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**Rates of Compensation Paid to Court-Appointed Counsel
in Non-Capital Felony Cases at Trial:
A State-by-State Overview**

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TABLE OF CONTENTS

Introduction	1
Different Approaches to Compensating Non-Public Defender Counsel	3
Reasonable Compensation	3
Statutory Hourly Rate	6
Hourly Rate Per Administrative or Court Rule	7
Flat Fee Per Case	
9 State Commission on Indigent Defense	
9	
Combination System	10
The Federal Model: the Criminal Justice Act	13
Conclusion	14

Appendix

Selected Case Law Concerning Indigent Defendant Counsel Compensation

Table

Rates of Compensation for Court-Appointed Counsel in Non-Capital Felonies at Trial,
1999

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A State-by-State Overview, 2002

Introduction

The Spangenberg Group last prepared a state-by-state table on compensation rates for assigned counsel handling non-capital felony trial cases in November of 1999. Prior to that, our most recent table on this topic was prepared in 1997. The tables, which are prepared on behalf of the American Bar Association's Bar Information Program, provide state-by-state information concerning the hourly rates paid to assigned counsel and the authority for the rates. We have received repeated requests for the tables from attorneys, policy-makers and others. Frequently interest in this report is generated by a state legislature's consideration of changes to its attorney compensation rates.

It is not the purpose of this report to produce any type of evaluative ranking of the compensation rates reported in this article. First, many states have so-called "reasonable compensation" systems, where the rates are set by the county or local judge and vary widely from county to county. Therefore no single rate can be defined for these states, making it impossible to place them in an ordinal ranking of rates paid to court-appointed counsel.

Second, even if it were possible to rank all fifty state's compensation rates, such a ranking would be of limited significance. This is so because, in addition to paying attorneys in private practice with an hourly rate, there are two other methods by which legal counsel is provided to defendants who cannot afford it. The three methods jurisdictions use to provide indigent defense are:

- The assigned counsel model: private attorneys are assigned to indigent criminal cases on either a systematic or ad hoc basis. Typically they are paid on an hourly basis or paid a flat fee per case.
- The contract model: a jurisdiction contracts with private attorneys, a group of attorneys, a bar association or a private, non-profit organization to provide representation in some or all of the indigent cases in the jurisdiction.¹ In some jurisdictions, such as Delaware and Connecticut, the public defender agency contracts with private attorneys to handle conflict of interest cases.
- The public defender model: a public or private non-profit organization with full or part-time staff attorneys and support personnel provides all or a percentage of the representation to indigent defendants in a jurisdiction. Employees of defender offices

¹ For more on this method of compensating indigent defense providers see, R. SPANGENBERG & A. SPENCE. FINDINGS CONCERNING THE CONTRACTING FOR THE DELIVERY OF INDIGENT DEFENSE SERVICES. American Bar Association, Bar Information Program (July 1995).

are paid a salary.

From these three models for the appointment of counsel, states and counties have developed indigent defense delivery systems, most of which employ some combination of the three. For example, even in states with a statewide public defender system, private attorneys are often appointed in conflict of interest cases and in some instances to alleviate burdensome caseloads. In other states where there is less uniformity, there may be contract counsel in one county, assigned counsel in a second county, and a public defender office in yet a third county. Maine is the only state in the country that relies exclusively on assigned counsel to represent indigent defendants at the trial level.

Since most jurisdictions use a combination of the above three models, it is incorrect to conclude that one jurisdiction “better funds” its indigent defense system simply because it pays assigned counsel a higher rate of compensation than other jurisdictions. For example, assigned counsel in Newark, New Jersey are paid less than assigned counsel in New York City. However, the bulk of cases in Newark are handled by New Jersey’s statewide public defender whereas in New York City up to 40% of the cases are handled by assigned counsel. Clearly, to determine the relative adequacy of funding of these two city’s indigent defense systems one must look at many factors, of which the comparable rates of compensation for court appointed counsel is only one.

Besides the hourly rate, there are other important factors that significantly affect assigned counsel compensation. For example, many states have set statutory limits on the amount that may be paid per case. However, in all but two of these states – Mississippi and Virginia – judges are statutorily permitted to authorize payment that exceeds the caps in extraordinary cases requiring additional time. Non-waiveable fee caps have a potentially chilling effect on the adequacy of representation provided by appointed counsel in complicated cases.

Hourly assigned counsel compensation rates are often inadequate to pay attorney overhead costs. Litigation in Alabama and Mississippi has resulted in court-appointed counsel being paid an hourly amount to cover overhead expenses. This overhead rate is paid on top of the hourly rate for compensation. In Mississippi, the hourly rate for overhead expenses is paid for every hour worked, with no cap, unlike the hourly rate paid to compensate the legal work put into a case.

There have been a number of changes made in the hourly rates paid to court-appointed counsel since 1999. The federal government has raised the rates of compensation for court-appointed counsel in federal court to \$90 an hour for work done both in and out of court. Hourly rates have been increased on a statewide basis in Ohio (from \$40 an hour out of court and \$50 an hour in court to \$50 an hour out of court and \$60 an hour in court) and South Dakota (from \$55 to \$67 an hour). The per case maximum in Virginia has been raised from \$845 to \$1,235 to

defend charges punishable for more than 20 years and \$305 to \$445 to defend other felony charges. Virginia is one of the two states where the per case maximum can not be waived.

Three states (Arkansas, North Carolina and Texas) have implemented reforms that have resulted in a greater uniformity of the rates paid to court-appointed counsel since 1999. Since its inception the Arkansas Public Defender Commission paid court-appointed counsel at rates set by local judges. In 2001 the Arkansas State Legislature granted the Public Defender Commission the power to set statewide hourly rates. In August 2000 the North Carolina General Assembly created the Office of Indigent Defense Services to oversee the state's indigent defense system. Among its responsibilities is to set statewide rates of compensation for court-appointed counsel. In June of 2001 the Texas Fair Defense Act was enacted. Among the provisions of this bill is that counties must develop formal plans for their local indigent defense systems. This will result in a greater standardization of the rates paid within counties, and it will likely result in a net increase in the rates paid to court-appointed counsel.

Different Approaches to Compensating Assigned Counsel

The following section discusses six approaches taken by the states to compensating conflict counsel and other non-public defender counsel assigned to non-capital felony cases. These approaches are characterized as:

- C Reasonable compensation
- C Statutory hourly rate
- C Hourly rate per administrative or court rule
- Flat fee per case
- State commissions on indigent defense
- Combination approach.

Reasonable Compensation

In 12 states (Arizona, Florida, Idaho, Louisiana, Michigan, Mississippi, Montana, Nebraska, Pennsylvania, Texas, Utah and Washington) the state legislatures have determined that compensation for court-appointed attorneys is left up to the locality, either the county, a local judge or a combination of the two. In some states, the rates paid and the use of a maximum vary considerably from county to county, and from judge to judge within a county. Because the range of practices concerning compensation of court-appointed counsel in so-called "reasonable compensation" states is so significant, we highlight below several examples from the various states.

C Arizona

In Arizona, state statute and the Rules of Criminal Procedure govern compensation of appointed counsel, leaving it to the court to award the attorney a sum representing reasonable

compensation for services performed. In the two largest counties –Maricopa (Phoenix) and Pima (Tucson)– the responsibility to establish rates of reasonable compensation for court-appointed counsel has been transferred from the courts to county agencies. The agencies administer contract programs for conflict of interest cases which the primary and secondary public defender agencies are unable to handle. These counties determine the necessary compensation through a contracting system rather than a fixed hourly rate.

C Florida

Statutory ceilings on individual case payments are in effect statewide (\$2,500 for a non-capital, non-life felony and \$3,000 for a life felony), but the hourly rates of compensation for attorneys handling cases in which the public defender has a conflict of interest vary from county to county. In Dade County (Miami) court-appointed counsel rates are set out in an administrative order of the chief judge of the circuit. Attorneys are paid \$40 per hour for work performed out of court and \$50 per hour for in-court work, but only after they exceed the quantum of hours set out by the Circuit Court of the 11th Judicial Circuit. Each type of case has a different schedule. The schedule for first degree felonies is:

5 hours or less	\$250
above 5 hours - 10 hours	\$500
above 10 hours - 20 hours	\$750
above 20 hours - 30 hours	\$1,000
above 30 hours - 40 hours	\$1,250
above 40 hours - 50 hours	\$1,500.

In Fall of 1998, Florida voters supported Revision Seven, which will gradually shift the responsibility for funding conflict of interest cases from the counties to the state beginning in 2004. The state will assume the responsibility for setting compensation rates for conflict counsel.

C Idaho

Although the statute concerning court-appointed counsel compensation states that the rates should be set by local judges, in some areas the county commissioners set the rates. While the hourly rate is not uniform throughout the state, we were informed that the majority of court-appointed counsel are paid \$50 per hour in non-capital felony cases.

C Louisiana

In Louisiana, most of the district-based indigent defender boards utilize contract counsel to handle conflict of interest cases, but among the few that still use court-appointed counsel, the average rate paid is \$42 per hour, for work performed both in and out of court.

• Michigan

There is wide variation in court-appointed counsel fee schedules among Michigan's judicial circuits. Further, while the majority of circuits pay hourly rates on a case-by-case basis,

some circuits pay flat fees for plea and trial cases. In the 3rd Judicial Circuit (Wayne County), for example, attorneys handling criminal cases in the trial court are reimbursed according to a graduated, event-based schedule. Based on the event (motion, preliminary examination, etc.) and possible sentence, attorneys receive a particular fee. For instance, for a half day of trial an attorney receives between \$90-\$210 per hour depending on the severity of the potential sentence. Other districts, such as the 21st (Isabella County), use contracts as the basis for compensation for counsel representing indigent defendants. Isabella County contracts with six attorneys for a total indigent defense cost of \$275,000 per year.

C Mississippi

Compensation rates for court-appointed counsel in non-capital cases in Mississippi vary throughout the state. The state has capped court-appointed compensation at \$1,000 per case. Litigation in Mississippi challenging the constitutionality of the fee cap failed to increase or eliminate the per-case maximum, but succeeded in entitling court-appointed counsel to receive reimbursement for overhead costs. In addition to submitting vouchers for payment of attorneys' fees, counsel in Mississippi submit vouchers for reimbursement of overhead costs for every hour worked. *Wilson v. State*, 574 So.2d 1338 (Miss. S.Ct., 1990). The presumptive rate for such expenses is \$25 per hour.

C Montana

In Montana it is up to local judges to decide what to pay court-appointed counsel, however, in the majority of counties, counsel are paid between \$40-\$60 per hour for work in and out of court. There is no firm case maximum in Montana, but some counties use \$5,000 as a ceiling.

C Nebraska

The majority of counties in Nebraska pay court-appointed counsel \$60 per hour with no per-case maximum. Douglas County (Omaha) is a notable exception, paying attorneys \$65 per hour out of court and \$80 per hour in court, up to \$12,000 for felony cases. Douglas County's employment of a per-case maximum is not sanctioned by state statute or common law (see *In re: Rhem v. County of Richardson*, 410 N.W.2d 92 (Neb. 1987)). The presiding judge can determine if additional funds should be granted.

C Pennsylvania

The rates paid to court-appointed counsel vary widely in Pennsylvania, ranging from \$40-\$75 an hour, with all decisions left to local judges. In Philadelphia, effective March 10, 1997, compensation for court-appointed counsel shifted from an hourly basis to a "Modified Guaranteed Fee System," where attorneys are paid on a per-diem basis. The fee is payable as follows:

- Court appointments in felony, non-homicide cases which require a one trial day that

- lasts more than three hours will be paid a \$750 fee. Of that \$750, \$600 is for preparation and \$150 is for the in-court time that lasts more than three hours.
- Court appointments in felony, non-homicide cases that last more than one day will be paid a \$650 fee for the first day of trial and an additional per diem of \$150 for each half day (three hours or less) and \$300 for each full day (three hours or more) of trial.
 - Court appointments in homicide cases that require one trial day lasting more than three hours will be compensated \$1,700 as a preparation fee and \$200 for the in-court time that lasts more than three hours.
 - Court appointments in homicide trial cases that last more than one day will be paid \$1,900 for the first day of trial (\$1,700 preparation fee and \$200 for more than three hours in-court time) and an additional per diem of \$200 for each half-day (three hours or less) and \$400 for each full day (three hours or more).

In cases of extreme complexity, counsel may petition the Administrative Judge of the Trial Division or his designee to apply for hourly compensation. Associate or backup counsel may be requested by counsel for homicide cases, but they will be compensated at a lesser rate of \$850 as a preparation fee with no per diem.

C Texas

In 2001 the Texas Fair Defense Act was signed into law. Previous to this legislation there was no systemic way to track the assigned counsel compensation plan for Texas' 254 counties, as judges set compensation rates for their own courtrooms (there are more than 800 criminal courts in Texas). Each county is still given the responsibility of designing and funding its own indigent defense system. However, counties must now develop and publish plans for their indigent defense systems that meet certain standards laid out in the statute. One such requirement is that all criminal courts in a county adhere to a single county-wide compensation plan.

C Washington

Court-appointed counsel compensation rates vary widely in Washington. At the low end of the scale, in King County (Seattle), conflict counsel are paid \$43.20 per hour for felony cases. Spokane County pays counsel \$40-\$50 per hour (depending on the charge) up to \$5,000 for a felony trial case. Less serious felonies are paid a flat \$250 per case.

Statutory Hourly Rate

Nine states (Alabama, Hawaii, Illinois, Nevada, New York, South Carolina, West Virginia and Wisconsin) reimburse court-appointed counsel according to state statute. Similarly the rates paid in the District of Columbia are set by statute. All of the pertinent statutory sections and the rates appear in the accompanying table. Some of the rates have not been changed for decades. For example, the hourly rates in Illinois (\$30 out of court, \$40 in court with a \$1,250

maximum) were set in 1975 and the hourly rates in New York (\$25 out of court and \$40 in court with a \$1,200 maximum) were set in 1986.

In 2000 the New York County Lawyers Association sued the City and State of New York, alleging that the statutory rate of compensation has resulted in the imminent danger of ineffective assistance of counsel for indigent defendants in criminal court in New York City in the case *New York County Lawyers' Association v. State of New York, County of New York*, Index no. 102987/00-LAS Part 38 (filed January 2000). In May of 2002, Judge Lucindo Suarez granted a preliminary injunction ordering that the City of New York pay assigned counsel in New York City's Criminal Court at a rate of \$90 per hour for work done both in and out of court, pending trial.

Hourly Rate Per Administrative or Court Rule

In 17 states, uniform, statewide hourly rates are established either by executive administrative rule (Rhode Island), the statewide Public Defender or indigent defense commission (Iowa, Kansas, Kentucky, Maryland, Massachusetts, Minnesota and New Jersey) or court rule (Colorado, Maine, New Hampshire, Oregon, Vermont, Virginia, South Dakota, Tennessee and Wyoming). The practices in several of these states warrant brief discussion.

C Iowa

The 1999 Iowa General Assembly passed legislation changing the method of determining appointed counsel rates of compensation and fee limitations. In 1996, the state legislature authorized the State Public Defender to set the rates paid to all court-appointed counsel, including those who work under contract with the public defender. In addition, according to past practice, the Iowa Supreme Court was required to periodically promulgate guidelines that include a range of rates and per-case maximums to be paid court-appointed counsel. These guidelines set the hourly fee range between \$40 and \$60 per hour with no per-case maximum. However, Senate Filing 415 Adopted in 1999 created a five-member Indigent Defense Advisory Commission to advise the Governor and General Assembly regarding hourly rates and per case fee limitations.²

Now The Iowa State Public Defender, rather than the Iowa Supreme Court, sets the fee limitations, but they are subject to review by the Commission. The bill also implemented a statutory hourly fee for cases handled by court-appointed counsel. As of July 1, 1999, attorneys representing indigent defendants in Iowa receive \$60 per hour for all work on Class "A" felonies; \$55 per hour for all work on Class "B" felonies; and \$50 per hour for all other cases. Since 1992 in Iowa, the state public defender has contracted with private attorneys to provide indigent defense services in some parts of the state. Contract attorneys are also paid according to

² Senate Filing 451 has since been codified in IOWA CODE §13B.2A(2001).

the statutory hourly rates.

The new per case limits, which are subject to Administrative Rules Review Committee approval, are: \$15,000 for Class “A” felonies; \$3,000 for Class “B” felonies; \$1,200 for Class “C” felonies; and \$1,000 for Class “D” felonies.

C Minnesota

In Minnesota, it is exceedingly rare to appoint counsel on an hourly basis. The State Board of Public Defense employs a mix of full-time and part-time public defenders. The part time public defenders have private offices and handle the conflict of interest cases of the full time public defenders.

C Vermont

In Vermont, 13 V.S.A. §5205(a) and an Administrative Order of the Vermont Supreme Court govern compensation rates for court-appointed counsel. In 1992, by Supreme Court administrative order, the \$25 per hour rate was raised to \$50 per hour, effective FY 1993, with the following maximums: \$25,000 for felonies involving life imprisonment or the death penalty (Vermont currently does not have the death penalty), \$5,000 for a major felony, and \$2,000 for a minor felony. However, the legislature passed a legislative override in 1992 stating:

"Notwithstanding 13 V.S.A. §5205(a) and Administrative Order of the Vermont Supreme Court as amended, the rate of compensation for the services of ad hoc counsel in public defender cases shall be \$40 per hour through June 30, 1997." The sunset date was extended in 1997 through June 30, 1998, and payment of \$40 per hour continued for a year after that date. However, as of July 1, 1999, Vermont began to adhere to the \$50 per hour rate.

C Virginia

In Virginia, the state supreme court has established rates of \$40 per hour for out-of-court work and \$60 per hour for in-court work, but state statute restricts per-case payments to no more than \$1,235 to defend charges punishable for more than 20 years and \$445 to defend other felony charges. Furthermore, the Virginia Legislature has not appropriated funds sufficient to pay court appointed counsel at this level. Thus the Virginia Courts have scaled down the per case maximum they will pay attorneys proportional to the funding the legislature has appropriated. As a result the per case maximums are, in practice, \$1,096 for felonies punishable by more than 20 years and \$395 for cases punishable by less than 20 years. Because of these low per-case caps, the relatively competitive hourly rates have little bearing.

Flat Fee Per Case

In Missouri, a standard flat rate of \$500 is paid for each non-capital felony not handled by a public defender. The rate is set by the state public defender, but it is extremely rare to appoint an attorney from outside of the public defender program to a conflict case. Out of 3,500 conflict of interest cases in 2001, only 500 went to private counsel. The vast majority of conflict

of interest cases are handled by transferring the case from the branch office where the conflict was identified to another branch office.

State Commission on Indigent Defense

In five states (Arkansas, Georgia, Indiana, Ohio and North Carolina) the rates paid to court appointed counsel are set by statewide public defender commissions. However, these rates are only binding in Arkansas and North Carolina. In the other three states, Georgia, Indiana and Ohio, a statewide commission for indigent defense sets recommended rates of compensation, but these rates have no binding effect. In these three states, indigent defense is organized and delivered at the county level.

- Arkansas

In the 2001 legislative session, the Arkansas legislature gave the Public Defender Commission the power to set the rates of compensation paid to court appointed counsel. Prior to this legislation, judges set the rates of compensation and ordered attorney vouchers to be paid by the Public Defender Commission.

- Georgia

The Georgia Indigent Defense Council (GIDC) recommends that counties pay rates of \$45 per hour out of court and \$60 per hour in court in non-capital felony cases, and discourages the setting of a per-case maximum. If a county chooses to adopt a maximum fee, GIDC recommends the fee be at least \$2,500 in non-capital felony cases. As of March 4, 1999, through a Supreme Court order, the 152 of Georgia's 159 counties which meet the standards and guidelines set out by GIDC must adhere to these rates. GIDC receives an annual state appropriation to distribute among counties that meet its standards. The remaining 7 counties utilize flat fees or hourly rates that vary from county to county.

- C Indiana

In Indiana, the Indiana Public Defender Commission also receives a state appropriation for disbursement to counties which meet its standards and guidelines pertaining to the delivery of indigent defense services. The Commission requires counties to pay attorneys \$60 per hour for work in non-capital felony cases with no case maximum, and the Commission reimburses compliant counties for a portion of their annual expenditures on appointed counsel.

- C Ohio

Each county in Ohio is required to have a fee schedule for court-appointed counsel. In addition, the Ohio Public Defender Commission sets a non-binding, recommended maximum fee schedule for appointed counsel. The Commission's recommended rates are currently \$50 per

hour out of court and \$60 per hour in court. Recommended per case maximums in non-capital felony cases are: aggravated murder without death penalty specifications - \$10,000 for two attorneys, \$8,000 for one attorney; murder - \$5,000; aggravated felony (first, second and third degree felonies) - \$3,000; other felonies - \$2,500. Some counties pay lower rates than suggested by the Commission, and a few pay higher rates. The Ohio Public Defender reimburses counties for up to 50% of the state or county rate (whichever is lower) paid to court-appointed counsel. Attorneys may petition the court for a waiver of the maximum if their county has an extraordinary fee clause in its fee schedule.

The Ohio Public Defender Commission's 2001 Annual Report lists the hourly rates paid in each county for felonies, misdemeanors, juvenile, appeals, death penalty and other cases. The average hourly rate for non-capital felonies paid among the counties in FY 2001 was \$49.

- North Carolina

In August 2000, the North Carolina General Assembly passed the Indigent Defense Services Act of 2000, creating the Office of Indigent Defense Services and charging it with the responsibility of overseeing the provision of legal representation to indigent defendants and others entitled to counsel under North Carolina law. Included in its responsibilities is the power to set the rates of compensation paid to assigned counsel. In 2002 the rates for assigned counsel in felony cases at trial were \$60 an hour with no per-case maximum.

Combination System

In four states (Alaska, California, North Dakota and Oklahoma), there is a combination of more than one system used to compensate non-public defender attorneys and therefore no way to succinctly characterize the hourly compensation paid to court-appointed counsel.

- C Alaska

In Alaska, non-capital felony cases not handled by the statewide public defender are handled by one of three types of counsel: staff, contract and "volunteer." The Office of Public Advocacy (OPA) has staff lawyers who handle a limited number of conflict cases. The OPA contracts with other lawyers at rates ranging between \$65-\$100 per hour, depending on the experience of the lawyer and his or her location. Lawyers who volunteer to take appointed cases and are not under contract are paid \$50 per hour for out of court work and \$60 per hour for work in court. There are different maximums for various types of cases for volunteer lawyers; \$4,000 is the outside maximum, however, the maximum will be waived for cases with extraordinary

circumstances.

C California

In California, trial-level indigent defense representation is organized at the county level. The majority of counties have a public defender, and several counties have a second, and even third, public defender to handle conflict of interest cases. Some counties contract with lawyers who accept case assignments and receive flat fee-per-case payments, while others pay conflict counsel hourly rates.

The majority of indigent cases in San Francisco County is handled by the county public defender. Conflict cases are handled by court-appointed counsel who receive \$77 per hour for work on regular felonies and \$92 per hour for work on serious felonies. There are no per case maximums imposed. The judges in San Francisco approve the rates set by the San Francisco Bar Association, which administers the assigned counsel panel and takes a two percent administrative fee from each payment to panel lawyers. The court forwards the payment to the Bar.

San Mateo County relies exclusively on court-appointed counsel to provide indigent defense services. In 1968, San Mateo County contracted the San Mateo County Bar's Private Defender Program (PDP) to provide legal representation of indigent defendants entitled to public counsel. Attorneys are compensated through an event-based fee schedule that is designed to provide no economic incentive to plea out a case. When a case is assigned, the attorney is paid a case fee of \$375. A flat fee is paid for each pretrial hearing. For example, representation at a preliminary hearing earns \$310-\$350, and representation at a pretrial conference earns \$80. When a case goes to trial, attorneys are paid \$90 per hour for in-court work and \$225 for a half day of preparation. Additionally, \$160 is paid for motions filed and a hearing on a motion is compensated at \$70 per hour. In certain circumstances attorneys may receive additional compensation of up to \$1,250 for cases that require exceptional time and effort.

C Connecticut

In Connecticut, the state public defender contracts with attorneys to handle conflict of interest cases where no public defender is available. Attorneys agree to accept a flat rate for each non-capital felony. When there is no available contract attorney, outside counsel are appointed at a rate of \$45 for out of court work and \$65 for work in court; rates which are also paid to contract attorneys when a case goes to trial.

C North Dakota

In North Dakota, the vast majority of conflict cases are handled by contract attorneys working under two-year contracts in the state's seven judicial districts. In 1981 the North Dakota Supreme Court's advisory commission on indigent defense first established a guideline for the hourly rate paid to those few attorneys who are appointed outside of the contracts. The guideline was \$50 per hour, and that was increased to \$75 per hour in 1995. Actual payments in 2002 ranged between \$60 per hour and \$85 per hour.

During the 1999 legislative session, the Legislative Assembly directed the Supreme Court to pursue an equitable allocation of indigent defense funds among the judicial districts. Presiding judges examined the disparity in contract amounts among the judicial districts, and decided to set a goal that all contracts pay between \$60 and \$65 per hour. When negotiating contracts with individual districts, the Administrative Office of the Courts adhered to this goal thus, contract rates throughout North Dakota typically fall between \$60-\$65 per hour.

C Oklahoma

In Oklahoma, a statewide program, the Oklahoma Indigent Defense System (OIDS), is responsible for all indigent defense representation in 75 of the state's 77 counties. Counsel in these counties who are appointed by the court to felony cases are entitled to be paid statutory rates of compensation (\$40 per hour out of court and \$60 per hour in court with a \$3,500 maximum). However, the majority of cases in these counties are handled by attorneys who work under annual contracts with OIDS, and receive significantly lower per-case payments than if they were working under the hourly amounts. Oklahoma and Tulsa counties, which both have county public defender offices, pay conflict counsel various rates.

The Federal Model: the Criminal Justice Act

The approach to appointing private counsel to represent indigent defendants charged with federal crimes is very similar to the "statutory hourly rate" approach used in a number of states. At the federal level, the Criminal Justice Act of 1964 (18 U.S.C. §3006A) authorizes payment for representation of indigent defendants accused of committing crimes. Under the Act, each United States District Court is required to develop a plan for furnishing counsel and investigative, expert and other services necessary for adequate representation in trial and

appellate proceedings. The Criminal Justice Act (CJA) authorizes three methods for a court to provide counsel to indigent defendants: a Federal Public Defender Organization, a Community Defender Organization, and a panel of private attorneys.

Sixty-four of the 94 federal judicial districts operate a Federal Public Defender Organization. A Federal Public Defender Organization consists of one or more full-time, federal salaried attorneys who are prohibited from having private law practices. The head of a Federal Public Defender Organization, the federal public defender, is appointed by the respective court of appeals to a renewable four year term and is paid a salary fixed by the court of appeals at a rate not greater than that of the United States Attorney (prosecutor) for that district. A Federal Public Defender Organization operates under a budget approved by the Administrative Office of the United States Courts.

A Community Defender Organization (CDO) is a non-profit legal services organization incorporated under state laws and supervised by a board of directors. Fifteen CDOs currently serve 17 of the nation's judicial districts. CDOs may operate under grants approved by the Judicial Conference or they may opt to be reimbursed for their services on a case-by-case basis under the statutorily prescribed hourly rates which also apply to CJA panel attorneys.

CJA panel attorneys serve every district in the federal court system. In those districts where there is a Federal Public Defender Organization or a Community Defender Organization, panel attorneys are appointed to handle those cases in which the institutional defender has a conflict of interest -- approximately 25% of all cases. They handle all of the indigent defendant cases in those districts without a CDO or Federal Public Defender Organization.

Private attorneys are appointed on a case-by-case basis by a district court or court of appeals from a panel of lawyers approved by the court as qualified to handle federal criminal cases. Section 3006A(d) of title 18, United States Code, established hourly panel attorney payments of \$45 for out-of-court work and \$65 for in-court work, and authorizes the Judicial Conference to approve rates as high as \$90 an hour. In April of 2001, the Judicial Conference raised the payment rates to \$55 out-of-court and \$75 in-court. Since then the Judicial Conference has approved rates of \$90 in and out-of-court in all districts. This increase reflects the partial implementation by congress of the annual pay adjustments authorized by the criminal justice act of 1986.

Attorneys may receive up to \$5,200 for felony cases. This ceiling may be exceeded in complex or extended cases upon application to the court.

Panel attorneys are also entitled to reimbursement for out-of-pocket expenses, such as travel. In order to receive payment for their services, panel attorneys submit vouchers to the clerk of the appointing court, specifying the number of hours devoted to the case and any accompanying expenses.

Conclusion

Standard 5-2.4 of the American Bar Association Standards for Criminal Justice, Providing Defense Services, Third Edition states, "Assigned counsel should receive prompt compensation at a reasonable hourly rate and should be reimbursed for their reasonable out-of-pocket expenses. Assigned counsel should be compensated for all hours necessary to provide quality legal representation... ." This standard provides a measure against which jurisdictions can evaluate their compensation rates for court-appointed counsel.

This narrative and accompanying table illustrate the different approaches throughout the states in compensating non-public defender counsel who represent indigent defendants in non-capital felony cases. As the table shows, many states have established hourly rates and a per-case maximum, but in only two of these states - Mississippi and Virginia - is there no possibility of waiving the maximum upon a showing of extraordinary circumstances. There has been a significant amount of litigation concerning compensation for court-appointed counsel, and the Appendix to this narrative provides a partial listing of such litigation.

The use of an hourly rate for attorneys' fees plus a separate hourly rate to cover overhead is the system endorsed by the *1992 Interim Report of the Committee to Review the Criminal Justice Act of the Judicial Conference of the United States*. The nine-member Committee was appointed by Chief Justice William H. Rehnquist to conduct a comprehensive analysis of the CJA program and to recommend appropriate legislative, administrative and procedural changes to the United States Judicial Conference. The Committee's report recommended enactment of a statutory method that ensures CJA panel attorneys a fair hourly fee over and above their reasonable overhead. One approach the report supports is the use of a national presumptive overhead figure, such as \$25 an hour, which could be tailored on a regional basis using empirical data contributed by local bar associations, chambers of commerce and the CJA panel entity in a federal district. The overhead rate would be paid in addition to the compensation rate.

Finally, it is important to mention one concern with the court-appointed counsel compensation system, which is the potential for conflict of interest when judges approve the

compensation and reimbursement claims of panel attorneys who appear before them. The *Interim Report of the Committee to Review the Criminal Justice Act* pointed out that when a judge approves a fee that is less than the amount sought, counsel may - rightly or wrongly - perceive the reduction as an "admonition, rebuke or retaliation for defense tactics." Judges, however, sometimes feel justified in cutting vouchers they feel are excessive for the type of case handled, relying on their own view of "what a case is worth." This practice, if done routinely, effectively reduces the authorized hourly rate or per-case maximum. The Committee addressed this issue by recommending utilization of a local administrator to review interim and final vouchers and to certify final payments. The Committee's report further recommended implementing a procedure to notify an attorney of the intent to reduce a payment to him or her and the reason for the reduction. In such a system, the attorney would have the opportunity to appeal a decision to reduce a voucher and judges would have the opportunity to comment on the administrator's initial determinations for payment.

Responding to the review committee's recommendations in the March 1993 *Report of the Judicial Conference of the United States on the Federal Defender Program*, the Judicial Conference rejected the proposal for local panel administrators but endorsed the recommendation that CJA panel attorneys receive compensation which covers reasonable overhead and a fair hourly fee.

Appendix
Selected Case Law Concerning Indigent Defendant Counsel Compensation

State Ex Rel Stephen v. Smith, 747 P.2d 816 (Kansas S.Ct., 1987)
State v. Lynch, 796 P.2d 1150 (Oklahoma S.Ct., 1990)
State v. Ryan, 444 N.W. 2d 656 (Nebraska, 1989)
State v. Smith, 681 P.2d 1374 (Arizona, 1984)
Wilson v. State, 574 So.2d 1338 (Miss. S.Ct., 1990)
May v. State, 672 S. 2d 1307 (Ala. App. 1993), cert. denied, May v. State, 672 S. 2d. 1310 (Ala. 1995)
In re: Rhem v. County of Richardson, 410 N.W.2d 92 (Neb. 1987)
Zarambia v. Superior Court, 912 P.2d 5 (Ariz. 1996)
White v. Board of County Commissioners, 537 So.2d 1376 (Fla. 1989)
New York County Lawyers' Association v. State of New York, Index no. 102987/00 (County of New York LAS Part 38, filed Jan 2000)