

## **REQUEST FOR COMMENTS ON APPOINTED COUNSEL RATES AND MAXIMUM FEES**

Pursuant to Ohio Revised Code Section 120.03, The Ohio Public Defender Commission is considering adopting guidelines for appointed counsel hourly rates and maximum fees (caps) based on the attached studies. See Attachment A. The Commission values the input, insight, and experience of all stakeholders in Ohio's justice system and would appreciate receiving any comments on this important topic including: reasons in support of or in opposition to these guidelines, how these guidelines may financially impact Ohio's counties, any factors that stakeholders believe should be taken into account, or any other information that stakeholders believe the Ohio Public Defender Commission should be aware of in considering these proposed guidelines. To assist in commenting on the proposed guidelines, interactive maps, which display the hourly rates and maximum fees of each respective Ohio county, are available at: <https://opd.ohio.gov/Budget/Updates>.

Comments on the proposed guidelines should be submitted in writing to: Laura Austen, Deputy Director of Policy and Outreach, Office of the Ohio Public Defender, 250 East Broad Street, 14<sup>th</sup> Floor, Columbus, Ohio 43215, or via email at [outreach@opd.ohio.gov](mailto:outreach@opd.ohio.gov) no later than close of business on February 27, 2020. Please include your full name and mailing address in any comments submitted by e-mail. The Ohio Public Defender Commission will be meeting on March 19, 2020, at which time comments on the proposed guidelines will be discussed.

## **PROPOSED GUIDELINES FOR APPOINTED COUNSEL RATES AND MAXIMUM FEES**

County schedules for appointed counsel hourly rates and maximum fees (caps) must provide for the effective assistance of counsel and be set in consultation with the local bar association.

“[T]he county commissioners, after consultation with the county bar association, shall establish a schedule that compensates appointed counsel in a manner that provides for effective representation . . . .” Ohio Administrative Code 120-1-15

Hourly rates and maximum fees must provide appointed counsel with sufficient compensation and hours to provide the effective assistance of counsel.

### **Rate Guidelines:**

Beginning July 1, 2020, any portion of a county schedule that includes appointed counsel rates of \$49/hour or less may be subject to a reduced reimbursement rate pursuant to R.C. 120.33(A)(5).

Beginning July 1, 2021, any portion of a county schedule that includes appointed counsel rates of \$59/hour or less may be subject to a reduced reimbursement rate pursuant to R.C. 120.33(A)(5).

### **Maximum Fee Guidelines:**

Beginning July 1, 2020, any portion of a county schedule that includes appointed counsel maximum fees that provide less than 1/3 of the hours provided in the State Fee Schedule will be subject to a reduced reimbursement rate pursuant to R.C. 120.33(A)(5).<sup>1</sup>

Beginning July 1, 2021, any portion of a county schedule that includes appointed counsel maximum fees that provide less than 2/3 of the hours provided in the State Fee Schedule will be subject to a reduced reimbursement rate pursuant to R.C. 120.33(A)(5).

### **Reduced Reimbursement:**

Any portion of a reimbursement submission that does not meet the rate guidelines or the maximum fee guidelines may be subject to reduced reimbursement. All other qualifying reimbursement submissions will be reimbursed at the current rate in effect.

### **Undue Financial Hardship Exemption:**

A county which does not meet the rate guidelines and/or the maximum fee guidelines because of an undue financial hardship may request an exemption to the guideline from the Ohio Public Defender Commission. A county requesting such an exemption must submit materials to the Ohio Public Defender Commission that demonstrate the county's financial hardship. The request and all supporting materials must be submitted at least two weeks prior to a regularly scheduled quarterly meeting of the Ohio Public Defender Commission. If the Ohio Public

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<sup>1</sup> Hours provided are determined by dividing the maximum fee permitted by the hourly rate.

Defender Commission approves the county's request for an exemption, the county will not be subject to a reduced reimbursement while the financial hardship exists. The Ohio Public Defender Commission will notify the county of its decision regarding the request for an exemption within two weeks after the Commission's meeting.

## ATTACHMENT A

### I. The Wisconsin Lawyer, *Low Assigned-counsel Compensation Shortchanges Justice*, Volume 88, Number 8, September 2015.

<https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=88&Issue=8&ArticleID=24309>

**Kansas:** “In 1987, the Kansas Supreme Court determined that the state has an obligation to pay appointed counsel ‘at a rate which is not confiscatory, considering overhead and expenses.’ *State ex rel. Stephen v. Smith*, 747 P.2d 816 (Kan. 1987). Testimony was taken in the case that the average overhead rate of attorneys in Kansas in 1987 was \$30 per hour. Kansas now compensates public defense attorneys at \$80 per hour.”

**Mississippi:** “In 1990, the Mississippi Supreme Court determined that indigent-defense attorneys are entitled to ‘reimbursement of actual expenses’ in addition to a reasonable sum, and defined ‘actual expenses’ to include ‘all actual costs to the lawyer for the purpose of keeping his or her door open to handle this case.’ *Wilson v. State*, 574 So. 2d 1338 (Miss. 1990). The Mississippi State Bar determined that overhead costs 25 years ago in that state were \$34.86.”

**Oklahoma:** “Based on the existing salary structure for Oklahoma district attorneys, the Oklahoma Supreme Court determined in 1987 that a reasonable appointed-counsel fee was between \$14.63 and \$29.26 (based on experience) and ‘[a]s a matter of course, when the district attorneys’ ... salaries are raised by the Legislature so, too, would the hourly rate of compensation for defense counsel.’ *State v. Lynch*, 796 P.2d 1150 (Okla. 1990). In addition, the Oklahoma Court determined that attorneys must be paid overhead and out-of-pocket expenses. The overhead costs for the Oklahoma attorneys in 1989 were \$48 per hour – making the low end of the range to be \$62.63.”

**New York:** “Announcing in 2003 that ‘[e]qual access to justice should not be a ceremonial platitude, but a perpetual pledge vigilantly guarded,’ *N.Y.Cnty. Lawyers’ Ass’n v. State*, 192 Misc. 2d 424, 425 (N.Y. Sup. Ct. 2002). [T]he Supreme Court for the County of New York ordered the city and state to compensate assigned-counsel attorneys at \$90 per hour – an increase from the \$40-per-hour rate they were being paid. The court determined that the \$40-per-hour rate paid to panel attorneys was ‘insufficient to cover even normal hourly overhead expenses,’ which the court pegged at approximately \$35 per hour. The following year, the rate was statutorily amended to \$75 per hour. NY CLS Jud § 35.”

**Alabama:** “In 1993, the Alabama Court of Criminal Appeals determined in *May v. State* that indigent-defense attorneys were entitled to overhead expenses (set at \$30 per hour) in addition to a reasonable fee. *May v. State*, 672 So. 2d 1307, 1308 (Ala. Crim. App. 1993). When the Alabama Attorney General issued an opinion against paying the overhead rate, the issue was litigated all the way to the Alabama Supreme Court. In *Wright v. Childree*, the Alabama

Supreme Court determined that assigned counsel are entitled to a reasonable fee in addition to overhead expenses. *Wright v. Childree*, 972 So. 2d 771 (Ala. 2006). After this litigation, the Alabama Legislature increased the hourly rate to \$70 per hour.”

**South Dakota:** “Although it is not the result of litigation, in 2000, the South Dakota Supreme Court set public counsel compensation hourly rates at \$67 per hour. To ensure that attorneys were perpetually paid both a reasonable fee and overhead, the court also mandated that “court-appointed attorney fees will increase annually in an amount equal to the cost of living increase that state employees receive each year from the legislature.” Assigned-counsel compensation in South Dakota now stands at \$90 per hour. Memo. to 1st Circuit Attorneys & County Commissioners, Dec. 16, 2014.”

## **II. CATO Policy Analysis, Reforming Indigent Defense; How Free Market Principles Can Help Fix a Broken System, No. 666, Sept. 1, 2010.**

<https://www.cato.org/sites/cato.org/files/pubs/pdf/pa666.pdf>

“Even 20 years ago, a court estimated that an attorney needs a fee of \$27–\$35 per hour just to cover overhead expenses for rent, library, and secretarial services. *State ex rel. Stephan v. Smith*, 747 P.2d 816, 837 (Kan. 1987). See also *Baker v. Corcoran*, 220 F.3d 276, 285–86 (4th Cir. 2000) (overhead for attorney in post-conviction proceedings was \$53 an hour); *Sheppard v. Jacksonville*, 827 So.2d 925, 931 (Fl. 2002) (\$40 an hour compensation renders counsel unable to cover overhead); *New York County Lawyers’ Association v. State*, 763 N.Y.S.2d 397, 416–17 (N.Y. Sup. Ct. 2003) (average overhead in N.Y. was \$42.88 an hour, with a range of \$26.80 to \$62.50 per hour); *State v. Young*, 172 P.3d 138, 140 (N.M. 2007) (overhead costs for a capital case was \$73.96 an hour).”

## **III. NACDL Gideon at 50: A Three-Part Examination of Indigent Defense in America, Part I – Rationing Justice: The Underfunding of Assigned Counsel Systems, March 2013.**

<https://www.nacdl.org/getattachment/cf613fe0-8f46-4dc1-b747-82346328522e/gideon-at-50-rationing-justice-the-underfunding-of-assigned-counsel-systems-part-1-.pdf>

“The American Bar Association’s Ten Principles of a Public Defense Delivery System stresses the need for assigned counsel compensation to be ‘a reasonable fee in addition to actual overhead and expenses.’ Designation of an hourly rate, without consideration of overhead expenses, is a haphazard and flawed method of compensation. For example, in 1996 court-appointed counsel in Iowa were paid an hourly rate of \$45, but the mean overhead expenses for court-appointed counsel was \$36.75 an hour, resulting in an hourly rate of \$8.25. Robert R. Rigg, *The Constitution, Compensation, and Competence: A Case Study*, 27 Am. J. Crim. L. 1, 25–26 (1999) (citing Iowa State Bar Association Indigent Defense Survey).”

“In 2003, it was estimated that an attorney working in New York City had hourly overhead costs of \$42.88, but the rate for appointed counsel was only \$40 for in-court work and \$25 for out-of-court work. Attorneys actually lost money when handling assigned cases. *New York County Lawyers’ Association v. State*, 196 Misc2d. 761, 763 N.Y.S.2d 397, 407 (2003). Altman Weil’s 2008 Survey of Law Firm Economics reported that the annual overhead costs for small law firms, defined as those with 2 to 8 lawyers, were \$160,000 per lawyer. Assuming an attorney was able to bill for 2,000 hours of work in a year, that would result in an overhead rate of approximately \$80 an hour. Another survey by Altman Weil reported that law firm overhead has risen twice as fast as the consumer price index since 1985. See Altman Weil, Survey of Law Firm Economics: Trend Comparison of Overhead Expenses (2003).”