulting firm specializing in public policy, strategic planning, system and community assessment, building alliances, project management, organizational development and sustainability, community engagement, and designing and delivering training and technical assistance. Consultants provide direct service, public policy analysis, research, and system and individual advocacy in the social justice fields. Lauren Litton is a lawyer and founder of the group.





# Appendix C: Members of the Indiana Task Force on Public Defense

## Reporting Committee:

Judge John Daniel Tinder, Chair  
Retired, 7<sup>th</sup> Circuit Court of Appeals

Representative Gregory W. Porter  
Ranking Minority Member, House Ways & Means  
Committee  
Indiana State House of Representatives

Roderick E. Bohannon, Project Director  
Indiana Legal Services, Inc.

David Bottorff, Executive Director  
Association of Indiana Counties

Monica Foster, Chief Federal Defender  
Indiana Federal Community Defenders

Larry Landis, Former Executive Director  
Indiana Public Defender Council

Stephen P. Luce, Executive Director  
Indiana Sheriffs' Association

Andrea D. Lyon, Prof. of Law  
Valparaiso University Law School

Judson McMillin  
Mullin McMillin & Rychener

Professor Joel Schumm  
Indiana University Robert H. McKinney School of  
Law

Dr. Jeff Papa, Partner  
Barnes and Thornburg

## Advisory Subcommittee

Senator Rodric Bray  
Chair, Senate Judiciary Committee  
Indiana State Senate

Justice Christopher M. Goff  
Indiana Supreme Court

Joseph R. Heerens, General Counsel  
Office of Indiana Governor Eric Holcomb

Judge Vicki Carmichael, Clark Circuit Court  
VP, Indiana Judges Association

Honorable Mary Diekhoff  
Indiana Public Defender Commission  
Monroe Circuit Court

Judge Mary Willis, Former Chief Adm. Officer\*  
Office of Court Services  
Indiana Supreme Court

## Advisors to Task Force:

Professor Norman Lefstein, Indiana University  
Robert H. McKinney School of Law

David Carroll, Sixth Amendment Center

Suzy St. John, Indiana Office of Court Services

Judge Carr Darden, Indiana Court of Appeals

Mimi Laver, Director of Legal Representation, ABA  
Center on Children and the Law

Tim Curry, Director of Training and Technical  
Assistance, National Juvenile Defender Center

## Appendix D: Biographies for Task Force Members and Staff

### **Judge John Daniel Tinder, Chair (Ret.) 7th Circuit Court of Appeals**

Judge John Tinder has had a distinguished career as a federal judge, serving for 20 years as a U.S. District Court Judge for the Southern District of Indiana, and an additional 8 years on the 7<sup>th</sup> Circuit Court of Appeals. He retired on October 9, 2015 and has been doing consulting on litigation and investigation matters, arbitration and special master assignments.

Before being appointed to the bench in 1987, Judge Tinder was appointed as a U.S. Attorney in the Southern District of Indiana, and served three years in that role from 1984 – 1987. He practiced privately for 7 years, and also served as a deputy prosecutor in the Marion County Prosecutor's office, and a public defender in the Marion County Superior Court Criminal Division.

Judge Tinder received his Juris Doctor from the Indiana University in Bloomington in 1975, and has received numerous honors and awards including the David W. Peck medal from Wabash College; Distinguished Barrister, Indiana Lawyer, Leadership in Law, and the Silver Gavel Professionalism Award from the Indiana Bar. He also served on the Judicial Conference of the United States Committee on Defender Services from 2009 – 2015

### **Roderick E. Bohannon, Project Director Indiana Legal Services**

Mr. Bohannon presently serves in the joint capacity of the Project Directors for: The Bankruptcy Practice, and the Ex-Offender Reintegration Project for Indiana Legal Services, Inc.. He has been employed with Indiana Legal Services, Inc., for

more the 30 years, joining, what was then known as Legal Service of Indianapolis, Inc., beginning in August 1976.

Roderick E. Bohannon received his B.S. Degree in 1972 from Seton Hall University, South Orange New Jersey. He received his J.D. from Seton Hall University Law Center, Newark, NJ in 1975. He is admitted to practice law in Indiana (1977), New Jersey (1975), DC Bar (1975), and the U.S. Court of Appeals for 7<sup>th</sup> Circuit (1981).

Since 2005, Mr. Bohannon has focused his practice in the area of Bankruptcy Practice (Chapter 7 and Chapter 13). Within the last three (3) years, he has also added to his practice Drivers License Restoration, Expungement of Criminal Records.

Mr. Bohannon has been the recipient of numerous community awards and recognition, among them most recently, the Distinguished Barrister Award- Indiana State Bar Association (2016); the NAACP Legal Redress Award-National NAACP Board-(2015); The Humanitarian Award for the Greater Indianapolis Branch of the NAACP (2013), and the Marion County Bar Association Advocate of the year (2008), and (1996).

### **David Bottorff, Executive Director Association of Indiana Counties**

David Bottorff has been the Executive Director of the Association of Indiana Counties (AIC) since November of 2004. The Association represents several county officials, including the county fiscal body and the county executive who have shared responsibilities ensuring funding for adequate public defense. The Association's mission is to support county officials so they can better represent taxpayers. The AIC also monitors federal issues and national policy trends through service on committees for the National Association of Counties.

Prior to joining the AIC, David worked as a legislative assistant for the Indiana House of Representatives for ten years. He has spent nearly twenty years monitoring or lobbying activities





of the Indiana General Assembly and state government. Originally from Clark County, David is a graduate of Indiana University Southeast.

**Senator Rodric Bray, Chair, Senate Judiciary Committee  
Ranking Member, Corrections and Criminal Law, Indiana State Senate**

Rodric D. Bray and wife Kelly have two children, Austin and Ethan and together they attend First United Methodist Church. Mr. Bray earned a B.A. at Indiana University and his J. D. at Valparaiso University.

Professionally, Senator Bray was the Deputy Prosecuting Attorney from 1994-1997 and has been practicing law in his family law firm in Martinsville since 2003 where he primarily practices business and municipal law.

In the Indiana Senate, Senator Bray was appointed in May as Senate President Pro-Temp Elect. He sits on the Corrections Committee as Ranking Majority Member, the Insurance and Financial Institutions Committee, and is Chair of the Judiciary Committee, and of the Courts and Juvenile Justice Subcommittee. Senator Bray serves as a Trustee for the Indiana Criminal Justice Institute.

**Judge Vicki Carmichael, Clark Circuit Court Vice-Chair, Indiana Judges Association**

On January 1, 2007, Judge Carmichael began her service as Judge of Clark Circuit Court No. 4 (formerly Superior Court No. 1). Circuit Court No. 4 handles a general jurisdiction caseload and all of the juvenile matters for Clark County, including delinquency and CHINS cases. The Court also has a major felony docket and a civil docket. She implemented a Family Court Project, a Truancy Prevention program, a Family Treatment Drug Court focusing on addressing substance abuse issues of parents, and Juvenile Detention Alternatives Initiative to prevent youth from being detained unnecessarily.

Prior to her election to the Circuit Court, Judge Carmichael served as Judge of Jeffersonville City

Court from January 1, 2000 until December 31, 2006. In that position, she presided over criminal misdemeanors and traffic infractions. She started many new programs for alcohol related offenses, including an Alcohol Court, a Victim Impact Panel, and an Alcohol Awareness Program. She also started the use of the Ignition Interlock Device for drunk drivers in Clark County.

Before her full-time judge’s position, Judge Carmichael maintained a private practice in Jeffersonville, where she focused on family law issues, including divorces, child support matters and child custody cases. She was a family law mediator in Indiana before taking the bench. Judge Carmichael was appointed as the first full-time Public Defender for Clark County in January 1989. She served as the Chief Public Defender and later as an Assistant Public Defender for twelve years. As Chief Public Defender, she had a trial caseload, including a capital murder case, and perfected all of the public defense appeals for the County.

Judge Carmichael attended Jeffersonville High School (graduating in 1980), Michigan State University, Indiana University Southeast (earning a Bachelor of Arts Degree with a Major in Sociology in 1984) and the University Of Louisville School Of Law (earning her Juris Doctorate in 1987).

**Judge Mary Ellen Diekhoff  
Indiana Public Defender Commission  
Monroe Circuit Court**

Mary Ellen Diekhoff is a Judge for the Monroe Circuit Court in Bloomington, Indiana. She has served as a judge for the court since 2005. Prior to becoming a judge, she was 1st Deputy Prosecutor for Monroe County and worked as an Associate Attorney at the Harrell, Clendening and Coyne Law Firm. She graduated from the Indiana University School of Law where she is currently an Adjunct Professor.

Judge Diekhoff currently handles criminal cases and presides over Drug Court, Veteran’s Court and Re-Entry Court. She is a member of the Monroe County Bar Association, Indiana State Bar



Association, Indiana Judges Association and the Indiana Public Defender Commission.

**Monica Foster, Chief Federal Defender  
Indiana Federal Community Defender**

Monica Foster has been the Chief Federal Defender for the Southern District of Indiana since 2012. Before that, she was in private practice where her practice focused on representing persons charged with the death penalty. She has successfully argued a number of death penalty cases to juries and has negotiated many more to successful resolution. While in private practice, Monica also represented the Government of Mexico when their nationals were charged with potential capital crimes in the United States. Monica has argued in appellate courts throughout the country, including the United States Supreme Court.

Monica and her spouse are trying to bring peace to the Middle East one young Arab boy at a time. In that effort, they have hosted foreign exchange students from Saudi Arabia since 2006. She is also a relentless rescuer of small dogs.

**Justice Christopher M. Goff  
Indiana Supreme Court**

Christopher M. Goff was appointed to the Indiana Supreme Court by Governor Eric Holcomb in June 2017. He took the oath of office as Indiana's 110th justice on July 24, 2017.

Justice Goff was born in Wabash, Indiana in 1972. After graduating from high school there, he attended Ball State University graduating summa cum laude in 1994, and then earned his law degree at the Indiana University Maurer School of Law in 1996.

After law school, Justice Goff worked in private practice, being named partner at a Huntington law firm after just 18 months working on criminal defense, domestic relations, personal injury, small business cases, and more. He served as Huntington County Public Defender for two years. His work lead to the establishment of the Huntington County Court Appointed Special Advocate (CASA)

program. Justice Goff was named Huntington County Pro Bono Attorney of the Year in 2001 and 2002. He also served as President of the Huntington County Police Merit Board and Vice President of the Huntington County Bar Association.

Before joining the Indiana Supreme Court, Justice Goff served as Wabash County Superior Court Judge for twelve years. During his service on the trial bench he established the Wabash County Drug Court and the Wabash County Family Drug Treatment Court.

Justice Goff served on the Board of Directors of the Indiana Judicial Conference, representing Wabash, Huntington, Wells and Adams Counties. He also served as Chair of the Protection Order Committee of the Indiana Judicial Conference.

**Joseph R. Heerens, General Counsel  
Office of Indiana Governor Eric Holcomb**

Joe Heerens has been an attorney in Indianapolis for more than 30 years. Educated at DePauw University, Georgetown University (Washington, D.C.), and Indiana University School of Law (Bloomington), Mr. Heerens currently serves as the General Counsel for Indiana Governor Eric J. Holcomb.

Prior to his service with Governor Holcomb, Mr. Heerens served as General Counsel, Government Affairs Director and Chief Ethics Officer for the Indianapolis Airport Authority. During his time with the Airport, Mr. Heerens was active in many other organizations, including service on a committee at the National Academy of Sciences (Transportation Research Board, ACRP), serving as the Chair of the State Employees' Appeals Commission, and participating in the FBI Citizens Academy (Indianapolis).

Prior to his service with the Airport, Mr. Heerens was Chief Legislative Counsel, Policy Director and Assistant General Counsel to Indiana Governor Mitch Daniels

Earlier in his career, Mr. Heerens served as the Chair of the Government Affairs Committee for an



industry association based in Washington, D.C., during which he testified on several occasions before several committees of the U.S. Congress. Mr. Heerens has lectured at Indiana University School of Law (Indianapolis) and Purdue School of Aviation (Lafayette), and has given numerous presentations to the legal community, aviation industry, chambers of commerce, and other groups.

**Larry Landis, former Executive Director  
Indiana Public Defender Council**

Larry A. Landis is from Highland, IN. He graduated from IU, Bloomington in 1969, and I.U. Robert H. McKinney School of Law in 1973. His first job as a lawyer was as a deputy state public defender. He was appointed the training director of the Indiana Public Defender Council when it was created in 1977. He has been the Executive Director of the IPDC since 1980. He has conducted over 350 seminars and workshops, published six manuals and numerous articles on criminal defense and has lectured extensively on a variety of criminal justice topics.

Larry drafted the legislation that created the Indiana Public Defender Commission in 1989 and served as the Executive Director of the Public Defender Council until July 2018. He works with the Indiana General Assembly on all criminal and juvenile justice bills. He is currently a member of the Public Defender Commission, Board of Trustees of the Indiana Criminal Justice Institute, Commission on Children, and the Commission on the Interstate Compact on Probation and Parole. He was a member of the Criminal Code Evaluation Commission and the Criminal Law and Sentencing Policy Study Committee that revised the Indiana Criminal Code in 2014.

Larry has been an adjunct professor in trial advocacy at I.U. Robert H. McKinney School of Law since 1981. His awards and honors include: Hoosier Freedom Award in 2012 from the Indiana Trial Lawyers Association; Chancellor's Award for Excellence in Teaching from IUPUI in 2010; Part-Time Teaching Award from I.U. President

Michael McRobbie in 2010; Marc Emery Award from the Marion County Public Defender Agency Board of Directors in 2007; Distinguished Teaching Award in 1998 and 1999 from I.U. School of Law – Indianapolis; Reginald Heber Smith Award in 1996 from the National Legal Aid and Defender Association; and the Criminal Justice Service Award in 1996 from the ISBA Criminal Justice Section. Larry is a member of the ABA, NLADA, NAPD, NACDL, ISBA, and the IBA.

**Stephen P. Luce, Executive Director  
Indiana Sheriffs' Association**

Since February of 2009, Luce has served as the executive director and the principal official in charge of the day-to-day operation of the Indiana Sheriff's Association (ISA). Luce has engaged in public appearances, media briefings, legislative hearings and public speaking on the behalf of the Association. In addition he has engaged in National Sheriff Association and national law enforcement events as a representative for the ISA.

Prior to Executive Director Luce's appointment to the Indiana Sheriffs' Association his career spanned over 25 years in law enforcement and correction services. In 1985, Luce began his career with the Knox County Work Release Program as the supervisor of the work release program. In 1990 he was hired on to the Vincennes Police Department as a Patrolman working much of his time as a School Liaison Officer. In 1997 he was appointed as a Deputy with the Knox County Sheriff's Office and was elected as the Knox County Sheriff in 2002 and 2006.

**Andrea D. Lyon, Dean and Professor of Law  
Valparaiso University Law School**

Andrea Lyon was appointed as Dean of Valparaiso University Law School in July of 2014. Formerly, she was a Clinical Professor of Law, Associate Dean of Clinical Programs, and Director of the Center for Justice in Capital Cases. Lyon received her undergraduate degree from Rutgers University and her law degree from Antioch School of Law. After graduating, she worked for the Cook County Public

Defenders' Office in the Felony Trial Division, Post-Conviction/Habeas Corpus Unit, Preliminary Hearing/First Municipal (Misdemeanor) Unit and the Appeals Division.

Her last position there was Chief of the Homicide Task Force, a 22-lawyer unit representing persons accused of homicides. She has tried over 130 homicide cases, both while in the Public Defender's Office and since. She has defended more than 30 potential capital cases at the trial level and has taken 19 through penalty phase; she won all 19. In 1990, she founded the Illinois Capital Resource Center and served as its Director until joining the University of Michigan Law School faculty as an Assistant Clinical Professor in 1995.

A winner of the prestigious National Legal Aid and Defender Association's Reginald Heber Smith Award for Best Advocate for the Poor in the Country, she is a nationally recognized expert in the field of death penalty defense and a frequent continuing legal education teacher throughout the country. In January of 2015 she was awarded Operation Push's Rev. Dr. Martin Luther King, Jr. and President Lyndon B. Johnson Dream-Makers Award.

#### **Judson McMillin Mullin McMillin & McMillin**

Jud McMillin is an attorney residing in Brookville, Indiana with his wife Natasha and their four children. He practices law at the firm of Mullin, McMillin and McMillin which has offices in Brookville and Liberty, Indiana.

Before entering private practice, Mr. McMillin attended the University of Cincinnati, obtaining a degree in Economics in 1999, and his Law Degree from the University of Mississippi in 2002. Shortly thereafter he became a deputy prosecutor in Ohio, where he found his love for the criminal justice system. The bulk of Mr. McMillin's current practice is in criminal defense.

As a five-year member of the Indiana General Assembly, Mr. McMillin was instrumental in

the Indiana Criminal Code Rewrite. He also led revisions to several laws pertaining to providing people opportunities to keep their drivers licenses, and to have their criminal records improved and expunged. Mr. McMillin is a strong supporter of law and order, but firmly believes that for law and order to prevail, the system should be fair and focused on rehabilitation rather than retribution. He believes there is no greater motivation to drive positive behavior than hope and opportunities and has dedicated the last decade of his life to working towards a criminal justice system that reflects these beliefs.

#### **Dr. Jeff Papa, Partner Barnes and Thornburg**

Jeff Papa is a partner in the Indianapolis office of Barnes & Thornburg LLP and is a member of the Labor and Employment Law Department. Mr. Papa focuses his practice on immigration matters. He counsels clients on a number of issues, including nonimmigrant status and visa issues, permanent residency and citizenship matters, as well as on higher education and government affairs issues. Mr. Papa provided immigration law services to Barnes & Thornburg clients for nearly seven years in an earlier role, and served two terms as chair of the Indiana chapter of the American Immigration Lawyers' Association, as well as two terms on the national board of governors of the American Immigration Lawyers' Association.

Prior to re-joining Barnes & Thornburg, Mr. Papa was the chief of staff and chief legal counsel for the Indiana Senate and also served as the first mayor of the Town of Zionsville, Indiana, in 2015. He previously was an attorney with Barnes & Thornburg from 2001-2007.

In the community, Mr. Papa was formerly a member of the Zionsville Town Council and also served on the Zionsville Board of Police Commissioners. He is president of the Youth Enhancement Training Initiative, Inc. and a distinguished Fellow of the Indianapolis Bar Foundation. In 2016, he was recognized with the Honor Alumni Award





from the Rose-Hulman Alumni Association and named a recipient of the Zionsville Chamber of Commerce’s Town Crier award. Mr. Papa is a co-founder and adviser for zWorks, Zionsville’s co-working venture, and he is a member of the Indiana Advisory Committee for the U.S. Global Leadership Coalition.

Mr. Papa earned his B.S. from the Rose-Hulman Institute of Technology in 1993 and his M.A. from Ball State University in 1999.

In 1999, he also earned his J.D. from the Indiana University Robert H. McKinney School of Law. In 2010, he earned an LL.M. from the Indiana University Robert H. McKinney School of Law. In 2016, Mr. Papa earned his Ph.D. in Education Leadership and Administration from Indiana State University, as well as a graduate certificate in Higher Ed and Student Affairs from IU-Bloomington, and completed the Academy for Teaching and Learning Leadership at Marian University. He served as president of the Rose-Hulman Alumni Board, as an adjunct professor at IU McKinney School of Law and at IU Bloomington SPEA, has served on external department advisory boards at Ball State University and Rose-Hulman, and has been published in multiple subject areas.

**Representative Gregory W. Porter  
Ranking Minority Member, Ways and Means  
Committee**

**Indiana House of Representatives**

Gregory W. Porter is a member of the 120th Indiana General Assembly. He is now serving his 13th term for the 96<sup>th</sup> House District in Indianapolis, Indiana. He is currently ranking minority member of the Indiana House Ways and Means Committee, and president of the National Black Caucus of State Legislators (NBCSL). As member of the Indiana General Assembly he and his legislative colleagues authored Resolution No. 56 that renames the section of Interstate Highway 65 from Seymour, Indiana to Johnson County the Tuskegee Airmen Highway. Mr. Porter also holds the position of vice-president

of External Affairs for the Health and Hospital Corporation of Marion County.

Porter has held a number of board positions and other leadership roles within the state and at the national level. He is past chairman of the Indiana Black Legislative Caucus and past chairman of the Indiana House Education Committee. Mr. Porter served on the National Taskforce for No Child Left Behind, the Council of State Government, the NAACP, and the Earlham College African American Advisory Board. He has chaired the Education Committees of the NBCSL, Council of State Governments and National Caucus of State Legislators. He also has authored legislation that established accountability and standards for k-12 education, cultural competency, and anti-bullying.

Mr. Porter has received numerous awards not limited to but including the NAACP – 2015 Pathfinder Award, Martin Center Distinguished Sickle Cell Champion Award, Indianapolis Urban League – 2015 Servant Leadership Legacy Award, Prevent Child Abuse of Indiana Leadership Award, Indiana Early Care Education Legislative Award, Indiana Council of Administrators of Special Education Award, Indiana School Counselors Association Friend of Youth Award, National Black Caucus of State Legislators Award, plus an Eagle Award from the National Black Caucus of State Legislators, Eli Lilly Legislator of the Year Award, and the Marion County Commission on Youth Holiday Honors Award.

He is a native of Indianapolis, a graduate of Shortridge High School and holds a Bachelor of Arts Degree from Earlham College where he received the Outstanding Alumni Award. He has also been inducted into the Shortridge High School Hall of Fame and the Indianapolis Public Schools Hall of Fame. He graduated from Harvard University’s John F. Kennedy School of Government Executive Program in 2001 and served on the Harvard working group on early childhood science and policy. He has an honorary doctorate degree from Martin University, Indianapolis, Indiana.

**Professor Joel Schumm**  
**Clinical Professor of Law**  
**Indiana University Robert H. McKinney School of Law**

Joel Schumm is a Clinical Professor of Law at the IU Robert H. McKinney School of Law, where he has taught since 2001. He teaches legal writing, juvenile justice, Indiana constitutional law, and a seminar on the selection of judges. He also directs the Court Externship Program, which places approximately 60 students each year with judges in central Indiana. Joel has represented more than 150 indigent clients on appeal in criminal, juvenile, and civil commitment cases, including more than 40 cases litigated by law students through the Appellate Clinic, which he created at the law school in 2008. He has been selected by his peers as one of the “Best Lawyers in America” for Appellate Practice since 2012.

Joel has authored several law review articles, public policy reports for the ABA or National Association of Criminal Defense Lawyers (NACDL), and is regularly sought out by media as an expert on a variety of criminal and juvenile justice issues.

Joel is a 1998 graduate of the evening program at IU-McKinney. He also served as a law clerk to Justice Theodore Boehm of the Indiana Supreme Court and Judge Paul Mathias of the Indiana Court of Appeals before he began teaching and practice.

***Special Advisors:***

**Norman Lefstein, Professor of Law and Dean Emeritus**  
**Indiana University Robert H. McKinney School of Law**

Professor Lefstein was dean of his law school in Indianapolis for 14 and half years, from 1988 until 2002. During his tenure, he enhanced financial support for faculty research and scholarship and promoted expansion of a number of the school’s activities, including civil legal aid and criminal defense clinics, student pro bono opportunities, internships, and international programs. He also

oversaw the fund raising and building of Inlow Hall, which now houses the IU McKinney School of Law. Prior to becoming the school’s dean, Professor Lefstein was a faculty member at the University of North Carolina School of Law at Chapel Hill and has held visiting or adjunct appointments at the law schools of Duke, Georgetown, and Northwestern. Earlier in his career, Professor Lefstein was selected for the E. Barrett Prettyman Fellowship Program in Trial Advocacy at the Georgetown University Law Center from which he received the LL.M. degree. Professor Lefstein’s prior positions have included service as director of the Public Defender Service for the District of Columbia, an Assistant United States Attorney in D.C., and as a staff member in the Office of the Deputy Attorney General of the U.S. Department of Justice. For more than forty-five years, Professor Lefstein has published extensively about indigent defense, ethics, and related subjects, including the duties of lawyers in providing defense representation. Among his most prominent publications are several national reports about public defense and a book about defense caseloads. These include [Gideon’s Broken Promise: America’s Continuing Quest for Equal Justice](#), published by the ABA in 2004; [Justice Denied: America’s Continuing Neglect of Our Constitutional Right to Counsel](#), published in 2009 on behalf of the National Right to Counsel Committee; and [Securing Reasonable Caseloads: Ethics and Law in Public Defense](#), published by the ABA in 2011. His other publications have included preparation of ABA criminal justice standards, principles, and guidelines for defense representation. Professor Lefstein is a prior chair of the ABA Section of Criminal Justice and testifies frequently on indigent defense matters as an expert witness in state and federal courts throughout the country. He currently serves as a Special Advisor to the ABA Standing Committee on Legal Aid and Indigent Defendants and to this Indiana Task Force on Public Defense.



**David Carroll**  
**Sixth Amendment Center**

David Carroll is the Executive Director of the Sixth Amendment Center (6AC). The 6AC is a non-partisan, non-profit organization providing technical assistance and evaluation services to policymakers and criminal justice stakeholders. Its services focus on the constitutional requirement to provide effective assistance of counsel at all critical stages of a case to the indigent accused facing a potential loss of liberty in a criminal or delinquency proceeding. Carroll is a nationally recognized expert on the standards and methods for the delivery of right to counsel services, with more than twenty years of providing technical assistance to policymakers at the federal, state, and local levels. He has led numerous research and evaluation projects, authored many papers and reports, and testified on right to counsel issues before a number of state legislatures and the U.S. Congress. His work has brought him to all but two of the nation's 50 states. His work has been instrumental to indigent defense reform in, among others, Idaho, Louisiana, Michigan, Montana, Nevada, and Utah.

**Suzy St. John**  
**Staff Attorney**  
**Indiana Office of Court Services**

Suzy St. John is a Staff Attorney in the Indiana Office of Court Services, Office of Judicial Administration. She provides legal and staff support to Indiana judges on matters involving criminal law. She currently sits on the Advisory Board for Indiana's Juvenile Defense Project. She previously practiced law in indigent defense as an appellate attorney in Marion County. She received her law degree from IU McKinney School of Law where she now teaches legal writing as an Adjunct Professor.

***Staff Biography:***

**Kim Tandy, Technical Advisor to the Task Force and Public Defender Commission Consultant, Justice by Design, LLC**

Kim Tandy has nearly 3 decades as a lawyer defending the civil rights of children, youth, and adults in the justice system. She was the founder and Executive Director of the Children's Law Center, Inc. in Covington, Kentucky for 28 years where she successfully litigated numerous class action civil rights cases on behalf of confined youth or youth otherwise denied their constitutional rights. She has directed communications and policy initiatives around removing youth from adult court and adult facilities, ending solitary confinement practices, and stopping the "school to prison pipeline."

As the coordinator for the Central Juvenile Defender Center for nearly twenty years, she served as primary investigator and author of state juvenile defense assessments in Ohio, Kentucky, Indiana and Missouri and has participated in twelve other state assessment teams for the National Juvenile Defender Center. Kim also spent nearly 15 years as an appellate contract lawyer for the Department of Public Advocacy in Kentucky, and served as a CJA appellate attorney for the Sixth Circuit Court of Appeals.

Kim has lectured across the country on numerous issues including conditions of confinement, improving juvenile defense, ethical considerations in representing child clients, ending the school to prison pipeline, access to the court issues, and other civil rights matters. She has received awards from the National Juvenile Defender Center, the American Bar Association, the IMPACT fund, and various state and local honors. She now serves as a consultant on a number of criminal and juvenile justice issues.

**Kathleen Casey**  
**Staff Attorney, Public Defender Commission**

Kathleen Casey graduated from the Indiana University-McKinney School of Law in 2010. After graduating, she worked as a public defender for the Marion County Public Defender Agency. She joined the Commission in 2014. She was a recent graduate of the Indianapolis Bar Association Bar Leaders Series as well as an “Up and Coming Lawyer” in the *Indiana Lawyer*.

**Andrew S. Cullen**  
**Policy & Communications Analyst to the Task Force and Public Defender Commission**  
**Indiana Public Policy Consultant**

Andrew Cullen is a public policy consultant with experience in all three branches of Indiana State Government, the U.S. Senate, and the non-profit sector. He most recently served as Vice President of Public Policy for United Way of Central Indiana where he lobbied for the creation of Indiana’s Pre-K Pilot program. He also led an effort that secured new state funding for Indiana’s 211 Resource and Referral System. In 2014, Andrew was the lead lobbyist on the Child Care & Development Fund Reform Act, which improved the quality and safety of child care for over 20,000 Hoosier children per year.

Prior to joining United Way, Andrew served as the Legislative Liaison for IPDC where he helped craft the first comprehensive re-codification of Indiana’s criminal code in over thirty years. He also led the lobby effort to establish Indiana’s first-ever general expungement law.

Prior to joining IPDC, he spent a year working in various positions on the primary presidential campaign of Hillary Rodham Clinton. He joined the Clinton campaign after serving as for many years as the Regional Director for Central & Southwest Indiana on the U.S. Senate Staff of then-Senator Evan Bayh. He was the key contact for Indiana constituent organizations who sought Senator Bayh’s support on a wide-array of issues. During his time with Senator Bayh, Andrew was

also the primary state staff person in charge of working to protect NAVSEA Crane during the Base Realignment & Closure Process, helping to preserve nearly 4000 Hoosier jobs.

Andrew also served as a Legislative Liaison to the Director of the Indiana Department of Natural Resources, where he managed legislative relations. His first professional experience was as a Legislative Assistant at the Indiana House of Representatives. He was a member of the staff of then-Indiana Speaker of the House John R. Gregg, where he functioned as the session reading clerk and managed the offices of State Representatives from Fort Wayne, Anderson, and St. Joseph County.

A 2003 graduate of the IU McKinney School of Law, Andrew concentrated his law education on public interest law. He earned a double major from the University of Evansville (UE) in journalism and political science. Andrew was recognized as the Partner of the Year to the Indiana Association for the Education of Young Children in 2014, and he also received the Impact Award from the Public Allies for Community Re-Entry that year. The Indianapolis Business Journal recognized him as a “40 Under 40” top professional in 2015.

**Derrick Mason**  
**Senior Staff Attorney, Public Defender Commission**

Derrick Mason graduated from the Indiana University-Maurer School of Law (Bloomington) in 2005. He worked in private practice in Lake County and the Department of Child Services in Monroe County prior to becoming a Monroe County public defender from 2007-2014. He has worked for the Commission since 2014. Over the past thirteen years he has spoken on expungement, criminal law, GAL issues, Children in Need of Services/Termination of Parental Rights, and family law issues for the Monroe County Bar Association, Marion County Public Defender Agency, Indiana Public Defender Council, Indiana State Bar Association, ICLEF, and more.





# Appendix E: Acknowledgements

## Indiana Public Defender Commission Staff

Derrick Mason, Senior Staff Attorney  
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Torrin Liddell, Research & Statistics Analyst  
Paula Diaz, Administrative Assistant  
Kristin Casper, Legislative Liaison  
Michelle Bartley

## Indiana Public Defender Council Staff:

Bernice Corley, Executive Director (July 7)  
Amy Karozos, Project Director, Juvenile Defense  
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### *Juvenile Subcommittee:*

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Honorable Vicki Carmichael  
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Chief Justice Loretta Rush  
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### *Indianapolis Listening Tour:*

Jonathan Little  
Jill Johnson  
Rhiannon Edwards  
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Mark Russell  
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***Fort Wayne Listening Tour***

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Mickey Kraus  
David Frank  
Kathryn Byrom  
Mark Olivero  
Bart Allen  
Mike McAlexander Prosecutor  
Mark Thoma  
Jared Haller  
Jim Abbs

***Evansville Listening Tour***

Stephen Owens  
Hon. Judge Brett Niemeier  
Hon. Judge Nathan Verkamp  
Connie Whitman  
Jon Schaefer  
David Bunner

***Clark County Listening Tour***

Jeremy Braunstein  
Alan Marshall  
Patrick Biggs  
Jennifer Culotta  
Jason Pattinson  
Abraham Navarro  
D. Bowyer  
A. Adams  
Judge Terrence Cody  
Bryan Abell  
George Streib

***Gary Listening Tour***

Marce Gonzalez  
Kelly Lavin  
Michaela Spangenburg  
William Schaefer  
Bernice Corley  
Gojko Kasich  
Norman Bailey  
Kim McGee  
Mayor Freeman-Wilson  
Rev. Homer Cobb  
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# Appendix F: Methodology of original research by Commission staff

## Reimbursement of Misdemeanors

To produce estimates of the cost for reimbursing misdemeanors we used two primary components. First, we produced per-case cost estimates using a statistical model informed by the caseload and cost data reported to the commission for 2017. Attorneys doing only misdemeanors (and thus outside of commission standards) were excluded from this analysis, as these attorneys are frequently far out of compliance if they were to be reimbursed. This methodology produced a commission per-case cost for each of our major case types. In the case of misdemeanors this cost estimate is \$277 per case.

The next component is to estimate the number of public defender appointments expected in 2019 and 2020. To do so, we used historical data from the Indiana Office of Court Services from the period of 2014 to 2017. In order to avoid potential over-extrapolation of existing trends, we use the overall rate of change in total caseloads. This approach accounts for general growth in caseload but apportions this growth proportionally across all case types, instead of modeling each case type individually. The method yields a projection of small consistent growth across all case categories on a yearly basis. To produce an average yearly cost for the 2019/2020 biennium, we used an average of the projected caseload for these two fiscal years. Excluding city and town courts, this yielded a total of 51,050 misdemeanor appointments. At \$277 per case, this provides a cost estimate of \$14,140,850 total, and \$5,656,340 in 40% commission reimbursement.

This brings us to the final issue of city and town courts. Many of these city and town courts handle

misdemeanors, and thus handle cases that can require public defenders. Using the same projection method described above and the same information provided by the Office of Court Services, the projected number of appointments in city and town courts for the 2019/2020 biennium is 5,940. However, the rate of public defender appointments for city and town courts is very low compared to other courts: in the 2016 by Office of Court Services data, city and town courts had a 20% public defender appointment rate, versus 40% for misdemeanors in other courts. To adjust for this, we doubled the amount of cases, meaning our final estimate is 11880 cases. Adding to the previous total misdemeanor appointments, the final misdemeanor yearly caseload prediction is 62,930.

This final caseload combined with the \$277 cost-per-case yields the final estimate of \$17,431,610 in total cost and \$6,972,644 in 40% commission reimbursement.

## Methods for Assessing Benefits Associate with Commission Membership

The assessment of benefits associated with commission membership utilize a variety of data sources with a common core model structure. This core model structure is similar to an ANCOVA (i.e., analysis of covariance or analysis of variance with covariates) with elaborations on this core structure specialized to the specific dependent variable. The core involves a single categorical predictor of interest, commission membership, and several covariates included to attempt to control for potential alternative explanations for the observed differences between county types.

The covariates include county population, a measure of crime frequency (arrests reported in 2014, taken from the FBI Uniform Crime Reporting Program Data<sup>292</sup>), a measure of political affiliation (% voted Republican in the 2016 presidential

<sup>292</sup> Fed. Bureau of Inv., *Uniform Crime Reporting Program Data County-Level Detailed Arrest and Offense Data* (2014), <https://www.icpsr.umich.edu/icpsrweb/NACJD/studies/36399/version/2> (last visited August 16, 2018).



election) and median income. The effect of these covariates is treated as non-interactive with commission membership.

This ANCOVA core determines a predicted tendency for the variable of interest. This tendency then should be translated into a predicted distribution of data. For the analyses of jail data, fixed term of incarceration, and foster stay length, the data are modeled with a  $t$  distribution centered on this predicted tendency. This distribution is an elaboration of the traditional normal distribution used in a standard ANCOVA, but with the thickness of the tail of the distribution (analogous to the prevalence of outliers) directly estimated. This allows atypical data to be included instead of being semi-arbitrarily thrown out, but without allowing a singular datum to dominate the central estimate. However it should be noted that all results presented in this document are qualitatively similar when using the standard normal distribution.

A continuous distribution is inappropriate for the IRAS data we had available to us, which was collated as a series of frequency counts in the labeled IRAS categories: low risk, moderate risk, high risk, and very high risk. To appropriately match this data structure, we use a Poisson distribution to model the frequencies for each category. The Poisson distribution is a discrete distribution traditionally used to model the frequency of events in a given time frame. In this case, the distribution models the predicted frequency for each of the four IRAS categories in a given county, as a function of commission membership and the value of the covariates in that county.

For all results presented here, Bayesian methods were used to estimate parameter values. All effects presented here were assessed for statistical credibility (analogous to frequentist statistical significance) by comparing the 95% highest density interval (HDI) to the null effect parameter value.<sup>293</sup>

This is analogous to tests of  $p < 0.05$  in frequentist statistics. All results presented here have non-null effects as evaluated by this metric.

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<sup>293</sup> See John K. Kruschke, *Rejecting or Accepting Parameter Values in Bayesian Estimation*, *ADVANCES IN METHODS AND PRACTICES IN PSYCHOLOGICAL SCIENCE* 270-280 (2018) (discussing Bayesian methods of assessing null values

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in more detail).



# Appendix G: Juvenile Subcommittee Report

## Introduction:

In 2006, the National Juvenile Defender Center and the Central Juvenile Defender Center released their assessment of Indiana’s juvenile justice system entitled *Indiana: An Assessment of Access to Counsel and Quality of Representation in Delinquency Proceedings*.<sup>294</sup> The Assessment identified significant problems with the number of youth who waived the right to counsel in juvenile delinquency proceedings, including those sent to the Indiana Department of Correction. It also noted inconsistent quality of representation, structural problems, and the lack of performance standards for attorneys handling juvenile cases. The Assessment recommended, among other things, the creation of a “statewide juvenile defender office to bring together the resources and expertise from across the state, continue the process of evaluating the delivery of legal services to Indiana’s children and implement specific policies and programs as appropriate.”<sup>295</sup>

Since the release of the 2006 Assessment, Indiana has made substantial progress in increasing juvenile specific public defender training, developing a community of juvenile defenders within the state, and reducing waiver of counsel—including the adoption of Criminal Rule 25. However, additional improvements are needed to build upon these efforts to make a more effective, comprehensive juvenile defense system and ensure that mandates of the 14th Amendment and *In re Gault* are met for all of Indiana’s youth.

In October of 2015, Indiana was one of four states awarded an Office of Juvenile Justice and

Delinquency Prevention (OJJDP) Smart on Juvenile Justice Access to Counsel Planning Grant. The grant provided resources to the Indiana Public Defender Council to assess the state’s delivery system for juvenile defense, and to propose ways to improve upon access to counsel, and quality of representation for youth in the delinquency system. With the input of stakeholders throughout the state, the “Indiana Statewide Plan for Juvenile Defense Improvement” was developed. In October of 2016, OJJDP awarded nearly \$750,000 over two years for implementation of this plan. The plan included oversight by a 12 member Advisory Board, with additional widespread stakeholder involvement. It has focused on building juvenile defense as a specialized practice by increasing both trial level and post-dispositional support through training, technical assistance and resource development.

Several members of the Advisory Board also serve on the Indiana Task Force on Public Defense. Those members, as well as others on the Advisory Board have participated in the process to provide the findings and recommendations to the larger Task Force group.

### 1) What are the key attributes of an effective system of representation of children in delinquency and status offender cases?

Youth who come before the juvenile courts in Indiana should have access to a strong juvenile defense delivery system which recognizes the developmental differences between children and adults, yet fully affords the protection of their constitutional, statutory and human rights. In 1967, the landmark U.S. Supreme Court opinion *In re Gault*<sup>296</sup> recognized certain fundamental due process protections for youth in delinquency proceedings including the right to counsel. Now, more than 50 years later, it is critical that Indiana ensure that all youth have the right to effective assistance of counsel.

To aid states in providing criteria to fully implement the holding in *Gault*, the National Juvenile Defender

<sup>294</sup> ELIZABETH GLADDEN KEHOE & KIM BROOKS TANDY, INDIANA: AN ASSESSMENT OF ACCESS TO COUNSEL & QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2006), <http://njdc.info/wp-content/uploads/2013/11/Final-Indiana-Assessment.pdf>.

<sup>295</sup> *In re Gault*, 387 U.S. 1 (1967).

<sup>296</sup> *Id.* at 28.

Center and the National Legal Aid and Defender Association created the Ten Core Principles for Providing Quality Delinquency Representation through Public Defense Delivery Systems.<sup>297</sup> NJDC has also provided guidance to states to ensure quality representation through national standards,<sup>298</sup> as well as ethical considerations about the role of counsel in these proceedings.<sup>299</sup>

The Task Force Subcommittee on Juvenile Defense, recognizes the following basic principles regarding its indigent defense delivery system:

- Representation of youth is a specialized area of the law which requires skilled, well-resourced, and trained lawyers.
- Youth are entitled to early appointment of counsel and representation at all critical stages, from arrest and detention until the youth is no longer subject to dispositional orders.
- Youth representation must be client-centered, developmentally appropriate, and bias-free.
- Youth should be treated with dignity and respect and have the opportunities to achieve their highest potential.
- An effective juvenile defense delivery system should be collaborative and engaged in the community.
- The juvenile defense system should cultivate leadership and ensure quality through oversight and accountability.
- All youth should have access to skilled and zealous advocacy from a public defense system regardless of geography.
- Juvenile defenders must have access to expert and ancillary services to provide quality services, including mental health

experts, education specialists, social workers, paralegals, interpreters, and forensic experts.

## 2) How does Indiana's system measure up against these key attributes? Where are the strengths? Where are weaknesses?

The OJJDP Planning Grant included an assessment of right to counsel issues in Indiana for youth in the delinquency system, with consideration given to statutory and rule provisions, policy and practice, and structural impediments within the public defense system that adversely affected both access to lawyers and quality of representation. Additional considerations addressed included the state's system of data collection on juvenile defense indicators, and what measures were in place for the state to ensure effectiveness in the delivery of services.

The Indiana Statewide Plan for Juvenile Defense Improvement is based on evidence-based standards and best practices. The improvements follow guiding principles on the need for skilled, well-trained juvenile defenders found in: American Council of Chief Defenders & National Juvenile Defender Center, *Ten Core Principles for Providing Quality Delinquency Representation Through Indigent Defense Delivery Systems* (2005); National Juvenile Defender Center and Models for Change, *National Juvenile Defense Standards* (2013); Institute of Judicial Standards-American Bar Association, *Juvenile Justice Standards Annotated Edition* (1996); National Council of Juvenile and Family Court Judges, *Juvenile Delinquency Guidelines: Improving Court Practice in Juvenile Delinquency Cases* (2005); Indiana Rules of Professional Conduct; Kaarin Lueck & Indiana Public Defender Council, *Performance Guidelines for Representation of Juveniles in Delinquency Cases* (2014); National Research Council, *Reforming Juvenile Justice: A Developmental Approach*; and, United States Department of Justice, *Report of the Attorney General's National Task Force on Children Exposed to Violence* (Dec. 12, 2012); National Juvenile Defender Center, *The Role of Juvenile Defense Counsel in Delinquency Court* (2009). The materials from NJDC's JTIP trainings

<sup>297</sup> The Principles were adopted in partnership with the American Council of Chief Defenders in December of 2004 and revised and reissued in July 2008, and again in October of 2012.

<sup>298</sup> Juvenile Standards, *supra* note 209.

<sup>299</sup> NAT'L JUVENILE DEF. CENT., ROLE OF JUVENILE DEFENSE COUNSEL IN DELINQUENCY COURT (2009), <http://njdc.info/wp-content/uploads/2013/11/NJDC-Role-of-Counsel.pdf>.



also helped inform the project through the lens of adolescent development concepts. Key findings made in that report include:

***A) Early appointment of counsel and reducing waiver of counsel remains a priority.***

Juveniles in Indiana charged with committing delinquent acts have the right to be represented by counsel at every stage of juvenile proceedings, including disposition.<sup>300</sup> By statute, juvenile court judges are required to appoint counsel at the detention hearing or initial hearing if the child does not have an attorney and if the child has not lawfully waived his or her right to counsel.<sup>301</sup> If a youth is in detention, the court must appoint counsel at the detention hearing; however, if the youth is not detained, the court must appoint counsel at the initial hearing.<sup>302</sup> The juvenile court judge must inform the child and his parent, guardian, or custodian of the child's right to counsel and right to have counsel appointed at public expense if the family cannot afford a lawyer.<sup>303</sup> The appointment of counsel is conditioned only on the determination as to whether the child has an attorney, and whether the child has waived the right to counsel.<sup>304</sup> The determination of who shall pay the cost of counsel is secondary and an independent decision from the determination of whether appointment is made.<sup>305</sup>

Additionally, in January 2015, the Indiana Supreme Court enacted Criminal Rule 25 which sets out mandatory appointment of counsel in certain delinquency proceedings, and prohibits waiver unless made in open court, on the record and confirmed in writing, and in the presence of the child's attorney.<sup>306</sup> Since the enactment of Criminal Rule 25, there has been a decrease in the number of children in court without a public defender, from 42.7% in 2014 in counties that adhere to the Public Defender Commission standards; 37.7% in 2015

<sup>300</sup> I.C. §§ 31-32-2-2, 31-32-4-1 (2018); D.H. v. State, 688 N.E.2d 221, 223 (Ind. Ct. App. 1997).

<sup>301</sup> I.C. § 31-32-4-2 (2018).

<sup>302</sup> I.C. § 31-32-4-2 (2018); IND. CRIM. R. 25.

<sup>303</sup> N.M. v. State, 791 N.E.2d 802 (Ind. Ct. App. 2003).

<sup>304</sup> Adams v. State, 411 N.E. 2d 160 (Ind. Ct. App. 1980)

<sup>305</sup> *Id.*

<sup>306</sup> IND. CRIM. R. 25.

and 31% in 2016.<sup>307</sup>

While there is continued progress in reducing the number of youth who are before the juvenile courts without counsel, the state should provide continued oversight and monitoring to ensure access to counsel and early appointment of counsel in delinquency proceedings. The OJJDP Implementation Grant staff has identified a number of youth at the Department of Corrections since April of 2017 who were committed without having had the benefit of counsel. Lawyers are often not assigned to be present with youth at the initial hearings, particularly when youth are not detained. Lawyers should be present at these hearings unless a valid waiver has been made in accordance with Crim. R. 25.

***B) Indigency determinations should be consistently applied.***

Standards for indigence relative to appointment of counsel are established for adults through the Indiana Public Defender Commission.<sup>308</sup> There are no separate standards set by the Commission for youth indigence determinations.

Indiana law allows for a court to assess reasonable attorney's fees against a parent of a child alleged to be delinquent.<sup>309</sup> A court is required to consider the parent's independently held assets, income, liabilities, and the extent to which such payments would burden the person and that person's dependents.<sup>310</sup> It is clear under Indiana law that appointment of counsel is conditioned only on whether a child before the court has a lawyer, and whether the child has waived the right to counsel.<sup>311</sup> The determination as to who, if anyone, should ultimately pay the cost is an independent and secondary determination to be made.<sup>312</sup>

<sup>307</sup> These percentages are based upon data from the Public Defender Commission and Indiana Courts Online Reports (ICOR) for 2014 and 2015. Such data is not necessarily complete, but is the most accurate format that currently exists in the state.

<sup>308</sup> I.C. § 33-40-5-4 (2018); *see also* Non-Capital Case Standards, *supra* note 69.

<sup>309</sup> I.C. § 33-40-3-6 (2018).

<sup>310</sup> I.C. § 33-40-3-7 (2018).

<sup>311</sup> Adams v. State, 411 N.E.2d 160 (Ind. Ct. App. 1980).

<sup>312</sup> *Id.* at 161.

But survey responses completed during the course of the planning process suggested that there is a need for clarification as to the presumption of indigence among Indiana's youth in delinquency proceedings. Of those responding, 42% believed such clarification would be helpful. The state must ensure that there are adequate means to provide lawyers to youth without regarding to the parents' ability to pay.

***C) Post-disposition advocacy needs to be strengthened.***

Juvenile court adjudications and dispositions may be directly appealed to the Indiana Court of Appeals or the Supreme Court.<sup>313</sup> Youth are entitled to an appeal as a matter of right.<sup>314</sup> Youth committed to the Department of Correction may be entitled to counsel through the State Public Defender for parole revocations and relief from judgment through a Trial Rule 60 motion.<sup>315</sup> Trial Rule 60 motions may be invoked as an appropriate way to vacate a dispositional order revoking probation,<sup>316</sup> seek a belated appeal from delinquency adjudication,<sup>317</sup> raise ineffective assistance of counsel,<sup>318</sup> or challenge the validity of a guilty plea.<sup>319</sup>

Indiana counties bear the responsibility of appellate representation, with Commission reimbursement provided to Commission counties at the 40% rate for both adult and juvenile appeals.<sup>320</sup> From January 2010 through 2015, there were 298 appeals of delinquency cases, of which 58% came from Marion County. This means that among the remaining 91 counties, only 124 appeals were filed in six years. Two-thirds of counties had no appeals during 2014-15, and nearly half had no appeals during the six-year period studied.<sup>321</sup>

<sup>313</sup> IND. R. OF APP. PROC. 5(A).

<sup>314</sup> I.C. § 31-32-15-1 (2018); *Jordan v. State*, 512 N.E.2d 407, 409 (Ind. 1987).

<sup>315</sup> I.C. § 33-40-1-2 (2018).

<sup>316</sup> *C.B. v. State*, 553 N.E. 2d 488 (Ind. Ct. App. 1990).

<sup>317</sup> *Haluska v. State*, 663 N.E. 2d 1193 (Ind. Ct. App. 1996).

<sup>318</sup> *S.E. v. State*, 774 N.E.2d 536, 539 (Ind. Ct. App. 2001).

<sup>319</sup> *W.T. J. v. State*, 713 N.E.2d 938 (Ind. Ct. App. 2001).

<sup>320</sup> Non-Capital Case Standards, *supra* note 68.

<sup>321</sup> These numbers were calculated based upon the number of JD appeals filed according to Indiana Supreme Court and Court of Appeals decisions and dockets.

The Indiana Public Defender provides post-conviction relief representation for incarcerated adults in non-capital cases after an indigent individual files a pro se petition for relief, and may provide representation at hearings and on appeal if there are meritorious post-conviction claims. The Indiana Public Defender office does not handle direct appeals, but will contract with attorneys to provide representation at trial or on appeal at county expense when requested by a trial court. The office provides legal representation for youth at the Department of Correction facing parole revocation hearings, and can provide representation to incarcerated youth in TR60(B) collateral challenges.

The void in juvenile appellate/post-dispositional practice in the vast majority of counties may be attributable to many factors, including the limited number of cases going to trial, financial constraints on counties, frequent waiver of rights by youth, a perception that the stakes are low for juvenile cases, or the unavailability of local qualified appellate counsel. Whatever the reason, the void results in a lack of guidance for trial courts and practitioners about the law as applied to juvenile proceedings, and raises questions about the lack of due process. Providing state funding for an office which may assume this responsibility from counties could provide a more robust and strategic appellate system, including as a high priority those cases in which youth are sent to the Department of Correction.

***D) Some juvenile defense lawyers are lacking standards, training, & access to experts.***

**Standards:** Both the National Juvenile Defense Standards and Indiana Juvenile Defense Guidelines provide that juvenile defense counsel should be knowledgeable of relevant statutes, case law, and court rules, and should be trained in a variety of topics specific to juvenile defense such as developmental science, collateral consequences, and adolescent interviewing techniques.<sup>322</sup>

<sup>322</sup> KAARIN LUECK, INDIANA PUBLIC DEFENDER COUNCIL, PERFORMANCE GUIDELINES FOR REPRESENTATION OF JUVENILES IN DELINQUENCY CASES Guideline 2.1 (2014); Juvenile Standards, *supra* note 209, at 1.1 & 1.3.



Indiana has no training requirements for juvenile representation. Counties participating in the Indiana Public Defender Commission must comply with Commission standards in order to qualify for reimbursement for public defense services. Commission standards for juvenile delinquency cases speak only to experience and do not require any juvenile specific training.<sup>52</sup> The Indiana Public Defender Council published Performance Guidelines for Representation of Juveniles in Delinquency Cases in 2014. The performance guidelines are not used in most counties, and most juvenile delinquency attorneys and judges are unaware of the existence of the guidelines.

**Training:** IPDC offers an annual one day juvenile delinquency training for public defenders. Past topics have included adolescent brain development, incorporating education and special education issues into delinquency cases, mental health and substance use treatment, competency, disposition advocacy, waiver hearings, and ethical issues and considerations of juvenile representation.

In 2015, IPDC collaborated with NJDC to hold a JTIP trainer training that produced a pool of twelve JTIP certified trainers from several different counties. The Juvenile Training Immersion Program (JTIP) is a 40-lesson curriculum for developing a specialization in juvenile defense and is the cornerstone of NJDC's training of front-line defenders. IPDC sponsored a statewide JTIP training in September 2015, using the certified trainers. 24 juvenile public defenders from across the state participated, and the training was enthusiastically received by the participants.

At the county level, public defender offices may provide training and mentoring opportunities. Marion County Public Defender's Office, for example, conducts in house trainings targeted to public defenders handling juvenile cases. The trainings are free and some are mandatory.

Through the OJJDP Implementation Grant, providing quality JTIP training, particularly in rural areas has been a high priority. During 2017,

for example, project staff provided intensive JTIP training free of charge in nine locations, reaching a total of 147 lawyers on three different topical areas. Training areas have focused in part of fundamentals such as Role of Counsel, Juvenile Detention Advocacy, and Adolescent Development. Nine dates have been set up for 2018 for JTIP training on three separate topics.

#### **Access to Expert and Ancillary Services Needed for Holistic Representation and Effective Assistance of Counsel:**

An important element of effective juvenile defense representation as a specialized area is the recognition that youth are different than adults and that lawyers have an obligation to maximize each client's participation in his or her own case to facilitate better understanding and decision making. The NJDC Ten Core Principles emphasize that public defense systems must pay special attention to providing high quality representation to the most vulnerable and over-represented groups in the delinquency system, including children of color, children with mental health and developmental disabilities, drug and alcohol dependent and dually diagnosed youth, and the special issues presented by LGBT youth.<sup>323</sup> The Principles require support for expert services for delinquency cases when necessary for quality representation, including evaluation by and testimony of mental health professionals, educational specialists, forensic evidence examiners, DNA experts, ballistics analysts and accident reconstruction experts, to name some. It also includes access to necessary litigation support services such as interpreters, court reporters, social workers, investigators, paralegals and other support staff.<sup>324</sup>

Public Defender Commission standards require each county's comprehensive plan to provide for investigative, expert, and other services necessary to provide quality legal representation consistent with Standard 5-1.4 of the American Bar Association Standards for Criminal Justice, Chapter 5: Providing

<sup>323</sup> NAT'L JUVENILE DEF. CENT., TEN CORE PRINCIPLES 1 (2012), [http://njdc.info/wp-content/uploads/2013/11/NJDC\\_10\\_Core\\_Principles\\_Oct\\_2012.pdf](http://njdc.info/wp-content/uploads/2013/11/NJDC_10_Core_Principles_Oct_2012.pdf).

<sup>324</sup> *Id.* at 2.



Defense Services (3rd ed. 1990).<sup>325</sup>

In practice, there is little to no use of expert and ancillary services in juvenile cases in most counties. Reasons include the lack of funding for experts, the perception that experts are not necessary to the delinquency defense, lack of knowledge about how to get funding for or find an expert witness, and a lack of time.

***E) Oversight and accountability measures are inadequate.***

Each county has its own independent juvenile defense delivery system. Counties eligible for Indiana Public Defender Commission reimbursement commit to meet a set of Standards established by the Commission. These standards pertain to the creation of independent public defender boards, creation of a comprehensive plan including a description of the defense delivery system to be used, eligibility determinations, qualification of appointed counsel both at the trial and appellate level, compensation, support services and caseloads. Training requirements and handling of caseload excesses are also required to be included in the comprehensive plans developed by counties.

The Public Defender Commission’s two staff attorneys are responsible for monitoring compliance with the Standards for counties in the Commission’s reimbursement program. The counties submit quarterly reports, although the Commission can require further auditing procedures beyond those reports. The Commission’s authority includes issuing reimbursements upon the “determination . . . that the request is in compliance with the guidelines and standards set by the commission.”<sup>326</sup>

There is no requirement of local public defender boards other than developing a

Comprehensive Plan, meeting regularly, and submitting the required reports to the Commission for reimbursement.

***OJJDP Implementation Grant***

As a result, the OJJDP Implementation Grant is focused on 4 key objectives as a way to ensure Indiana meets its obligation of providing effective juvenile defense representation, and to address some of the deficiencies noted in the assessment. The grant has four main objectives to bolster effective representation, in spite of limited financial resources and structural challenges. The objectives are to:

- 1) Ensure that all youth have access to counsel in delinquency and status cases at all critical stages, including early appointment at detention hearings or initial hearings when the child is not detained;
- 2) Create a strong system of post-dispositional representation for youth by increasing state resources, including appellate representation and civil legal services for re-entry;
- 3) Create a system of comprehensive and thorough legal advocacy, which recognizes juvenile defense as a specialization; and,
- 4) Enhance the current juvenile data collection systems to promote accuracy and to collect key defense data indicators statewide.

The progress achieved throughout the course of this grant is beyond the scope of this report, but the work has further confirmed the need for specialization of juvenile defense, and more specifically, documented need for enhanced oversight, technical assistance, and quality controls.

**6) What models within Indiana or outside of Indiana might exemplify the identified attributes?**

The subcommittee examined four other states with specialized juvenile defense offices designed to enhance quality of representation, and/or which provided direct services in some cases including appellate and other post-dispositional services. A summary of these states is included as an attachment herein, and includes a description of how the office was created and structured, design and major functions, and performance measures

<sup>325</sup> Non-Capital Case Standards, *supra* note 68, Standard I.

<sup>326</sup> I.C. § 33-40-6-5(b) (2108).



and outcomes. The states included Colorado, North Carolina, Ohio and Wisconsin.

Some of the major themes which emerged from these states included;

***a) Trial level support from juvenile defense experts is critical.***

In each state, expertise in juvenile defense was shared through structured training, technical assistance on cases, listservs, website resources, and in some instances, assistance directly on cases. This supportive function was important particularly in rural counties, and in more complex or high profile cases.

***b) State appellate services provided better oversight and quality control of trial practices.***

Each of the four states included an appellate office, even if it had discretionary authority and did not handle all juvenile appeals. For example, Ohio does not mandate its Office of the Public Defender to handle all appeals, but it does permit appeals to be done, particularly for those individuals who are incarcerated in state facilities. A specialized juvenile appellate unit was created for youth in DYS facilities, and to serve in a consultative role to local offices on other appeals. The statutory language is broad and allows for other post-dispositional advocacy for incarcerated youth. Colorado's Office of Alternative Defense Services has attorneys who handle juvenile appeals which arise in conflict cases.

***c) Oversight of quality of representation in juvenile defense can be accomplished in a number of ways depending upon the service delivery model.***

A state office of juvenile defense may have various methods for monitoring and improving quality of defense representation. Performance standards are one method to enhance quality, but should be tied to performance reviews or other methods to ensure compliance. Colorado tied such standards to their contracts with lawyers and reviews the skills and performance of lawyers through more rigorous

screening for contracts, period court observations, input from judges and period contract renewals. Similarly, North Carolina uses field observations and performance standards to identify and train effective lawyers around the state for participation in their contract program.

***d) Specific performance indicators and data collection can be effective ways to document outcome and achieve quality results.***

Colorado and North Carolina have annual reports with specific performance measures that document goals, objectives and outcomes of their work. Colorado is specifically mandated by law to report on specific data regarding juvenile defense, which becomes a cornerstone for the work of the office. North Carolina measures the effectiveness of their own office every four years with wide stakeholder input to determine if it is meeting its major objectives.

**7) What would be needed for Indiana to achieve the attributes identified?**

The approach to strengthening juvenile defense has thus far been piecemeal, and while recently bolstered by a 3 year federal project, a long term sustainable mechanism for the state to ensure quality of representation in juvenile defense must be accomplished through legislation. A state could be built into the existing structure through the Public Defender Commission or Council, or a separate entity. Key requirements, however, necessitate the additional authority to provide direct representation, development of separate standards, and mechanisms which can have a direct role in ensuring that service delivery systems adhere to those standards.

**8) Recommendations to the Task Force**

***a) Centralize the support and oversight for an Office of Juvenile Defense Services in Indiana through a separate office, or one within an existing entity.***

***b) Provide legislative authority for the Office of Juvenile Defense Services to***



- Adopt trial and post-trial practice standards for juvenile defense with oversight and enforcement mechanisms.
- Provide relevant, accessible training for juvenile defense lawyers and develop a mentoring program for new attorneys wishing to do juvenile defense work.
- Improve juvenile defender access to experts, investigators, social workers, and paralegals, and provide other forms of litigation support including a motions and brief bank, listserv and resource library.
- Oversee the recruitment and retention of high quality juvenile defense counsel, support services, and resources for juvenile defense in rural districts.
- Provide appellate and other post-trial representation to youth who are incarcerated or at risk for incarceration.
- Require the collection and annual reporting of data and specific juvenile defense performance indicators developed in the five areas above.



# Appendix H: CHINS/ TPR Subcommittee Report

## Introduction:

The Subcommittee on Children in Need of Services and Termination of Parental Rights Cases was created to provide additional information to the Task Force on right to counsel, standards, best practices, and to produce a separate set of findings and recommendations about policy and practice in Indiana. The Subcommittee enlisted Mimi Laver, Legal Director of the ABA Center on Children and the Law, as a consultant and advisor, given this specialized nature of this area of civil practice. With her guidance, the Subcommittee reviewed best practices, research and national standards. The Subcommittee also enlisted several Indiana practitioners as advisors to its work, and examined models from several other states, including Colorado, North Carolina, Washington and New York.

While the Sixth Amendment Report did not separately address issues relative to CHINS/TPR, many of the structural barriers it identified in the criminal defense realm also apply to the parent representation delivery system. For purposes of this subcommittee report, we address only those which are specifically identified in separate standards in this practice area.

## Key Attributes of an Effective System of Representation:

The American Bar Association Center on Children and the Law has a number of publications used for guidance to determine key elements of an effective system of representation in child welfare cases, both for parents and children. The Subcommittee and its advisors reviewed the Indicators for Success in Parent Representation,<sup>327</sup> Fundamentals of

Quality Representation of Parents and Children in Child Welfare Cases,<sup>328</sup> and Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases.<sup>329</sup> It ultimately adopted several key measures which are aligned with these standards for both parents and children.

## System Attributes:

- 1. Caseloads and Compensation:** Ensure lawyers are compensated adequately for their practicing, taking into account overhead and other costs borne by private professionals. At a minimum compensation should be equal to other publicly funded lawyers including criminal defense attorneys and child welfare agency attorneys. Ensure attorneys have a reasonable caseload of no more than 60 clients at a time, or number determined reasonable by a caseload study, assuming a caseload that includes clients at various stages of the case. Generally, caseloads with over 60 clients will not be manageable for attorneys who do not have supports that may come with an interdisciplinary practice model, which includes access to social workers, investigators, and/or paralegals.
- 2. Interdisciplinary Model:** Ensure attorneys have access to work in an integrated manner with interpreters, experts, social workers, and investigators, as needed. Ensure attorneys have access to work in an integrated manner with parent allies/ peer parent mentors and youth ambassadors, or other supportive groups.
- 3. Diversity/Cultural Understanding:** Ensure system provides attorney training around the diverse needs, backgrounds and characteristics of clients in the child welfare

publicdefender/files/Indicators-of-Success.authcheckdam.pdf.

<sup>328</sup> CENTER ON CHILDREN AND THE LAW, AMERICAN BAR ASSOCIATION, FUNDAMENTALS OF QUALITY REPRESENTATION OF PARENTS AND CHILDREN IN CHILD WELFARE CASES (2017).

<sup>329</sup> AMERICAN BAR ASSOCIATION, STANDARDS OF PRACTICE FOR ATTORNEYS REPRESENTING PARENTS IN ABUSE AND NEGLECT CASES (2006) [hereinafter STANDARDS FOR REPRESENTING PARENTS], [https://www.americanbar.org/content/dam/aba/administrative/child\\_law/ParentStds.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/child_law/ParentStds.authcheckdam.pdf).

<sup>327</sup> CENTER ON CHILDREN AND THE LAW, AMERICAN BAR ASSOCIATION, INDICATORS FOR SUCCESS IN PARENT REPRESENTATION (2015), <https://www.in.gov/>

system. Develop and implement a strategy to ensure a diverse attorney and staff workforce, which includes meaningful professional advancement and leadership opportunities.

4. **Timing of Appointment:** Ensure attorneys are appointed and have the opportunity to have a meaningful meeting with the client, prior to any court appearance, regarding any allegations of abuse or neglect, the attorney/client relationship, and the child welfare legal system process, at the earliest to occur of the following: (1) the emergency removal of a child from his or her home; (2) an application for an order of removal, prior to the filing of a petition alleging abuse or neglect; or (3) the filing of a petition alleging abuse or neglect.
5. **Support and Oversight:** Define clear roles and expectations for attorneys. Provide training and education opportunities. Provide oversight and performance evaluation. Provide the opportunity for clients to provide feedback on representation.
6. **Accountability/Use of Data:** Utilize a continuous quality improvement process to measure qualitative and quantitative outcomes.

#### Individual Attorney Attributes:

1. **Legal Advocacy:** The Fundamentals of Quality Representation stress the need for both strong legal advocacy in the courtroom, and outside the courtroom. Lawyers are expected to diligently pursue client goals, including proactively advancing the case, including development of case theory and strategy for adjudication, and advancing other client objectives which support reunification. Attorneys should litigate and utilize experts as needed, including active motion practice.
2. **Out-of-Court Advocacy:** The Fundamentals of Quality Representation also stress out of court advocacy, with an emphasis on engaging with and knowing the clients. Regular

communication, including counseling clients on all legal matters related to the case, including allegations raised, proposed service plans and the client's rights in the pending proceedings. Lawyers should understand trauma, and the client's trauma history, as well as how that may impact the attorney/client relationship and ability to engage in services. Collateral issues include participation and input into Child and Family Team meetings, and developing and proposing case plans, service providers and a visitation schedule when applicable.

Time out of court should also include a thorough and independent investigation, including after the dispositional stage of the case. Immediate focus should be on placement arrangements, visitation when consistent with child safety, and services to appropriately address client needs and strengths. Lawyers should be engaged in case planning for appropriate services on an ongoing basis, including after the disposition of the proceedings.

3. **Scope and Timing of Representation:** Attorneys should be aware of ancillary legal issues that could impact client's dependency case and refer client to legal resources to address issues, or handle if competent and permitted to do so. It is also imperative to cooperate and regularly communicate with other legal service providers to ensure dependency proceedings and other legal proceedings have beneficial results for clients. The attorney's representation does not terminate until the child achieves permanency, or pending orders cease.

#### How does Indiana's System Measure up to these Key Attributes?

Indiana's system of providing parent representation in child welfare proceedings is part of the public defender system, and included as part of the Public Defender Commission reimbursement system. Just as with criminal cases, there is no requirement that a county meet the requirements of the Commission unless they intend to join the program and receive

reimbursement. As such, roughly 1/3 of counties have no state oversight or enforcement of standards for parent representation. For those participating counties, the Commission requires adherence to CHINS/TPR caseload standards, and basic training requirements.

**Appointment of Counsel:** Parents have a fundamental liberty interest in the care and custody of their children as a due process right protected by the 14<sup>th</sup> Amendment.<sup>330</sup> Indiana law recognizes the right to appointed counsel for parents involved in CHINS proceedings if requested and the court finds that the parent does not have sufficient means for obtaining representation.<sup>331</sup> Parents are also entitled to appointed counsel in termination of parental rights cases, a right that extends throughout all stages, including appeals.<sup>332</sup> In those cases, Juvenile Courts must appoint counsel for the parent at the initial hearing or at any earlier time.<sup>333</sup> Indiana law does not provide a comparable provisions for the timing of appointment in a CHINS case.

The key attributes for effective representation begin with the premise that parents are provided representation. Data compiled by the Office of State Court Administration indicates that for 2016, roughly 75% of parents were represented in CHINS cases.<sup>334</sup> In terminations of parental rights cases, where the most significant consequences for parents and families can result, the rate of appointed counsel was only 56%.<sup>335</sup> While it is not clear why parents waive the right to appointed counsel in some cases, the consequences of doing so can be significant, particularly when children are removed and a parent may later face the permanent severing of the parent/child relationship through a termination proceeding.

Appointment of counsel for children and youth in CHINS or TPR cases is discretionary.<sup>336</sup> Courts

are required to appoint a Court Appoint Special Advocate to children in CHINS cases,<sup>337</sup> and if the parent is contesting a termination of parental rights cases, in those proceedings.<sup>338</sup> Indiana is in the minority of states by not providing children with an absolute right to counsel in CHINS types of proceedings.<sup>339</sup>

**Timing of appointment and duration of representation:** The key attributes of an effective system should ensure that attorneys are appointed early in the process, prior to any court appearance which addresses (1) the emergency removal of a child from his or her home; (2) an application for an order of removal, prior to the filing of a petition alleging abuse or neglect; or (3) the filing of a petition alleging abuse or neglect.

Early appointment of counsel in these proceedings may create logistical and other challenges for courts, particularly in counties without full time public defender offices. Current data maintained by Office of Judicial Administration does not track the timing of appointment and whether it occurs at this early stage.

Recent data suggests that Indiana's rate of child removal into the foster care system is twice the national average, and at the fourth highest rate by 2016, even when factoring in rates of child poverty.<sup>340</sup> Early involvement of parent lawyers in DCS cases may help to prevent the removal of children when other less restrictive alternatives are available, and return children more quickly to their parents or other caregivers to prevent traumatization to the child. Federal child protection laws have an overarching goal to prevent removals when possible, requiring courts to carefully oversee the removal of children into foster care. Expansive

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represent any child in dependency proceedings).

<sup>337</sup> I.C. § 31-33-15-1 (2018).

<sup>338</sup> I.C. § 31-35-2-7(a) (2018).

<sup>339</sup> FIRST STAR ET AL., A CHILD'S RIGHT TO COUNSEL: A NATIONAL REPORT CARD ON THE RIGHT TO COUNSEL FOR ABUSED AND NEGLECTED CHILDREN 10 (2015), <http://www.firststar.org/wp-content/uploads/2015/02/First-Star-Third-Edition-A-Childs-Right-To-Counsel.pdf>.

<sup>340</sup> Richard Wexler, *National Coalition for Child Welfare Reform*, INDIANAPOLIS STAR (Jan. 11, 2018), <https://www.indystar.com/story/opinion/2018/01/11/why-indianas-child-protection-system-failing-its-not-lack-money/1024255001/>.

<sup>330</sup> See generally *Santosky v. Kramer*, 455 U.S. 745 (1982); *Troxel v. Granville*, 530 U.S. 57, 65 (2000).

<sup>331</sup> *In re G.P.*, 4 N.E.3d 1158 (Ind. 2014).

<sup>332</sup> I.C. § 31-32-4-3(a) (2018).

<sup>333</sup> *Id.*

<sup>334</sup> Judicial Service Report, *supra* note 148, at 718.

<sup>335</sup> *Id.*

<sup>336</sup> I.C. § 31-32-4-2(b) (2018) (stating that the court may appoint counsel to





research reveals that the removal of children is physically, legally and emotionally traumatizing to children in lasting ways.<sup>341</sup> Early appointment is particularly critical as one element of safely reducing Indiana’s high removal rate.

Appointment orders made at the initial hearing, resulting in lawyers often not being present and prepared at that time, may significantly impact the ability of lawyers to be effective later. The Administration for Children and Families has recognized that early access to legal counsel by all parties to the proceedings “can expedite the provision of appropriate services to families, prevent unnecessary separation of children from their families, promote timely and appropriate permanency decisions for children, and conserve agency and judicial resources.”<sup>342</sup>

Similarly, involvement until the child achieves permanency or orders are terminated is critical given many important decisions are made after disposition which can ultimately impact the permanency plan. Public comment and input from public defenders indicate that some attorneys withdraw after disposition, and that for attorneys compensated on an hourly basis, there is pressure to withdraw to avoid additional costs. Expectations regarding the duration of representation are not clearly established.

**Interdisciplinary models:** DCS involved parents require the effective assistance of counsel, which can mean the difference between termination of parent rights and family preservation. The complex dynamic of legal and social work issues involved have been recognized by the American Bar Association and the federal Administration for Children and Families, both of which acknowledge that a multi-disciplinary approach is a key indicator of effective parental representation.<sup>343</sup> Access

to multi-disciplinary staff should include social workers as part of the legal team, investigators and/or paralegal staff, as well as access to expert witnesses.

Marion County has an excellent model using social workers as part of their legal team in handling CHINS and termination cases, but they likely represent the exception and not the rule. Access to investigators and/or paralegal staff has been noted by the Sixth Amendment Report as lacking in many counties visited for that report, with experts being used sparingly, and after seeking funding from the judge.<sup>344</sup> Testimony during the Listening Tour from attorneys suggests that social workers could play an important role in assisting them, and improve the likelihood of better outcomes in the case.

The result of not having these resources available for public defenders and appointed counsel results at best in lawyers spending time investigating their own cases, finding resources for families, and handling social work aspects of the case. Alternatively, these tasks simply aren’t done on behalf of the parent as part of the representation.

**Caseloads and compensation:** Child abuse and neglect cases are complex and can be labor intensive both in court and outside of court. They are typically longer in duration and may involve multiple children and multiple parents. Effective representation requires regular communication with clients, family members and other professionals, and other work outside of court including ancillary proceedings, agency treatment planning, and work with social service agencies necessary to improve client outcomes. It is critical to define the scope of in court and out of court work expectations, and to have reasonable caseload limits accordingly.

Caseloads and minimum compensation rates are set by the Public Defender Commission. Full

<sup>341</sup> Christopher Church, et al., *Timely Permanency or Unnecessary Removal?*, 36 ABA CHILD L. PRAC. NO. 3, 71-2 (2017).

<sup>342</sup> UNITED STATES ADMINISTRATION FOR CHILDREN AND FAMILIES, HIGH QUALITY LEGAL REPRESENTATION FOR ALL PARTIES IN CHILD WELFARE PROCEEDINGS 6-7 (Jan. 17, 2017), <https://www.acf.hhs.gov/sites/default/files/cb/im1702.pdf>.

<sup>343</sup> See, e.g., *Id.* at 10-11, (Information Memorandum ACYF-CB-IM-17-02, January 17, 2017) (hereinafter High Quality Legal Representation); ABA, *Indicators of Success for Parent Representation*, Center on Children and the

Law (2015), [http://www.americanbar.org/content/dam/aba/administrative/child\\_law/ParentRep/Indicators-ofSuccess.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/child_law/ParentRep/Indicators-ofSuccess.authcheckdam.pdf); Instructions for State Courts Applying for Court Improvement Program (CIP) Funds, Fiscal Years 2012-2016, at 7 and Attachment B, Indicators of Quality Legal Representation, U.S. Dep’t of Health and Human Services, Administration for Children and Families (2012).

<sup>344</sup> See SIXTH AMENDMENT CENTER, *supra* note 29, at 166.



time public defenders with adequate support staff, meaning one full time support staff person for every four full time attorneys, may take 150 CHINS or TPR cases per year, or 120 cases without adequate support staff. Part time public defenders may take 75 CHINS or TPR cases with adequate support staff, or 60 cases without adequate support staff.<sup>345</sup>

The ABA recommends that attorneys have a caseload of between 50 - 100 clients at a time for a full-time attorney, assuming a caseload that includes clients at various stages of the case, and compliance with other ABA standards for effective representation of parents.<sup>346</sup> While state standards may vary, it is clear that the caseloads are heavily dependent upon other resources available to the attorney, resources which are not readily available in most jurisdictions in Indiana.

The Sixth Amendment Center provided an example of how this becomes problematic in a smaller jurisdiction with mixed caseload, using part time attorneys who can also represent an unlimited number of private clients. An attorney in one jurisdiction which does not participate in the Commission's reimbursement program was assigned 121 CHINS/TPR cases (in excess of the Commission's allowed maximum for a full time attorney with adequate support staff), and was additionally assigned 50 felonies, 25 juvenile delinquency cases, and 27 other adult and juvenile cases.<sup>347</sup> Indiana's system of public defense oversight can prevent this from happening if a county chooses to operate a system outside of Commission standards.

**Support and oversight:** Clearly defined roles and expectations for attorneys can be achieved through the development of performance standards, with guidance from national standards, protocols or best practice models. To ensure effective representation, states should ensure that these expectations are created, and that mechanisms are in place to provide monitoring, oversight, performance reviews and

enforcement when attorneys fall short in their performance.

Training and educational opportunities are other key aspects of supporting lawyers in their work. Training should be ongoing, with attention not only to relevant federal and state laws, new cases and pertinent regulations, but also focus on in court performance as well as out of court work which should be done to advance the client's case. Training should also focus on a variety of poverty related issues, recognition of racial, cultural, social and economic differences that may impact the attorney/client relationship as well as relationships with providers and agency staff. Understanding personal and system bias and identifying client strengths, resources and potential are also important.

Indiana has no performance based standards enforced by the Commission to provide guidance to attorneys who represent parents in CHINS/TPR cases. While performance reviews are incorporated into some full time offices, the current system of contractors and individual case appointments provides no requirement of meaningful quality assurance and supervision.

The Commission standards require that in order to serve as appointed counsel in CHINS/TPR cases, an attorney must have completed prior to appointment at least six (6) hours of training in CHINS/TPR practice in a course approved by the Indiana Public Defender Commission. The standards also require that any attorney with less than one (1) year experience litigating terminations cases, or who has not litigated at least one termination case to completion, must have co-counsel in any termination matter proceeding to trial.<sup>348</sup>

**Outcome measures and data collection:** Little information is collected or otherwise obtained from counties to provide quality assurance on qualitative or quantitative measures. Data is maintained by local courts and reported to the Supreme Court on the number of pauper appointments made county by

<sup>345</sup> Non-Capital Case Standards, *supra* note 68, at 10.

<sup>346</sup> Standards for Representing Parents, *supra* note 329, at 39.

<sup>347</sup> SIXTH AMENDMENT CENTER, *supra* note 29, at 169.

<sup>348</sup> Non-Capital Case Standards, *supra* note 68, at 10.



county in all types of cases, including CHINS and TPR cases, but there is no ongoing analysis of this information to determine why rates of appointment may vary significantly. There is no information obtained on the timing of appointments to determine if early appointments are being made.

Unlike some states, there is no information being tracked on whether specific performance measures by public defender can lead to other successful case outcomes such as reducing removals, decreasing time in placement, or achieving permanency goals earlier. Performance measures, when built into a quality assurance process, could help “establish baseline practices; diagnose what they need to improve, and use that information to make improvements, track their efforts, and identify, document and replicate positive results.”<sup>349</sup>

**Models from other Jurisdictions:** The Subcommittee examined models from Colorado, Washington State, New York and North Carolina. Each has a state office focused on quality improvement and oversight of parent representation, and were examined for structure, function, quality assurance measures, and the collection of data and performance indicators. A chart detailing this information is attached to this report separately. Several important features stood out among these states.

**a) Training and Technical Assistance to Trial Offices:** Each of the four states provide a variety of training and technical assistance measures, including resource banks, consultation, list serves, and training for parents’ attorneys.

**b) Performance Standards or Guidelines:** Each state has a set of performance guidelines which are used to establish expectations and which work to improve quality of representation. In Washington, these include both attorney and social work standards. The program tracks the percentage of time spent by attorneys communicating, use of social worker, utilization of independent experts,

court observation and client feedback as well as stakeholder feedback.

**c) Use of Interdisciplinary Model:** Washington and Colorado have incorporated social workers and other interdisciplinary team members as integral to the success of their representation. A model in New York City likewise uses other team members and focuses in on intensive work within the first 60 days of state agency involvement. These states have documented success with specific outcomes such as reduced removal rates, shorter times to achieve permanency, and cost savings overall.

**d) Capacity for Effective Quality Assurance and Quality Improvement Functions:** In each of these states, legislative directives aimed at quality assurance and improvement measures necessitate a variety of data collection measures, aimed at documenting specific case outcomes and tracking specific performance measures. In New York, Colorado and North Carolina, some of these measures target the specific functions of the state office in achieving its legislatively prescribed mandates. Washington has much more detailed evaluative criteria it measures within its service delivery model. Essential to each of these states is the structure and capacity at the state level to perform QA/QI functions.

### Key Findings and Conclusion

**1) Indiana places the primary responsibility of funding parent representation on counties, without sufficient resources and oversight measures in place at the state level to ensure quality representation:** The cost of providing attorneys for parents in child welfare proceedings is a county responsibility, with 40% cost reimbursement by the Public Defender Commission in those counties which have joined the program and are meeting its standards. The requirements specific to parent representation include minimal training and experience requirements, and caseload standards. Caseload standards are significantly higher than recommended by the ABA, and do not include an attorney’s outside practice. Roughly

<sup>349</sup> See VICTOR E. FLANGO & NEAL KAUDER, NATIONAL CENTER FOR STATE COURTS, COURT PERFORMANCE MEASURES IN CHILD ABUSE AND NEGLECT CASES 12-14 (2008), <https://ncjrs.gov/pdffiles1/ojdp/223567.pdf>.





1/3 of counties are not subject to even those basic standards as they are not in the reimbursement system. No performance standards are in place.

The dramatic increase over the last five years of CHINS and TPR filings has strained all aspects of the system. Public defender services have struggled across the state to stay within caseload standards, and to meet the demand for counsel. Compensation and other resources in child protection cases vary across the state, but include only a handful of full time offices. Many services are delivered by practitioners by flat fee contracts, or in some cases, through an hourly rate by case. Social worker support and involvement is utilized in Marion County, where its CHINS/TPR practice is now the largest division, but that county appears to be the exception to the rule. These factors may have a direct bearing on the quality of representation issues discussed below, as well as assuring that those who need lawyers have access to them at critical stages of the case.

Finally, data collection on CHINS/TPR representation is minimal and mostly reported in the form of total pauper appointments for these cases by the Supreme Court. There is little to no data required by the Commission as to what counties spend for representation in these cases.

**2) Eligible parents do not always receive the benefit of appointed counsel, are appointed counsel after critical events may already have taken place, or the duration of representation ends prematurely:** The data available on appointment rates in CHINS and TPR cases comes primarily from the Supreme Court as reported by counties. Based on this data, roughly 25% of parents facing a CHINS proceeding are not represented by appointed counsel, and more than 40% of parents are unrepresented by appointed counsel in TPR cases.<sup>350</sup>

For those who are appointed counsel, the timing of the appointment often occurs after critical events

may have already taken place, including removal of the child. A week or two delay in when an attorney begins to work the case may place both the parent and the child(ren) at a disadvantage throughout the proceedings.

Finally, the duration of representation is unclear, with some lawyers terminating representation after a disposition hearing, and when critical events and decisions occur which can lead to termination of parental rights. Entering the case again once a termination petition has been filed may well place parents at a disadvantage.

**3) Parent representation is a specialization which is not uniformly reflected in current policies and practices, and which can negatively impact the quality of representation:** Several of the key attributes for an effective system of parent representation discussed above are not incorporated into policies and practices in Indiana, and can have a significant impact on the quality of legal representation provided. Lawyers handling these cases require specific skill sets, and should be well trained, with strong trial and negotiation skills, and skilled at working with multi-disciplinary teams.

**a) Training requirements are minimal:** While six hours of training in CHINS and TRP practice is a requirement by the Public Defender Commission before being qualified to take these cases for reimbursement, there are no training requirements in the remaining non-Commission counties. The Indiana Public Defender Council provided an annual seminar for CHINS/TPR attorneys. Ongoing training opportunities are minimal. There is no uniform training on the fundamentals of parent representation for lawyers starting practice in this area.

**b) Multi-disciplinary teams are not used:** The social work aspects required in CHINS and TPR cases, as well as the expanded role of lawyers outside the courtroom, are important elements of providing quality legal representation. While Marion County utilizes social workers as an integral part of their team, this appears to be the exception

<sup>350</sup> The appointment of counsel is not a mandatory field for completion; as such, the trial court numbers on this may not be entirely accurate as reported.



and not common among counties. Similarly, there is not consistent access to the use of investigators and independent experts in these cases across counties.

**c) Technical assistance at the state level is minimal:** Parent representation is provided through Indiana’s system of public defense, where the primary emphasis is on criminal defense. There are limited opportunities for lawyers for technical assistance, obtaining resources, and case consultation offered at the state level for parents’ attorneys. While some resources exist through the IPDC, current resources do not adequately provide assistance given the specialized nature and complexity of these cases.

**d) Performance standards are not in place for parent representation:** There are no required expectations set in place through performance standards for attorney representation both in court and out of court. Data is not collected or maintained on specific indicators which can reflect quality of representation and accessibility of counsel at all critical stages.

**4) Quality assurance and improvement mechanisms are insufficient to ensure effective representation for parents in CHINS/TPR cases:** Parent representation in child welfare proceedings are civil in nature, specialized in substantive law, and require a host of other aspects which are not part of an attorney’s criminal practice. Indiana has no specific performance standards for lawyers in these cases, and no current mechanism to enforce performance standards. States such as Colorado, Washington, and North Carolina, have been able to develop such standards, and provide a variety of means by which to train, monitor and work to improve compliance to standards by service providers. These states also have performance measures for their own offices to ensure that they are adequately monitoring and providing assistance to counties on QA/QI measures.

For example, case management tracking can document significant indicators of performance such as client contacts, out of court time, referrals, use of

social workers, and investigations. The tasks have been shown to lead to more effective representation and better outcomes.

**5) Children do not receive the benefit of counsel in the vast majority of CHINS and TPR cases, where there are substantial interests that can be adversely impacted:** Indiana primarily uses CASA volunteers or guardians ad litem to advocate for children for the best interest of children in CHINS and TPR cases. Lawyers appointed to represent children in these cases are not generally required, and are infrequently appointed. Having a trained lawyer to advocate for a child’s substantive rights in child welfare cases is required in 29 states.

**Recommendations:**

**1) Legislation should be proposed to create a separate office for parent representation,** with centralized oversight, administration and support of the service delivery system for parents in Children in Need of Service (CHINS) and Termination of Parental Rights (TPR) cases.

Such office could be placed within the Public Defender Commission. The Commission would need to expand its capacity to administer this office through the appointment of a separate Director for the office, and with the addition of Commission members with experience and knowledge of child welfare issues, and specifically parent representation. Alternatively, or in addition to, an Advisory Board could be developed with 3-5 members appointed by the Commission to advise them of decisions regarding hiring of the Director and other necessary staff, as well as the creation of separate standards. The qualifications for the Director should be included in the legislation, and require a minimum of 5 years of experience as a licensed attorney (Indiana licensed or eligible for licensure at the effective date of the legislation), and be familiar with the demands of representing parents in CHINS and TPR cases. The Director should be a full time employee and should not otherwise engage in other practice or employment. Compensation should be competitive and in line

with other comparable positions.

Proposed staffing should be sufficient to ensure appropriate resources for five core functions: 1) oversight and enforcement of standards ; 2) training and technical assistance for defenders; 3) collection of data and performance outcomes; 4) leadership involvement in policy and practice initiatives involving child welfare; and 5) fiscal and other administrative duties.

A separately created state agency for CHINS/TPR parent representation was also discussed as an option. Should the Task Force consider that option, recommendations above regarding an oversight board and staffing, and well as key functions, are still applicable.

**2) The office for parent representation should have a legislative mandate to provide key functions** including: a) oversight and enforcement of standards, b) training and technical assistance, c) development and implementation of data collection methods and performance indicators, d) state leadership in policy and practice regarding child welfare issues, and e) office administration.

**a) Oversight and Enforcement of Standards:** In consultation with an advisory board and other qualified practitioners knowledgeable about parent representation, the office should be mandated to develop standards of practice for parent representation within the first year. These standards should be evidence based to the extent possible, and include, but not be limited to:

**Workload standards** in compliance with national standards, or as recommended by the Commission's workload study, whichever may be most appropriate for Indiana.

**Standards defining the timing and duration of representation**, including appointment and the presence of counsel at or before a removal, or an initial hearing, whichever comes first. This should also include requirements for continued representation throughout the period during which the court retains jurisdiction of the matter(s). (Note:

Concerns were raised that these requirements would be difficult to meet in many counties, and that some courts may not have lawyers available for appointment at this early stage of proceeding, and may not believe it is necessary or required. Providing technical assistance in this area is critical, as is a phase in period of time for implementation of this provision.)

**Standards requiring training and experience for lawyers** to be placed on an approved list for appointment in parent representation cases for CHINS and TPR proceedings.

**Standards regarding access to and the use of social workers**, experts, investigators, paralegals, and other interdisciplinary staff in CHINS/TPR cases.

**Standards for compensation of attorneys** and other staff which provide salary ranges based upon experience and skill levels, and which include benefits and other incentives to recruit and retain talented lawyers. Restrictions on other practice which would prohibit or make difficult compliance with these standards should be included. (Note: a concern was voiced that parity with DCS lawyers should not be a measure. It was also recognized that it may be harder to attract lawyers in smaller more rural counties.)

**Performance standards which can be measured through a case management or other tracking system.** (Note: The ABA Indicators for Success is an excellent tool for creating performance based measures for parent representation)

**Standards for mechanisms for handling complaints against lawyers** or other staff by clients or others in the performance of their responsibilities.

The office must establish **mechanisms for staff to evaluate lawyer performance** including but not limited to interviews, court observations, review of pleadings, input from judges, and review of case management data.

If the system is contracts based as the mechanisms



for providing oversight and accountability, provisions for monitoring and enforcement should be put in the contractual agreement with lawyers or contracting entities. Should a regional system be put into place which provides support to CHINS/TPR representation, the region would likely have a role in providing evaluation of lawyers and delivery systems with oversight at the state office.

***b) Training and Technical Assistance:***

A robust training program should be developed which can provide attorneys and support staff with annual training opportunities, as well as a training program for new lawyers to gain knowledge of foundational principles for parent representation. Technical assistance should be provided to assist lawyers on case strategy, legal arguments, and potential appellate issues. Other forms of assistance can include motion and brief banks, a listserv, publications, and expert lists. The office should also work to build alliances and opportunities within law schools and university social work programs to address attract good candidates for these positions.

***c) Development and Implementation of Data Collection Methods and Performance Indicators to Improve Outcomes:*** The office should develop a system of data collection points and performance indicators which can aid in meeting its obligations to provide meaningful oversight of effective representation. For example, the ABA Indicators for Success provides indicators for infrastructure (i.e. attorney appointment, workloads, timely appointment, training, continuity of representation, and access to interdisciplinary staff), Advocacy (in court, out of court, and appellate), and Safety, Permanency, Well-being and Due Process Indicators (i.e. prevention, shortened time to permanency, parent satisfaction).

Special attention should be given to ways in which parent representation can contribute to overall cost savings within the child welfare system. For example, research demonstrates that children have better long-term outcomes when they are raised in their families of origin.<sup>351</sup> Additionally, the cost of

removal and out of home care can be significant. As such, reunification, or return of children to their family of origin a common goal for children in the child welfare system and for successful parent representation. Colorado piloted social workers in 3 sites in July of 2017, and has already shown that for a 10 week period, reunification rates of new removals were at 33% contrasted with non-pilot sites which averaged 9%.<sup>352</sup> Similar studies in Washington State and New York show positive fiscal impact as well as better outcomes for children.

***d) State Leadership in Policy and Practice Issues concerning CHINS and TPR issues:***

The role of a state office should include involvement in state or local policy and practice issues which may affect families involved in child protection proceedings. The office should be proactive in addressing needed policy changes, examination of data and trends, and should be involved in relevant committees, work groups or other avenues to provide a voice for parents.

Opportunities should be sought out for participation in national TA opportunities and training, and for potential sources for supplemental funding to enhance parent representation and overall indicators for success.

***e) Office Administration:*** Sufficient support staff must be in place to assist in the administration of contracts, reporting requirements, and reimbursement to contractors, fiscal responsibilities, and data collection.

**3) Funding for parent representation should be substantially increased with state dollars.**

There is no accurate account of what counties currently spend across the state for parent representation in CHINS and TPR cases. However, there is widespread concern among chief defenders, courts and county officials about the doubling of case filings over the last few years and the resulting

FOR PARENTS IN THE CHILD-WELFARE SYSTEM (Oct. 7 2013), <https://apps.americanbar.org/litigation/committees/childrights/content/articles/fall2013-1013-improving-representation-parents-child-welfare-system.html>.

<sup>352</sup> OFFICE OF RESPONDENT PARENTS LEGAL COUNSEL, STATE OF COLORADO, 2017-18 ANNUAL PERFORMANCE REPORT 11 (Jan. 1, 2018).

<sup>351</sup> MIMI LAVER, AMERICAN BAR ASSOCIATION, IMPROVING REPRESENTATION

necessity of increased resources. Strengthening the public defense system for parent representation can and should be part of efforts at the state level to improve outcomes for children who are abused and neglected, and work to keep families together.

The cost of funding for a system which incorporated these recommendations could be estimated by Commission staff but may also be dependent upon trends over the next few years within the Department of Child Services. If the high number of removals and case decrease, the costs of such system would likely be less. Currently, the Commission staff estimate that roughly 20 million was spent on CHINS/TPR representation statewide in 2016, with the Commission providing reimbursement of roughly 4 million within its participating counties.

Increased funding for parent representation in CHINS and TPR cases by the state can alleviate the strain that has been placed on counties to ensure compliance in this area. Two models have been proposed which could provide oversight to representation of CHINS and TPR representation by parents.

A model similar to Colorado would ensure standards of representation are met using a contractual model where services are bid out to providers subject to specific terms to uphold quality. The advantages of this approach are that it allows flexibility of service delivery in local communities or regions, builds in remedial measures through contractual obligations and ultimately, termination provisions, and obligates individual lawyers to ensure compliance with standards based upon contract reporting requirements. This option would be best suited for a 100% state funded system, or where the state is first dollar in, and would align funding with other aspects of the child welfare system. Regional support and oversight can be built into this model as a way of providing support closer to where services are delivered.

An alternative model proposed would support 100% state funded regional resources centers to

provide support to attorneys providing CHINS/TPR representation, and keep remaining funding as is or anticipated under the Commission's reimbursement mechanisms. This alternative would be less costly and may alleviate concerns about moving to a more state controlled system. Increased funding with partial county contributions would ensure that more than one funding source would be responsible for services. Concerns have also been raised about how to prioritize parent representation with criminal representation needs in a system which has multiple challenges.

Both models would require the same standards and accountability measures for all counties.

Funding by the state should be sought to establish the office for parent representation with sufficient resources to provide necessary staff. Commission staff should provide an estimate of costs for this office given the added functions within these recommendations for oversight, training, data collection including the use of a case management program, technical assistance and the requirements for support staff. If regions are utilized for support, these added costs should also be assessed. Funding by the state of parent representation should be considered at a significantly higher amount than current provided, including consideration of 100% state funding. In doing so, this office should be actively engaged as part of other state efforts to improve child and family outcomes in child abuse and neglect cases while upholding a strong system of due process protections for parents.

#### **4) Service delivery models for parent representation should remain locally-based and allow for flexibility of providers.**

Regardless of the amount or percentage of state funding for parent representation, the delivery of services should remain primarily at the local level with significant input from courts, local defenders and other stakeholders.

There are many attorneys or full time offices which may choose to continue parent representation, and should, provided they are able to meet new



standards. But flexibility in service delivery should also allow for and encourage other alternatives, such as contractual agreements with non-profits organizations or law firms choosing to create full time offices. Regional offices could also be created if multiple counties wish to have such agreements.

Because contracts would come from the state office overseeing parent representation, that office can and should seek out qualified attorneys and firms willing and able to provide services. Judicial interest in expansion of Problem Solving Courts may prove helpful in some jurisdictions as a good resource to provide interdisciplinary assistance and resources. For more rural counties with limited resources, these courts, if focused on CHINS cases, may help to provide needed expertise and resources not otherwise easily accessible to lawyers. They should be considered as a resource which may be able to help achieve some of the identified Indicators for Success.

**5) Timing for Implementation Should be Phased In Over a 3-5 Year Period**

As in other states, implementation of new standards, oversight and quality control measures takes time. An examination of other state reforms has proven that this can take years, but that incremental changes can be made to achieve progress toward the overall goal. Creating a phase in time within the legislation would allow for a plan to develop standards, initiate contracts, and monitor for compliance of new requirements over a period of time.

Pilot projects may be helpful to develop and evaluate new models. But even with pilot sites, a plan for full implementation plan is needed. It has been suggested that a 3-5 year phase in period would allow for a more orderly and consistent process to implement changes across counties.

**Other recommendations from participants:**

1) Statutory changes should be considered which require the appointment and presence of counsel for parents in CHINS cases at or before a removal

occurs, or an initial hearing, whichever comes first.

2) Requirements should be considered that parents may not sign agreements with DCS which will be submitted to a Court without those agreements having been reviewed by the parent’s appointed counsel.

3) Statutory changes should be considered in CHINS and TPR cases that require judges to advise parents of the dangers of self-representation, similar to requirements in criminal cases, if they choose to waive the right to counsel.

4) Representation of children in CHINS and TPR cases was discussed by this Subcommittee but has not been the central focus of the group’s work. Its importance should not be overlooked, however. A separate effort to study this issue should be initiated by the Commission or other group with expertise in this area for further recommendations.



# Appendix I: Appellate Subcommittee Report

## Introduction

The Sixth Amendment Center report made significant findings and recommendations to improve Indiana’s system of public defense and ensure the state meets its constitutional obligation to provide effective representation. It found that the state “has no mechanism to ensure that it’s constitutional obligation to provide effective counsel to the indigent accused is met in felony and juvenile delinquency cases, at both the trial level and on direct appeal, in counties and courts that do not participate in the IPDC reimbursement program,” and only limited capacity to ensure this in counties that do participate.<sup>353</sup> The report noted that the state has not properly funded and adequately staffed the Public Defender Commission to conduct verification audits and evaluations in participating counties.<sup>354</sup>

Another critical finding is that the Indiana does not consistently meet its constitutional obligation to provide counsel at all critical stages of criminal proceedings. It provided specific examples of trial level practices which suggest denial of counsel under *United States v. Cronin*.<sup>355</sup> Information was not provided or studied regarding appellate and other post-trial right to counsel issues.

The report also noted a lack of consistency in specific qualifications for lawyers handling cases of varying severity, or training to handle specific cases in both for Commission and non-Commission counties.<sup>356</sup>

Finally, the Report noted the failure in many counties to ensure undue judicial or political

interference which produce conflicts between the lawyer’s self-interests and the defendant’s right to effective representation was noted. This lack of independence occurred in both Commission and non-Commission counties.<sup>357</sup>

The Sixth Amendment report included a recommendation to create a statewide appellate defender.<sup>358</sup> The Task Force recognized that appellate and post-conviction services are specialized areas of practice. This Subcommittee’s work focused on how Indiana’s current system of appellate and other post-trial services is structured, funded and delivered, and what strengths and deficiencies may exist within that system.

### Key Attributes for an Effective System of Representation:

The Subcommittee considered a number of documents for guidance on key principles for an effective system of appellate representation. These include the ABA Ten Principles of a Public Defense Delivery System,<sup>359</sup> Standards and Evaluation Design for Appellate Defender Offices,<sup>360</sup> and the ABA Criminal Justice Standards for the Defense Function.<sup>361</sup> Several key attributes within these standards are important for consideration in Indiana.

**1) Independence:** Post-trial services such as appellate and post-conviction representation should be independent, including selection, funding and payment of defense counsel.<sup>362</sup> Counsel should not be selected by, or under the direct control of the judicial branch by appointment.

**2) Supervision of lawyers:** Defense counsel should be supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.<sup>363</sup>

<sup>357</sup> *Id.* at 198.

<sup>358</sup> *Id.* at IX.

<sup>359</sup> ABA TEN PRINCIPLES, *supra* note 98.

<sup>360</sup> NAT’L LEGAL AID AND DEFENDER ASSOC., STANDARDS FOR DESIGN AND EVALUATION OF DEFENDER APPELLATE OFFICES [hereinafter NLADA APPELLATE STANDARDS], <http://www.nlada.org/defender-standards/appellate/black-letter>.

<sup>361</sup> AMERICAN BAR ASSOCIATION, *supra* note 16, at Part IX [https://www.americanbar.org/groups/criminal\\_justice/standards/DefenseFunctionFourthEdition.html](https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition.html).

<sup>362</sup> ABA TEN PRINCIPLES, *supra* note 98, at Principle 1.

<sup>363</sup> *Id.* at Principle 10.

<sup>353</sup> SIXTH AMENDMENT CENTER, *supra* note 29, at 88.

<sup>354</sup> *Id.* at 91.

<sup>355</sup> *Id.* at VI.

<sup>356</sup> *Id.* at VII.

**3) Recognition of the Specialized Nature of Appellate Representation:** Appellate attorneys should be hired on the basis of merit and upon recruitment and screening for the appropriate skills set. An attorney whose primary previous experience is in trial work does not become qualified to be an appellate defense counsel simply through trial experience. Lawyers should independently demonstrate their ability to provide appellate representation to eligible defendants.<sup>364</sup>

Special standards should be in place for appellate lawyers which address the scope of representation, timing of post-conviction remedies, case weighting, client contact, communication with trial counsel, review and screening of briefs, oral arguments, and procedures for determining motions for discretionary review, rehearing and reconsideration.<sup>365</sup>

**4) Training:** Defense counsel must be provided with and required to attend continuing legal education.<sup>366</sup> Training for new appellate counsel should commence prior to the attorney providing representation on any cases; “on the job” training based on what the lawyer will learn from individual cases, is not adequate. Training should include ongoing legal education programs for attorneys and support staff, and take advantage of national programs or particular relevance for appellate defenders.<sup>367</sup>

**5) Workload Limitations:** Appellate caseload standards must be established and monitored to ensure that effective representation is provided with sufficient time and resources devoted to each case, and that adequate information is provided to the funding source to ensure an adequate appropriation. Such caseloads should reflect national standards based upon time records developed by the office

<sup>364</sup> NLADA APPELLATE STANDARDS, *supra* note 360, at Section C.

<sup>365</sup> *Id.* at Section D, (discussing Scope of Representation); Section E (discussing Timing of Representation), Section H (discussing Case Weighting); Section I (discussing Client Contact); Section K (discussing Contact with Trial Counsel); Sections L (discussing Brief Preparation); Section M (discussing Oral Arguments); and Section N (discussing Discretionary Review).

<sup>366</sup> ABA Ten Principles, *supra* note 98, at Principle 9.

<sup>367</sup> NLADA APPELLATE STANDARDS, *supra* note 360, at Section K.

in accordance with the specific nature of the cases handled by that unit.<sup>368</sup>

**6) Measures of Office Efficiency:** Appellate offices should have in place procedures for general office procedures, management information system, assignment and supervision of cases and workload, procedures for handling conflict, eligibility for services, timeliness of briefing, and feedback from appellate courts.<sup>369</sup>

### How does Indiana Measure up to these Key Attributes?

The Subcommittee examined appellate practices, and post-conviction services, including services provided by the State Public Defender’s office. It conducted interviews with several appellate and post-conviction lawyers, a representative of the office of the State Public Defender, assistant attorneys general, appellate judges from the Supreme Court and Court of Appeals, and other interested stakeholders. The Subcommittee also examined appellate and post-conviction offices in Ohio, Kentucky, Illinois, Michigan and Idaho for structure, scope of services, and oversight and accountability measures.

A site visit to the Marion County Public Defender office was done to collect additional information about its appellate division. Finally, an informal survey instrument was created and distributed to appellate attorneys throughout the state, with 31 appellate attorneys responding. The Subcommittee also reviewed appellate opinions that highlighted concerns about incomplete records requested, ineffective assistance of counsel claims, ethical violations, and instances where briefing was so bad new counsel had to be appointed.

### A) Indiana’s System of Appellate

**Representation:** Indiana’s appellate system functions at the local level and is decentralized. Marion County has an appellate office with full time attorneys, and uses several contract attorneys to handle cases in addition. In other counties, the

<sup>368</sup> *Id.* at Standard F.

<sup>369</sup> *Id.* at Section II.



practice ranges from experienced lawyers who handle mostly appellate cases, sometimes for multiple counties, to lawyers with relatively no experience, sometimes handling cases in which they served as trial counsel. Some interviewees also expressed concern that quality of appellate briefs by defenders varied significantly, and that the briefs of the Attorneys General were significantly better.

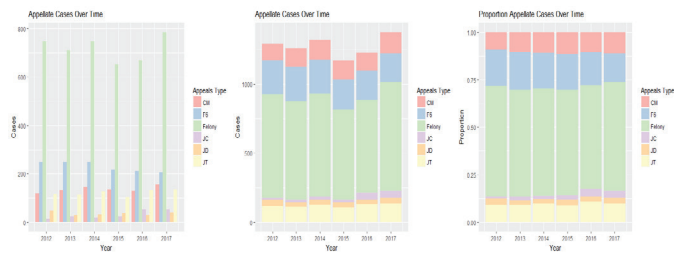
The Public Defender Commission has established requirements for attorneys handling appellate cases for reimbursement:

1. Murder and Level 1, 2, 3, or 4 Felony. To be eligible to serve as appointed counsel in a case where the accused is charged with murder or a Level 1, 2, 3, or 4 felony, an attorney shall be an experienced and active trial or appellate practitioner with at least three (3) years experience in criminal litigation and have completed prior to appointment at least six (6) hours of training in appellate practice in a course approved by the Indiana Public Defender Commission.
2. Other Cases. To be eligible to serve as appointed counsel in other cases, an attorney shall have completed prior to appointment at least six (6) hours of training in appellate practice in a course approved by the Indiana Public Defender Commission.<sup>370</sup>

The Commission also has caseload standards for appellate counsel, both full time and part time, with and without adequate support staff. For full time attorneys without adequate support staff, the maximum annual caseload is 20 trial appeals, or 40 guilty plea appeals; for part time, (50%), the numbers are 10 trial appeals and 20 guilty plea appeals. For appellate counsel with adequate support staff, the numbers increase to 25 and 50 respectively for full time attorneys, and 12 and 24 respectively for part time attorneys at 50%.<sup>371</sup>

While it was not possible to determine the number of indigent defense appeals in the state with precision, Commission staff did extract the number of appellate decisions by type from 2012 – 2017 for

comparison.<sup>372</sup>



The highest number of appeals come from Marion, Allen, Elkhart, St. Joseph, and Tippecanoe Counties, with Marion County litigating about 27% of the total appellate cases in these areas, and Allen County being second at 7%.

A survey conducted primarily through the Indiana Public Defender Council Appellate Listserv yielded 31 responses representing 52 counties, about 1/2 of which were full time or contract attorneys doing work in Marion County. Roughly 2/3 of the respondents have been handling appeals for more than 10 years, while only 10% were under 3 years. Over half (53.3%) estimated they had litigated more than 100 appeals. Twenty percent (20%) listed 10 or fewer appeals. The types of appeals handled were mixed with the largest percentage (93.5%) responding that they handled adult criminal appeals. Over half also did CHINS/TPR and juvenile appeals. Only 6 respondents were full time appellate defenders without a separate caseload.

When asked about whether or not the Commission’s standards for appellate caseloads were appropriate, about half responded that they were, a small number indicated they were too low, and the rest were in between. Several individuals had comments about how cases are weighted.

Most respondents received no oversight or supervisions in their appellate practice. Less than 1/3 received any supervision or feedback on briefing, strategy or decisions such as motions for transfer. Less than half receive any type of performance evaluation of their work (48%), have supervision by an experienced appellate attorney

<sup>370</sup> Non-Capital Case Standards, *supra* note 68, at 11.

<sup>371</sup> *Id.* at 15-16.

<sup>372</sup> See INDIANA COURT OF APPEALS, <https://www.in.gov/judiciary/opinions/archapp.html>.



(40%), or are assigned cases based upon their experience, expertise and knowledge (48%).

Most survey respondents had several years of experience and generally did not believe greater supervision was necessary. Only 38% indicated they would like more opportunities for brainstorming legal issues and theories, or have their briefs review. Assistance with compiling the Appendix was the number one area where lawyers would like to have more assistance.

When asked about the recommendation of the Sixth Amendment Center to create a full time appellate office, roughly ¼ of respondents thought the current system worked well and would not change it. The remaining responses indicated change was necessary, with the highest percentage (33%) favoring as state appellate office which had flexibility to contract out cases. Four respondents liked the idea of full time offices within regions with full state funding.

Finally, some survey respondents noted that quality appellate practice requires stronger trial practice, and that we should not lose sight of the connection between the two.

**B) Indiana State Public Defender Office:** The Indiana State Public Defender was created in 1945 “for the benefit of those wrongfully imprisoned, as well as to aid the courts in administering justice...”<sup>373</sup> The office is under the judicial branch of government, and the state public defender is “appointed by and serves at the pleasure of the Supreme Court, for a term of four years.”<sup>374</sup>

The Subcommittee examined the annual reports from the State Public Defender’s office from 2012-13 to 2016-17. That office conducts factual and legal investigations into non-capital cases “for any incarcerated, indigent inmate who files a pro se petition for post-conviction relief and requests assistance in challenging a conviction or sentence having present penal consequences.”<sup>375</sup> One

attorney is assigned to represent youth in parole revocation and Trial Rule 60(B) proceedings, and in capital cases, attorneys prepare and file petitions for post-conviction relief and continue through state court appellate proceedings.<sup>376</sup>

The State Public Defender tracks the number of cases evaluated by year, and those waiting to be evaluated at year end. As an example, in FY 2017, 215 post-trial records and 250 guilty pleas were evaluated for a total of 465 cases.<sup>377</sup> It was noted that the number of post-trial and appeal records waiting to be evaluated has steadily decreased over 5 years,<sup>378</sup> from 316 in 2013, to 239 in 2017.<sup>379</sup> It was reported this backlog in some cases can result in a 2 -3 year wait since there are no filing deadlines.

Cases are summarized in the Annual Report based upon the number received, witness and client interviews, evidentiary hearings, juvenile parole revocations, post-trial and appellate cases read and waiting to be read, files opened, closed, and closed without merit. Of the 616 cases closed in 2017, for example, 414, or 67% were found to be “no merit.”<sup>380</sup> The State Public Defender is also by statute required to provide representation to indigent persons committed to the department of corrections by a criminal conviction or adjudication, both adults and juveniles, in proceedings before the department of corrections or parole board, if such right “is established by law.”<sup>381</sup> For juveniles charged with a revocation or parole, Indiana law requires the appointment of counsel when if youth is indigent, as one of the procedural safeguards.<sup>382</sup>

No comparable Indiana statute is found regarding the appointment of counsel for adults in parole revocation proceedings. The U.S. Supreme Court has held, however, that while the right to appointed counsel in parole revocation cases is not absolute, certain presumptive criteria should be applied in

<sup>376</sup> *Id.*

<sup>377</sup> *Id.* at 9.

<sup>378</sup> *Id.*

<sup>379</sup> *Id.* at 10.

<sup>380</sup> *Id.* at 23.

<sup>381</sup> I.C. § 33-40-1-2(b) (2018).

<sup>382</sup> I.C. § 11-13-6-9(a) (2018).

<sup>373</sup> State *ex rel.* Sanders v. Reeves, 91 N. E. 2d 912, 912 (Ind. 1950).

<sup>374</sup> I.C. § 33-40-1-1(b) (2018).

<sup>375</sup> INDIANA STATE PUBLIC DEFENDER, ANNUAL REPORT 2, (2017).



determining whether counsel should be appointed.<sup>383</sup>

“Counsel should be provided in cases where, after being informed of his right to request counsel, the probationer or parolee makes such a request, based on a timely and colorable claim (i) that he has not committed the alleged violation of the conditions upon which he is at liberty; or (ii) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present. In passing on a request for the appointment of counsel, the responsible agency also should consider, especially in doubtful cases, whether the probationer appears to be capable of speaking effectively for himself. In every case in which a request for counsel at a preliminary or final hearing is refused, the grounds for refusal should be stated succinctly in the record.”<sup>384</sup>

A handful of parole revocation cases are included in the State Public Defender Annual Report, however, these are reportedly appeals of parole revocations, and primarily done by contractors.<sup>385</sup>

### **What other state models have systems to more effectively achieve these attributes?**

The Subcommittee examined appellate and post-conviction systems in Kentucky, Ohio, Illinois, Idaho and Michigan. Several important aspects were noted in these systems. A chart of these states and their structure, function, oversight and accountability measures is attached to this report.

The advantages of having a full time office with a centralized appellate function were apparent in the level of training, supervision and oversight of appellate lawyers. These offices by in large worked well with local trial offices, and could offer expertise to trial lawyers to better frame and preserve issues for appeal. Most of the offices sought input from appellate courts about the

performance of their office.

Michigan’s appellate office handles only about ¼ of the cases in the state, with a separate division handling the assignment of cases on contract. The contract office provides some level of quality assurance measures through the contract process.

Workload measures varied, but each system had some variation and flexibility in the design of its system.

Performance measures were varied as well, but included tracking reductions in time extensions and backlog (Illinois), ineffective assistance of appellate counsel claims, and discretionary review petitions granted. Some states tracked the number of years shaved off of prison sentences in post-trial proceedings to correct or otherwise amend sentences.

### **What are the key findings of the Committee?**

**1) The system of providing appellate representation in Indiana does not ensure sufficient independence from the judiciary in all counties.** In roughly 1/3 of counties, appellate counsel are selected and appointed by judges without any required training, experience or oversight.

**2) Appellate representation is a specialized area requiring specific skills, training, experience and standards.** While the state has many excellent appellate lawyers, the experience and requirements for handling appeals in Commission counties are minimal, and there are no performance standards in place. Many counties do not have sufficient resources to ensure high quality appellate representation and oversight measures. Marion County, on the other hand, has a well-established appellate office which sets high standards for its lawyers, and works closely with the agency’s trial lawyers.

**3) The State Public Defender office is not independent from the judiciary,** and its Public Defender remains accountable to the Supreme Court which appoints him and to whom he is directly

<sup>383</sup> Gagnon v. Scarpelli, 411 U.S. 778 (1973)

<sup>384</sup> *Id.* at 790-791.

<sup>385</sup> State Public Defender, *supra* note 375, at 24.



responsible.

**4) While there are no set workload standards for the State Public Defender office, cases numbers are monitored.** The steady backlog of cases with 2-3 year waiting periods before an investigation can begin raises concerns about appropriate levels of staffing, workloads and/or funding.

**5) There appears to be no established mechanism to trigger appointment of counsel by the State Public Defender** for those accused of parole violations who may qualify for appointed counsel pursuant to *Gagnon* criteria.

**Recommendations:**

**1) The legislature should create a statewide appellate office to central public defender appellate work**, including criminal, juvenile, CHINS/TPR cases, and other cases eligible for public defenders. The office could be placed under the Public Defender Commission. Criteria for a Chief Appellate Defender should be incorporated into the statute and include a minimum of five years of appellate experience, licensure in Indiana or eligibility for, and strong management and leadership skills. The office could establish regional support services as appropriate.

**2) The state must be required to create separate standards for appellate practice**, including supervisory standards, annual training, mentoring of newer lawyers, and specific performance indicators.

**3) The state appellate office should be 100% state funded with state employees, but with the authority to contract out cases to qualified appellate lawyers.**

**4) The state appellate office should play a role in training and providing technical assistance to trial lawyers on legal issues**, and should advocate for improved appellate practices.

**5) The office of the State Public Defender should be independent from the judicial branch and be under the supervision of a separate board rather than directly under the Supreme Court.**

One option is to combine the State Public Defender office with a new state appellate office, provided there are adequate safeguards to deal with potential conflicts.

**6) The State Public Defender should work to ensure an adequate mechanism is in place for individuals facing parole revocation who are entitled to counsel.**

**7) Further examination and remedial measures should be taken to further reduce and ultimately eliminate the backlog of cases waiting for review through the office of the State Public Defender.**





# Appendix J: Literature Reviewed by the Task Force

Please find below a list of documents, scholarly papers, court cases and data reviewed by the Task Force. Nearly every document is available on our web page via the links provided below.

## Task Force Documents

- Task Force Announcement
  - <https://www.in.gov/publicdefender/files/Task%20Force%20Annoucement.pdf>
- Appointment of Judge Tinder Press Release
  - <https://www.in.gov/publicdefender/files/Task%20Force%20Press%20Release%2010-16-17.pdf>
- Editorial by Former Executive Director of the Indiana Public Defender about the importance of public defenders as defenders of liberty
  - <https://www.courierpress.com/story/opinion/readers/2018/03/13/commentary-public-defenders-help-protect-liberty/421463002/>
- Journal-Gazette Opinion Piece on Task Force
  - <http://www.journalgazette.net/opinion/20171026/a-needed-look-at-indianas-legal-aid>
- Indianapolis Listening Tour
  - Transcript:
    - ◆ <https://www.in.gov/publicdefender/files/020918Listening%20Tour.pdf>
  - Transcript Summary
    - ◆ [https://www.in.gov/publicdefender/files/Proofed%20Indianapolis%20Transcript%20\(2\).docx](https://www.in.gov/publicdefender/files/Proofed%20Indianapolis%20Transcript%20(2).docx)
- Fort Wayne Listening Tour
  - Transcript:
    - ◆ <https://www.in.gov/publicdefender/files/Fort%20Wayne%20Transcript.pdf>
  - Transcript Summary
    - ◆ [https://www.in.gov/publicdefender/files/Listening%20Tour%20Transcript%20Ft.%20Wayne%20Summary%20\(002\).docx](https://www.in.gov/publicdefender/files/Listening%20Tour%20Transcript%20Ft.%20Wayne%20Summary%20(002).docx)
- Evansville Listening Tour
  - Transcript
    - ◆ <https://www.in.gov/publicdefender/files/Evansville%20Task%20Force%203-20-18.pdf>
  - Transcript Summary
    - ◆ <https://www.in.gov/publicdefender/files/3-20-18%20Evansville%20Transcript%20summary.docx>
- Clark County Listening Tour
  - Transcript
    - ◆ <https://www.in.gov/publicdefender/files/TASKFORCEMTG.pdf>
- Gary Listening Tour



- Transcript
  - ◆ <https://www.in.gov/publicdefender/files/Gary%20Listening%20Tour%2003312018.pdf>
- Transcript Summary
  - ◆ <https://www.in.gov/publicdefender/files/Summary%20of%20Gary%20IN%20listening%20session%203-31-18.docx>

## Task Force News Articles

- May 30, 2018, The Indiana Lawyer. “Justices won’t hear Johnson County Public Defender suit?”
  - <https://www.theindianalawyer.com/articles/47155-justices-wont-hear-johnson-county-public-defender-suit>
- May 16, 2018, The Indiana Lawyer. “Among public defenders, cases rise but funding lags.”
  - <https://www.theindianalawyer.com/articles/47030-among-public-defenders-cases-rise-but-funding-lags>
- February 19, 2018, Indiana Public Media. “Number of Kids in Child Welfare System Strains Public Defenders.”
  - <https://indianapublicmedia.org/news/number-kids-child-welfare-system-strains-public-defenders-141413/>
- February 15, 2018, The Journal-Gazette. “Crisis mentality: Indigent defense issues get needed attention.”
  - <http://www.journalgazette.net/opinion/columns/20180215/crisis-mentality>
- January 25, 2018, The Indiana Lawyer. “Public defender task force announces listening tour.”
  - <https://www.theindianalawyer.com/articles/45977-public-defender-task-force-announces-listening-tour>
- January 8, 2018, Indiana public Media. “Appeal Planned On Lawsuit Challenging public Defender System.”
  - <https://indianapublicmedia.org/news/appeal-planned-lawsuit-challenging-public-defender-system-136868/>
- January 2, 2018, Indiana Public Media. “Court Upholds Dismissal Of Johnson Co. Public Defense Suit.”
  - <https://indianapublicmedia.org/news/court-upholds-dismissal-johnson-public-defense-suit-136251/>
- December 13, 2017, The Indiana Lawyer. “Task force researches improving Indiana’s public defender system.”
  - <https://www.theindianalawyer.com/articles/45592-task-force-researches-improving-indianas-public-defender-system>
- December 12, 2017, Pharos-Tribune Logansport. “Lawsuit may prompt public defender rule changes.”
  - [http://www.pharostribune.com/news/state\\_news/article\\_a5d012ce-ab0c-50b9-817a-766aabade3ad.html](http://www.pharostribune.com/news/state_news/article_a5d012ce-ab0c-50b9-817a-766aabade3ad.html)
- December 8, 2017, The Indiana Lawyer. “COA hears challenge to Johnson County public defender system.”



- <https://www.theindianalawyer.com/articles/45578-coa-hears-challenge-to-johnson-county-public-defender-system>
- October 26, 2017, The Journal-Gazette. “A needed look at Indiana’s legal aid.”
  - <http://www.journalgazette.net/opinion/20171026/a-needed-look-at-indianas-legal-aid>
- September 20, 2017, TimesSentinel.com. “Former Zionsville mayor named to Indiana Task Force on Public Defense.”
  - [http://www.timesentinel.com/news/local\\_news/former-zionsville-mayor-named-to-indiana-task-force-on-public/article\\_a386e802-eea9-59c6-a6f0-04f794c70fc2.html](http://www.timesentinel.com/news/local_news/former-zionsville-mayor-named-to-indiana-task-force-on-public/article_a386e802-eea9-59c6-a6f0-04f794c70fc2.html)
- March 29, 2018, New York Times. “His Clients Weren’t Complaining, But the Judge Said this Lawyer Worked Too Hard.”
  - <https://www.in.gov/publicdefender/files/His%20Clients%20Werent%20Complaining.%20But%20the%20Judge%20Said%20This%20Lawyer%20Worked%20Too%20Hard..pdf>

## Meeting Materials

July 30, 2018 meeting materials:

- Minutes
  - ◆ <https://www.in.gov/publicdefender/2333.htm>

May 25, 2018 meeting materials:

- Minutes
  - ◆ <https://www.in.gov/publicdefender/files/Task%20force%20Minutes%205-25-18%20web.pdf>

April 20, 2018 meeting materials:

- Meeting Agenda.
  - ◆ <https://www.in.gov/publicdefender/files/April%2020%20meeting%20agenda%20revised%20draft.docx>
- Right to Counsel Services in the 50 States
  - ◆ <https://www.in.gov/publicdefender/files/Right%20to%20Counsel%20Services%20in%20the%2050%20States.pdf>
- Summary of Michigan Reform Efforts
  - ◆ <https://www.in.gov/publicdefender/files/Michigan%202%20page%20summary.docx>
- Summary of New York reform chronology
  - ◆ [https://www.in.gov/publicdefender/files/Indiana%20Task%20Force%20NY%20chronology%20\(1\).pdf](https://www.in.gov/publicdefender/files/Indiana%20Task%20Force%20NY%20chronology%20(1).pdf)

February 9, 2018 meeting materials:

- Indiana Task Force on Public Defense February 9th Agenda
  - ◆ <https://www.in.gov/publicdefender/files/Indiana%20Task%20Force%20on%20Public%20>





[Defense%20February%209th%20Agenda.docx](#)

- Juvenile Defense Subcommittee PPT
  - ◆ <https://www.in.gov/publicdefender/files/Juvenile%20Defense%20Subcommittee%20PPT.pdf>
- Juvenile Defense Subcommittee Report and Recommendations for Distribution
  - ◆ [https://www.in.gov/publicdefender/files/Juvenile%20Defense%20Subcommittee%20Report%20and%20Recommendations%20for%20Distribution%20\(002\).docx](https://www.in.gov/publicdefender/files/Juvenile%20Defense%20Subcommittee%20Report%20and%20Recommendations%20for%20Distribution%20(002).docx)
- 10 Principles NACDL and NJDC
  - ◆ <https://www.in.gov/publicdefender/files/10%20principles%20NACDL%20and%20NJDC.pdf>

January 26, 2018 meeting with Chief Public Defenders:

- PUBLIC DEFENDER TASK FORCE MEETING MINUTES OF 1-26-18
  - ◆ <https://www.in.gov/publicdefender/files/PUBLIC%20DEFENDER%20TASK%20FORCE%20MEETING%20MINUTES%20OF%201-26-18.pdf>
- Summary of the Chief's Meeting transcript
  - ◆ [https://www.in.gov/publicdefender/files/Summary%20of%20Chiefs%20Meeting%201-26-2018%20\(2\).docx](https://www.in.gov/publicdefender/files/Summary%20of%20Chiefs%20Meeting%201-26-2018%20(2).docx)

December 8, 2017 meeting materials:

- Indicators of Success
  - ◆ <https://www.in.gov/publicdefender/files/Indicators-of-Success.authcheckdam.pdf>
- CHINS-TPR State Comparison Chart
  - ◆ <https://www.in.gov/publicdefender/files/CHINS-TPR%20State%20Comparison%20Chart.pdf>
- FJIPrioritizedAttributesofQualityRepresentation11.2
  - ◆ <https://www.in.gov/publicdefender/files/FJIPrioritizedAttributesofQualityRepresentation11.2.pdf>
- Meeting #4 Agenda and Materials
  - ◆ <https://www.in.gov/publicdefender/files/Meeting%20%234%20Agenda%20and%20Materials.pdf>

November 10, 2017 meeting materials:

- November 10 Meeting Agenda and Minutes from the October 27 Meeting
  - ◆ <https://www.in.gov/publicdefender/files/Quality%20of%20Representation%20Issues%20-%20Final.pdf>
- November 10 PowerPoint
  - ◆ <https://www.in.gov/publicdefender/files/Quality%20of%20Representation%20Issues%20-%20Final.pdf>



October 27, 2017 meeting materials:

- October 27 Meeting Agenda and Minutes from September 8 Meeting
  - ◆ [https://www.in.gov/publicdefender/files/Meeting%20%20Materials%20\(1\).pdf](https://www.in.gov/publicdefender/files/Meeting%20%20Materials%20(1).pdf)
- October 27 Powerpoint
  - ◆ <https://www.in.gov/publicdefender/files/Access%20to%20Counsel%20and%20Timely%20Appointment.pdf>
- Process Evaluation of the IRAS-PAT Pilot Program Implementation
  - ◆ [https://www.in.gov/publicdefender/files/IRAS-PAT\\_Report\\_Pr1%20\(3\).pdf](https://www.in.gov/publicdefender/files/IRAS-PAT_Report_Pr1%20(3).pdf)
- Jail Data Summary
  - ◆ <https://www.in.gov/publicdefender/files/jail%20data%20summary.pdf>
- Task Force Press Release Announcing Judge Tinder
  - ◆ [https://www.in.gov/publicdefender/files/Task%20Force%20Press%20Release%2010-16-17%20\(2\).pdf](https://www.in.gov/publicdefender/files/Task%20Force%20Press%20Release%2010-16-17%20(2).pdf)

September 8, 2017 meeting materials:

- September 8 Powerpoint
  - ◆ <https://www.in.gov/publicdefender/files/Sept%208%20Powerpoint.pdf>
- September 8 Agenda
  - ◆ <https://www.in.gov/publicdefender/files/Sept%208%20Agenda.pdf>
- Juvenile Defense Project Fact Sheet
  - ◆ <https://www.in.gov/publicdefender/files/Juvenile%20Defense%20Project%20Fact%20Sheet.pdf>
- Indiana Public Defense at a Glance
  - ◆ <https://www.in.gov/publicdefender/files/PD%20Fact%20Sheet%201%20-%20Revised.pdf>

## Resources and Links

### Indiana's Public Defense Delivery System

- Right to Counsel in Indiana: Evaluation of Trial Level Services – Sixth Amendment Center (2016)
  - ◆ [http://sixthamendment.org/6ac/6AC\\_indianareport.pdf](http://sixthamendment.org/6ac/6AC_indianareport.pdf)
- Executive Summary – Sixth Amendment Center (2016)
  - ◆ [http://sixthamendment.org/6ac/6AC\\_indianareport\\_executivesummary.pdf](http://sixthamendment.org/6ac/6AC_indianareport_executivesummary.pdf)
- In Re: Request for Rule Making Concerning the Marion County Public Defender System
  - ◆ <https://www.in.gov/publicdefender/files/49S00-9210-MS-822.pdf>
- Evaluation of Partial State Funding for Public Defender Services in Indiana (1986)
  - ◆ <https://www.in.gov/publicdefender/files/Eval%20of%20Partial%20State%20Funding.pdf>
- Report of the Commission on Public Defenders of the Indianapolis Bar Association (1991)



- ◆ <https://www.in.gov/publicdefender/files/Report%20of%20Commission%20of%20PD.pdf>
- Structure and Funding for Criminal Defense of Indigents in Indiana (1974)
  - ◆ <https://www.in.gov/publicdefender/files/Structure%20and%20Funding%20for%20Criminal%20Defense%20of%20Indigents.pdf>

### Indiana Law Review Volume 51, No. 1

- Will We Ever Succeed in Fulfilling *Gideon's* Promise? - Dean Emeritus Norman Lefstein
  - ◆ <https://www.in.gov/publicdefender/files/Will%20We%20Ever%20Succeed%20in%20Fulfilling%20Gideons%20Promise%20-%20Lefstein.pdf>
- Case Refusal: A Duty for a Public Defender and a Remedy for All of a Public Defender's Clients - Stephen F. Hanlon
  - ◆ <https://www.in.gov/publicdefender/files/Case%20Refusal%20-%20Hanlon.pdf>
- Public Defense Litigation: An Overview - Laren Sudeall Lucas
  - ◆ <https://www.in.gov/publicdefender/files/PD%20Litigation%20-%20Lucas.pdf>
- Public Defense Innovation in Texas - James D. Bethke, Morgan Shell
  - ◆ <https://www.in.gov/publicdefender/files/PD%20Innovation%20in%20Texas%20-%20Bethke%20Shell%20.pdf>
- The Right to Counsel in New York: How Reform Was Achieved After Decades of Failure - William J. Leahy
  - ◆ <https://www.in.gov/publicdefender/files/New%20York%20Reform%20-%20Leahy.pdf>

### Indiana Juvenile Defense Delivery System

- Assessment of Access to Counsel and Quality of Representation
  - ◆ <https://www.in.gov/publicdefender/files/New%20York%20Reform%20-%20Leahy.pdf>

### Indiana Post-Trial Services

- Public Defender of Indiana
  - ◆ <http://www.in.gov/judiciary/defender/2331.htm>

### DOJ/National Resources

- Hurrell Harrington v. State of New York
  - ◆ <https://www.in.gov/publicdefender/files/Hurrell%20Harrington%20v.%20State%20of%20New%20York%20-%20DOJ%20Statement%20of%20Interest.pdf>
- Kuren v. Lucerne County - DOJ Statement of Interest
  - ◆ <https://www.in.gov/publicdefender/files/Kuren%20v.%20Lucerne%20County%20-%20DOJ%20Statement%20of%20Interest.pdf>





- N.P. v. State of Georgia - DOJ Statement of Interest
  - ◆ <https://www.in.gov/publicdefender/files/N.P.%20v.%20State%20of%20Georgia%20-%20DOJ%20Statement%20of%20Interest.pdf>
- Public Defense Expenditures - Office of Justice Programs, Department of Justice
  - ◆ <https://www.in.gov/publicdefender/files/Public%20Defense%20Expenditures%20-%20BJS.pdf>
- Tucker v. State of Idaho - DOJ Statement of Interest
  - ◆ <https://www.in.gov/publicdefender/files/Tucker%20v.%20State%20of%20Idaho%20-%20DOJ%20Statement%20of%20Interest.pdf>
- Wilbur v. City of Mount Vernon - DOJ Statement of Interest
  - ◆ <https://www.in.gov/publicdefender/files/Wilbur%20v.%20City%20of%20Mount%20Vernon%20-%20DOJ%20Statement%20of%20Interest.pdf>

## National Standards and Links

### *Overall Principles of Criminal Defense Reform*

- Ten Principles of a Public Defense Delivery System
  - ◆ [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_tenprinciplesbooklet.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf)
- ABA Criminal Defense Standards for the Defense Function
  - ◆ [https://www.americanbar.org/groups/criminal\\_justice/standards/DefenseFunctionFourthEdition.html](https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition.html)
- Standards for the Administration of Assigned Counsel Systems
  - ◆ <http://www.nlada.org/defender-standards/assigned-counsel>
- Gideon's Broken Promise: America's Continuing Quest for Equal Justice - American Bar Association
  - ◆ <https://www.in.gov/publicdefender/files/ABAGideon%27sBrokenPromise.pdf>
- Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel - Report of the National Right to Counsel Committee
  - ◆ <https://constitutionproject.org/wp-content/uploads/2012/10/139.pdf>
- Implicit Racial Attitudes of Death Penalty Lawyers - Eisenberg and Johnson
  - ◆ <https://www.in.gov/publicdefender/files/eisenberg%20and%20johnson%20racial%20attitudes%20death%20lawyers%202004%20Depaul%20LR.pdf>
- Implicit Racial Bias in Public Defender Triage - Richardson and P. Goff
  - ◆ <https://www.in.gov/publicdefender/files/implicit%20racial%20bias%20in%20public%20defender%20triage%20Richardson%20YLJ%202013.PDF>
- Defense Attorney Plea Recommendations and Client Race: Does Zealous Representation Apply Equally to All? - Edkins
  - ◆ <https://www.in.gov/publicdefender/files/Race%20differences%20in%20expectancies%20of%20pleadingpdf.pdf>

***Juvenile Standards***

- National Juvenile Defense Standards, NJDC (2012)
  - ◆ <http://njdc.info/national-juvenile-defense-standards/>
- Ten Core Principles for Providing Quality Delinquency Representation Through Public Defense Delivery Systems, National Juvenile Defender Center & National Legal Aid and Defender Association (2008)
  - ◆ <https://www.in.gov/publicdefender/files/ABAGideon%27sBrokenPromise.pdf>

***Appellate Standards***

- Standards and Evaluation Design for Appellate Defender Services
  - ◆ <http://www.nlada.org/defender-standards/appellate>

***Standards for Parent Representation***

- ABA Standards of Practice for Attorneys Representing Parents in Abuse and Neglect Cases
  - ◆ [https://www.americanbar.org/content/dam/aba/publications/center\\_on\\_children\\_and\\_the\\_law/parentrepresentation/ABA-Parent-Attorney-Standards.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/center_on_children_and_the_law/parentrepresentation/ABA-Parent-Attorney-Standards.authcheckdam.pdf)
- Indicators for Success for Parent Representation – American Bar Association
  - ◆ [https://www.americanbar.org/content/dam/aba/administrative/child\\_law/ParentRep/Indicators-of-Success.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/child_law/ParentRep/Indicators-of-Success.authcheckdam.pdf)
- High Quality Legal Representation for All Parties in Child Welfare Proceedings, Department of Health and Human Services, Administration for Children and Families, Guidance Memo
  - ◆ [https://www.americanbar.org/content/dam/aba/administrative/child\\_law/ParentRep/legalrepim2017.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/child_law/ParentRep/legalrepim2017.authcheckdam.pdf)
- ABA National Project to Improve Representation for Parents
  - ◆ [https://www.americanbar.org/content/dam/aba/administrative/child\\_law/ParentRep/At-a-glance%20final.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/child_law/ParentRep/At-a-glance%20final.authcheckdam.pdf)
- Timely Permanency or Unnecessary Removal?: Tips for Advocates for Children Who Spend Less Than 30 Days in Foster Care
  - ◆ [https://www.in.gov/publicdefender/files/Timely%20Permanency%20or%20Unnecessary%20Removal\\_%20Tips%20for%20Advocates%20for%20\(003\).pdf](https://www.in.gov/publicdefender/files/Timely%20Permanency%20or%20Unnecessary%20Removal_%20Tips%20for%20Advocates%20for%20(003).pdf)

***Misdemeanors***

- Minor Crimes, Massive Waste - NACDL
  - ◆ [https://www.in.gov/publicdefender/files/MinorCrimesMassiveWaste%20\(1\).pdf](https://www.in.gov/publicdefender/files/MinorCrimesMassiveWaste%20(1).pdf)

***Public Defender Caseloads***

- Securing Reasonable Caseloads - Full Book
  - ◆ <https://www.in.gov/publicdefender/files/SecuringReasonableCaseloads.Book.pdf>
- Securing Reasonable Caseloads - Executive Summary
  - ◆ <https://www.in.gov/publicdefender/files/ABA%20Eight%20GuidelinesMay2010.pdf>



- Eight Guidelines of Public Defense Related to Excessive Workloads
  - ◆ <https://www.in.gov/publicdefender/files/ABA%20Eight%20GuidelinesMay2010.pdf>

### *Ethics*

- ABA Standing Committee on Ethics and Professional Responsibility Formal Opinion 06-441
  - ◆ <https://www.in.gov/publicdefender/files/ABA.Ethics06-441.pdf>

### *Other State Evaluations*

- Denial of the Right to Counsel in Misdemeanor Cases: Court Watching in Nashville, Tennessee
  - ◆ <https://www.in.gov/publicdefender/files/Nashville.CourtWatchingNLFinalAugust3.pdf>
- NLADA Report – Michigan
  - ◆ <https://www.in.gov/publicdefender/files/NLADA%20Report%20-%20Michigan.pdf>
- Sixth Amendment Center - Mississippi Evaluation
  - ◆ <http://sixthamendment.org/withholding-felony-representation-for-months-at-a-time-in-mississippi/>

### *International Standards and Links*

- United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems
  - ◆ [https://www.in.gov/publicdefender/files/UN\\_principles\\_and\\_guidlines\\_on\\_access\\_to\\_legal\\_aid.pdf](https://www.in.gov/publicdefender/files/UN_principles_and_guidlines_on_access_to_legal_aid.pdf)
- [Letter from the Mexican Consulate in Indianapolis re: public defenders and need for interpreters](https://www.in.gov/publicdefender/files/Mexican%20Consulate.pdf)
  - ◆ <https://www.in.gov/publicdefender/files/Mexican%20Consulate.pdf>



# Appendix K: Message from the Advisory Task Force of the Indiana Task Force on Public Defense

As you will read in the following Report, since its formation in August, 2017, the Task Force has reviewed voluminous information about the public defense function as it is and should be performed, not only in Indiana, but also throughout the United States. As described in the report, we have been assisted in this review by helpful expert local and national advisors and the talented staff of the Public Defender Commission. From the presentations and discussions at Task Force meetings, listening sessions held throughout the State, and from the interviews and surveys conducted and the articles and treatises identified for us, we have become well informed on a variety of challenges faced by those in need of public defense, their families, courts, the defense bar and governmental agencies.

We are aware that Indiana faces critical decisions on public defense reform. It is hoped that, at least in part as a result of this Task Force process, those critical decisions will be presented to the legislative, executive and judicial branches of Indiana for action in the days and years ahead. However, even though the members of the Advisory Subcommittee fully participated in the development and discussion of the information that was compiled by the Task Force, because the Advisory Subcommittee members serve in those very branches of government which will need to address these issues, we agree with the Task Force determination that we should not be asked to participate in making or endorsing the particularized findings and recommendations contained in the Report. We look forward to working with our colleagues to find ways to properly address the concerns identified by the

Reporting Committee of the Task Force.

## Advisory Committee Members:

*Senator Rodric Bray*  
Chair, Senate Judiciary Committee  
Indiana State Senate

*Justice Christopher M. Goff*  
Indiana Supreme Court

*Judge Vicki Carmichael, Clark Circuit Court*  
VP, Indiana Judges Association

*Judge Mary Ellen Diekhoff*  
Indiana Public Defender Commission  
Monroe Circuit Court

*Judge Mary Willis (served partial term)*  
Former Chief Adm. Officer  
Office of Court Services  
Indiana Supreme Court

*Joseph R. Heerens, General Counsel*  
Office of Indiana Governor Eric Holcomb



## Appendix L: Statement of David Bottorff, Association of Indiana Counties

I believe the Task Force identified many areas that could be improved in the public defense system and generally support the report.

A concern I have with the report is the assumption that counties not participating in the state program are providing inadequate public defense representation. Some counties may have developed a process that provides representation that meets constitutional requirements. I know the Task Force did not have the time to evaluate each county's process, caseload or financial commitment to public defense but that does not automatically translate into an inadequate system.

To quote the Sixth Amendment report:

*"Of course, the lack of state oversight of indigent defense services is not by itself outcome-determinative. That is, the absence of institutionalized statewide oversight does not mean that all right to counsel services provided by all county and municipal governments are constitutionally inadequate."*

I believe we can work on incremental changes to improve the system but do not believe we should completely abandon all local programs at this time.

David A. Bottorff  
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Association of Indiana Counties  
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