MEMO

DATE: July 24, 2019
TO: County Public Defender Directors, County Commissioners, Judges, Auditors, Court Administrators, Ohio State Bar Association, Ohio Association of Criminal Defense Attorneys, County Public Defenders
FROM: William R. Creedon, Ohio Public Defender Commission Chair, and Timothy Young, State Public Defender
RE: Indigent Defense Budget

The Ohio Public Defender Commission and the Office of the Ohio Public Defender (OPD) are excited to announce that Governor DeWine and the Ohio General Assembly have allocated $59,020,000 additional dollars in the State Budget to reimburse counties for indigent defense costs for Fiscal Year 2020 (July 1, 2019 – June 30, 2020) and $95,000,000 for Fiscal Year 2021 (July 1, 2020 – June 30, 2021). This level of funding for indigent defense is unprecedented in Ohio. At this time, OPD estimates that the allocated funding will permit the OPD to reimburse counties for approximately 70% of the cost of indigent defense for Fiscal Year 2020. The 70% reimbursement rate is an estimate based on current reimbursement submissions and anticipated increases in requests for reimbursement. For Fiscal Year 2021, the OPD initially estimates that Fiscal Year 2021 could approach a 90% reimbursement rate. However, the OPD will be better able to forecast the specific reimbursement rate for Fiscal Year 2021 once we have received data from the Fiscal Year 2020 reimbursement submissions.

OPD believes the availability and advocacy of quality defense counsel result in better efficiencies for the courts, better outcomes for all parties, and a fair justice system. Governor DeWine and the General Assembly have made a major commitment to guarantee the right to counsel, a cornerstone of individual liberty, to indigent persons. Their investment demonstrates that the Governor and the General Assembly are dedicated to helping counties improve their indigent defense services to build strong, constitutionally sound programs in every county. The State of Ohio has taken a significant step to assist counties with the expense of providing indigent defense counsel, a duty which is required by the United States and Ohio Constitutions.

The Sixth Amendment to the United States Constitution safeguards our most basic liberties. The guarantee of the right to counsel is a right that has been deemed necessary to fully protect our most fundamental freedom – individual liberty. “In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense.”1 In the seminal case of Gideon v. Wainwright, the United States Supreme Court held that this bedrock right extended to state courts by application of the Due Process Clause of the Fourteenth Amendment.2 The right to counsel “is one of the safeguards of the Sixth Amendment deemed necessary to [e]nsure fundamental human rights of life and liberty,” and serves as

1 U.S. Const., Amend VI
2 Gideon v. Wainwright, 372 U.S. 335, 342 (1963)
one of the “essential barriers against arbitrary or unjust deprivation of human rights.”3 “The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not ‘still be done.’”4

The OPD Commission is grateful to Governor DeWine and the Ohio General Assembly for recognizing the need to support counties in strengthening and improving the right to counsel for indigent persons across Ohio. For too long, the State has underfunded Ohio’s county based indigent defense systems which has impeded systemic improvement. Making improvements requires increased funding. Governor DeWine and the Ohio General Assembly have recognized this need and have addressed it in a very significant way with their funding increases.

While this major change evidences a renewed dedication to the counties to support strong and robust mechanisms for providing and protecting the right to counsel, the system of county based public defense remains the same – albeit with much more State funding available. Broadly outlined, each county still selects the delivery model, the budget for indigent defense services, and the structure of its indigent defense system. This new funding will allow counties to make sure every person in Ohio is guaranteed his or her most fundamental liberty rights are protected. The OPD is eager to offer assistance and guidance to counties in using the new funds to restore needed local government funding and make fundamental improvements to the counties indigent defense systems.

Effective Dates of Reimbursement Increases

At this time, the OPD cannot reimburse counties above 50% for the first 90 days of Fiscal Year 2020 (until October 16, 2019), because current law limits the OPD to reimburse counties only “up to 50 percent.” However, the legislative language change that authorizes the OPD to reimburse counties at a rate higher than 50 percent becomes effective 90 days after Governor DeWine signed the budget bill. Due to the 90-day delay in the effective date, the first reimbursement payments of Fiscal Year 2020 (payments issued in August and September) will be at 50%, and payments during the remaining nine months of the fiscal year (October – June) will be at a rate higher than 70% – resulting in distribution of all of the money appropriated for Fiscal Year 2020 and an estimated average rate of reimbursement for the entire fiscal year at 70%.

Indigent Defense Systems in the Counties

Since 1976, the Ohio Public Defender Commission has been statutorily charged with the duty to: “[E]stablish rules for the conduct of the offices of the county and joint county public defenders and for the conduct of county appointed counsel systems in the state.”5 In addition to this overarching duty, the Ohio Public Defender Commission is mandated to set standards for caseloads, staffing, and the qualifications of counsel. The Ohio Public Defender Commission has passed rules and regulations to effectuate these specific areas that ensure the right to counsel is effective throughout Ohio.

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3 Johnson v. Zerbst, 304 U.S. 458, 462 (1938)
5 O.R.C. §120.03(B)
With this biennial budget the State has recognized its obligation to properly fund counties to assist in making improvements to their respective indigent defense systems. Most, if not all counties, will find that with the significant increase in the reimbursement rate, improvements to the system will still result in counties spending fewer local dollars than before, and ultimately freeing up local government funds for use elsewhere.

The OPD Commission, in an effort to help guide improvements where needed, asks that counties review the following rules and requirements and make improvements to their respective systems as necessary.

**Appointed Counsel Rates**

The Ohio Revised Code places the duty upon the County Commissioners in each county to create a rate (the hourly wage an appointed counsel is paid) and cap (the maximum amount, absent approval of an extraordinary fee, that an appointed counsel may be paid in a given case) schedule that will ensure the effective assistance of counsel. In setting the rates and caps, counties must seek input on what fees and caps should be from the local county bar association. The American Bar Association has calculated that the overhead cost of operating a law office is a minimum of $67 per hour. Other associations have calculated the cost at $40 per hour. Using the lower figure, the actual rate needs to be much higher than $40 per hour to adequately pay counsel for the professional services rendered.

A failure to pay reasonable rates ultimately undermines the right to counsel and has a disastrous impact both in individual cases and for the downstream social service costs that are borne by the county taxpayers. Multiple studies have found that when appointed counsel rates are too low, qualified attorneys stop taking appointed cases. This means clients have worse outcomes with higher societal costs. People end up spending a longer time in jail or prison than was necessary and in the worst-case scenario, innocent people end up convicted and imprisoned. Ultimately, the goal should always be that people are sanctioned with the proper punishments for the act committed. The direct and collateral consequences of appointed counsel rates being too low is that many skilled lawyers will not take appointed cases which can lead to lost jobs for individuals that were improperly jailed, children removed from homes, and communities that are less safe when the wrong individuals – whether those who are innocent or low level offenders – are sent to prison. Many of these consequences can be mitigated by paying reasonable rates to appointed counsel, which helps attract and retain skilled lawyers to serve as appointed counsel and ensure appropriate outcomes.

The OPD issued an updated State fee schedule, including increased rates and caps, in January 2019. The OPD set an in-court and out-of-court rate of $75 per hour for all cases excluding capital cases which are set by the Ohio Supreme Court at $125 per hour. To assist counties in reviewing the rates and caps in their fee schedule, beginning on page 11, the fee schedule adopted by the OPD may be found here:


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\(^6\) O.R.C. §120.33(D)
Now that Governor DeWine and the Ohio General Assembly have provided significant funding increases for indigent defense, the Ohio Public Defender Commission strongly encourages counties to adopt this fee schedule.

**Caseloads and Staffing**

Just as low appointed counsel rates impact the right to counsel, excessive caseloads can have the same deleterious impact. As a result, the Ohio Public Defender Commission is statutorily charged with setting caseload standards and the requirements for the supporting staff of public defender offices. These standards require that a public defender office have adequate support staff to enable it to provide meaningful and effective defense services. Each office should have secretaries, intake staff, investigators, and social workers, as needed. Similarly, each office should have funds allocated to hire forensic and psychological experts as well as provide professional training to staff.

The caseloads of each attorney must not be excessive to ensure the effectiveness of counsel. The Ohio Public Defender Commission does not presently have a specific caseload number for each county because there are numerous differences in how courts schedule cases, when and how prosecutors provide discovery, and the scheduling of cases for motion hearings and trials. These and other factors can substantially impact how many cases a full-time public defender can handle.

The National Advisory Commission (NAC) on Criminal Justice Standards published maximum annual caseloads for public defense providers. The American Council of Chief Defenders affirmed the NAC Standards in 2007. These standards have been adopted by numerous other states as the maximum caseloads a full-time attorney may handle.

In recognition of the variations that may occur in each county, and in each court, in lieu of specific caseloads for each court or county, the Ohio Public Defender Commission voted to adopt as part of the Ohio Administrative Code, the maximum caseloads that set the ceiling for the number of cases that can be assigned to an individual attorney on an annual basis. Now that Governor DeWine and the Ohio General Assembly have provided significant funding increases for indigent defense, the Ohio Public Defender Commission strongly encourages counties to not exceed the following NAC standards for caseloads:

- 150 felonies per attorney per year;
- 400 misdemeanors per attorney per year (excluding non-OVI traffic offenses);
- 200 juvenile delinquencies per attorney per year;
- 200 mental health per attorney per year; or,
- 25 appeals per attorney per year.

In some counties, full-time public defenders are tasked with handling caseloads in excess of these standards, even when including upward departures for traffic cases in municipal and county courts. Therefore, counties may have to hire additional attorneys to ensure the right to counsel is not jeopardized. The above ceilings are for an attorney handling these types of cases fulltime. For

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7 See Ohio Administrative Code §120-1-12
8 See Ohio Administrative Code §120-1-07
appointed counsel, these numbers should be adjusted downward depending on the time devoted to the attorney’s private practice. Finally, it must be emphasized that these are ceilings. Depending upon the severity of the charges, court scheduling, prosecutorial policies, and numerous other factors, many full-time attorneys should not carry caseloads approaching these numbers.

Pay Parity

Finally, in the same manner that low appointed counsel rates can risk undermining the right to counsel, low pay for public defenders carries the same risk. To ameliorate this risk, the Ohio Administrative Code requires pay parity between similarly situated prosecutors and public defenders or those serving in a non-profit office.9 A full-time public defender and a full-time prosecutor with similar histories, doing the same or substantially similar work, should make substantially the same money.

Around the state, salaries for public defenders and prosecutors remain under local control. Salaries are still subject to the local market economy. The Administrative Code mandates only require that the two sides of our adversarial system have similar pay structures in the same locale. Professional pay comparisons done for agencies regularly find these positions to be two sides of the same coin. These two sides have very similar tasks, duties, and hours required. A government should not put its finger on one side of the scales of justice by paying one side more than other. Now that Governor DeWine and the Ohio General Assembly have provided significant funding increases for indigent defense, the Ohio Public Defender Commission strongly encourages counties to establish pay parity between public defenders and similarly situated prosecutors in their county.

Measuring Improvements in Indigent Defense

In January 2020, as part of the Ohio Public Defender Commission’s statutory duties to oversee the meaningful delivery of indigent defense services in Ohio, the OPD will survey all counties for their hourly rates, fee schedules, caseloads, pay parity, and other data points from their indigent defense systems. The OPD will be in contact with local officials, county commissioners, judges, and auditors of each county in October 2019 with further information on how this data will be collected. The OPD will use this data to assist the Ohio Public Defender Commission with determining future rates of reimbursement to the counties.

Conclusion

The Ohio Public Defender Commission and the Office of the Ohio Public Defender thank Governor DeWine and the Ohio General Assembly for their commitment to offering quality, indigent defense throughout the State of Ohio. The Ohio Public Defender Commission and the Office of the Ohio Public Defender are excited to support the counties with increased reimbursement rates, and work with the counties to improve their system of indigent defense. As you move into your budgeting season this fall in preparation for next calendar year, the OPD is available to assist you in making necessary improvements to guarantee the right to counsel is fully realized. For ease of reference and for your

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9 O.A.C. §120-1-06 and §120-1-12
preparations, attached are several relevant sections of the Ohio Revised Code and Ohio Administrative Code.

If you need assistance or have other questions about the above information, please do not hesitate to contact the Office of the Ohio Public Defender’s Policy & Outreach Division, by calling 614.466.5394, or emailing outreach@opd.ohio.gov. Thank you.
OHIO REVISED CODE (relevant sections)

120.03 Commission – powers and duties

(B) The Ohio public defender commission shall establish rules for the conduct of the offices of the county and joint county public defenders and for the conduct of county appointed counsel systems in the state. These rules shall include, but are not limited to, the following:

(1) Standards of indigency and minimum qualifications for legal representation by a public defender or appointed counsel.

(2) Standards for the hiring of outside counsel;

(3) Standards for contracts by a public defender with law schools, legal aid societies, and nonprofit organizations for providing counsel;

(4) Standards for the qualifications, training, and size of the legal and supporting staff for a public defender, facilities, and other requirements needed to maintain and operate an office of a public defender;

(5) Minimum caseload standards;

(C) The Ohio public defender commission shall adopt rules prescribing minimum qualifications of counsel appointed pursuant to this chapter or appointed by the courts.

120.14 County public defender commission - powers and duties.

(C) In administering the office of county public defender, the commission shall:

(1) Recommend to the county commissioners an annual operating budget which is subject to the review, amendment, and approval of the board of county commissioners;

(F) A county public defender commission, with the approval of the board of county commissioners regarding all provisions that pertain to the financing of defense counsel for indigent persons, may contract with the state public defender or with any nonprofit organization, the primary purpose of which is to provide legal representation to indigent persons, for the state public defender or the organization to provide all or any part of the services that a county public defender is required or permitted to provide by this chapter.
120.33 Alternative system of selected or appointed counsel.

(A) In lieu of using a county public defender or joint county public defender to represent indigent persons in the proceedings set forth in division (A) of section 120.16 of the Revised Code, the board of county commissioners of any county may adopt a resolution to pay counsel who are either personally selected by the indigent person or appointed by the court. The resolution shall include those provisions the board of county commissioners considers necessary to provide effective representation of indigent persons in any proceeding for which counsel is provided under this section.

(3) The board of county commissioners shall establish a schedule of fees by case or on an hourly basis to be paid to counsel for legal services provided pursuant to a resolution adopted under this section. Prior to establishing the schedule, the board of county commissioners shall request the bar association or associations of the county to submit a proposed schedule for cases other than capital cases.

OHIO ADMINISTRATIVE CODE (relevant sections)

120-1-06 – Facilities for county or joint county public defender office.

The supporting staff, facilities, equipment, supplies, and other requirements needed to maintain and operate an office of a county or joint county public defender shall be sufficient to allow quality representation and shall be substantially equivalent to that provided for the county prosecutor's office. In applying this rule, the following criteria shall govern:

(A) The salaries for public defender attorneys shall approximate and be in parity with the compensation received by prosecutors with comparable years in practice and experience.

(B) The office of the county public defender or joint county public defender shall be based in a location convenient for clients and readily accessible to the courts and other necessary services.

(C) Each attorney shall have adequate office space to assure privacy in consultation with clients and efficiency in operations.

(D) The budget of a county public defender shall provide for:

(1) Adequate office space, file storage space, and other facilities as prescribed by the Ohio public defender standards and guidelines for reimbursement, including a case reporting and management information system;

(2) Adequate and accessible research capabilities that meet the needs and duties of the office;
(3) Adequate computer, recording, photographic, and other equipment of sufficient quantity, quality, and versatility to permit preservation of evidence;

(4) The confidential employment of experts and specialists, or, if such funds are not included in the public defender budget, requests for experts must be held ex parte if so requested in writing;

(5) Supportive services, including secretarial, investigative, and other defense litigation support necessary to provide quality representation at every phase of the process at which the office provides representation, including determinations on pretrial release, eligibility for diversion mitigation advocacy at sentencing, and representation following conviction, including appeals and post-conviction relief;

(6) Training for attorneys and support staff in subject matter areas relevant to their job duties.

120-1-07 Workload standards.

(A) Neither a public defender nor a court-appointed counsel may accept a workload that threatens to deny due process of law or constitutional rights to any client, places the office or attorney in imminent danger of violating the Ohio Rules of Professional Conduct, or otherwise threatens quality representation of the client.

120-1-15 Adequate fee schedule for appointed counsel and public defender salaries.

(A) In establishing a fee schedule to be paid appointed to appointed counsel in indigent cases eligible for reimbursement pursuant to section 120.33 of the Revised Code, the county commissioners and county bar association shall establish a schedule that is comparable to the fees paid to retained counsel in the same type of cases. Changes to a county's fee schedule must be submitted to the Ohio public defender before such changes go into effect.

(B) Salaries paid to public defenders should be equivalent to salaries paid to similar positions within the justice system.