

REPORT OF THE
NSBA INDIGENT
DEFENSE
COMPENSATION
COMMITTEE

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Indigent Defense Compensation Committee

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Report of the Indigent Defense Compensation Committee

Introduction

Just outcomes in the criminal justice system require capable counsel for both the state and the defendant. The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." In *Gideon v. Wainwright*, the United States Supreme Court stated that "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."¹

Under the Sixth Amendment, the state has an obligation to provide counsel to all those who cannot afford to hire an attorney and who are facing criminal charges that could result in a deprivation of liberty. States may delegate this obligation to the counties, but it retains an obligation to monitor the counties and ensure that the obligation is met in a constitutionally sufficient manner.

When compensation for these cases is not adequately addressed, there is a cost: it ultimately means that fewer lawyers will take court appointed cases and/or that attorneys will spend less time on each case. Spending less time will inevitably have an adverse impact on defendants and the legal system, in terms of just outcomes for defendants and in defendant and public perceptions of fairness and their confidence in the judicial system. At some point, there is a question of whether ethical and/or constitutional provisions are being met.

In February of 2014, the Nebraska Supreme Court adopted court rules related to the appointment of counsel in criminal and juvenile cases (see Nebraska Supreme Court Rules § 6-1525, 6-1467 and 6-1704). Those rules require each judicial district to have a transparent process for appointment of counsel for indigent defendants. It requires that the local rules include provisions for maintenance of a list of all licensed attorneys who may be expected to accept appointments in criminal cases in the judicial district, and information for how an attorney can be added to or removed from the court appointed attorney list.

These rules have significantly increased transparency in the court appointed counsel process, however additional improvements should be considered, particularly in the area of compensation. In 2017, the Nebraska State Bar Association formed an Ad Hoc Committee to further explore issues related to compensation for court appointed

¹ Chiang, E; Ogletree, C., Climenko, J; Dimino, M; Steinberg, J; and D. Carrol, (2008). *The Obligation of States in Providing Constitutionally-Mandated Right to Counsel Services*. National Legal Aid and Defender Association.

counsel. The results of their inquiry and the Committee’s recommendations are included herein.

Rate of Pay

The hourly rate for court appointed counsel is generally not included in local court rules. In an effort to document current rates for court appointed counsel, an individualized request for such information was sent to the district, county, and juvenile courts. These requests were submitted in January-February 2017, and the responses arrived shortly thereafter.

The Clerks of the District Courts of Nebraska, the Clerk Magistrates of the County Courts, and the Administrators of the Separate Juvenile Courts were contacted via email to obtain fee/rate schedules for court-appointed counsel. Follow up phone calls were made to the few who did not reply via email. Responses were received for all 93 counties. Some forwarded a copy of a general order mandating payment of a particular fee, while others offered a more direct response via email. All general orders and email responses were archived for future reference.

District Courts

The range in court-appointed fees paid by districts courts is \$65-\$100. The most common rate is \$100 per hour, which is paid in 38 of Nebraska’s 93 counties. The statewide average fee paid in the district courts is \$91/hour, while the median fee is \$95/hour (see Appendix A for a full list of rates paid by county in Nebraska District Courts).

Hourly Rate	Number of Counties
\$65	1
\$70	4
\$75	14
\$80	3
\$85	4
\$90	9
\$95	20
\$100	38
Total	93

County Courts

The range in court-appointed fees paid by county courts is \$50 to \$100. The most common rate is \$100 per hour, which is paid in 37 of Nebraska’s 93 counties. The statewide average fee paid in the district courts is \$90/hour, while the median fee is

\$95/hour (see Appendix B for a full list of rates paid by county in Nebraska County Courts).

Hourly Rate	Number of Counties
\$50	2
\$60	2
\$65	1
\$70	5
\$75	14
\$80	2
\$85	1
\$90	9
\$95	20
\$100	37
Total	93

Separate Juvenile Courts

With regard to the three separate juvenile courts in Nebraska, Sarpy County pays \$75/hour, and both Douglas and Lancaster counties pay \$65/hour.

Hourly Rate	Number of Counties
\$65	2
\$75	1

Recommendation 1: Nebraska Supreme Court Rules § 6-1525, 6-1467 and 6-1704 should be amended to require districts to publish their hourly rates for court appointed counsel.

The different rates paid across the state are likely, in part, a function of supply and demand. Generally speaking, in rural areas of the state, with a limited pool of available lawyers, rates are higher and in metropolitan areas, with a larger pool of available lawyers, the rates are generally lower. The American Bar Association’s *Ten Principles of Public Defense Delivery System* recommends that, “assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses.”

In addition to information regarding rates of payment, the Indigent Defense Compensation Committee also solicited feedback through electronic surveys sent to County Court Judges (n=31), District Court Judges (n=34), and lawyers identifying as criminal defense lawyers (n=101). Although by no means scientific, the results are shared here to provide a snapshot/ perspective of how both Nebraska lawyers and judges currently feel about these issues.

District and County Court Judges were asked if they felt whether the hourly rate for court appointed counsel in their county was adequate? Judges were divided. Judges in urban jurisdictions were more likely than rural judges to indicate that the hourly rate is not adequate.

Table 4: Do You Feel that the Hourly Rate for Court Appointed Counsel in Your County is Adequate?						
	County Court Judge N=31		District Court Judges N=34		Total	
	Rural	Metro	Rural	Metro	Total	Percentage
Yes	14	1	12	4	31	48%
No	6	8	8	9	31	48%
I'm not sure	2	0	0	0	2	4%

As one lawyer put it,

“The current hourly rate is less than the amount the plumber bills out his apprentice in our area which is a notable profession, but I think hourly fees should at least be the same as the plumbers, not less than the apprentice’s.”

Many lawyers commented on how the rates paid impact the quality of lawyers accepting court appointments:

“As an attorney only 12 years in the practice, it is fast becoming financially untenable to take court appointments. Fees will need to be increased if we hope to continue to attract experienced attorneys to provide quality defense on court appointed cases.”

“The current structure makes it difficult for more experienced lawyers to stay on the court appointed list.”

“Lancaster County pays \$50/hour which seems low and I know that it causes some attorneys not to take court appointments because they can’t justify it financially with office overhead.”

“An hourly rate below \$100 is not realistic. It dis-incentivizes good lawyers from serving as court-appointed counsel and incentivizes bad lawyers to do poor work so they can spend more time on better-paying clients. It is not enough to say, “Well the certainty that the county will pay you makes up for the reduced rate, because the court may reduce the hours.” The fact is that constitutionally-adequate representation costs money. You can find terrible lawyers who will take a criminal case a \$55/hour, but you’re going to pay IAC litigation afterwards.

“It is a shame how low the hourly rate is for court appointed counsel in my district. It’s a difficult population to serve and often requires more time from an attorney. If my private practice would ever become more stable I would take myself off the court appointed list because of the poor pay structure. It hasn’t even kept up with the cost of living.

“The districts in which I practice have set their rates at \$70 and \$75 per hour. That is acceptable when you have a misdemeanor or lower felony. However, at least three area attorneys were recently appointed to represent defendants allegedly involved in a murder. These are not death penalty cases but they are complicated, time consuming, and will significantly reduce the amount of time these attorneys can devote to their civil practice. At some point, attorneys are not going to be willing to accept the risks involved with assuming complicated court appointed cases. To prevent future problems, I think the issue of court appointed fees need to be thoughtfully considered.”

Nebraska case law may be instructive in determining a reasonable fee for court appointed counsel. In *State v. Lowery and Huff*, 798 N.W.2d626, 629 (Neb.Ct.App. 2011), the Nebraska Court of Appeals found that, “To determine proper and reasonable fees, it is necessary to consider the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney and the customary charges of the bar for similar services.”

The Nebraska Court of Appeals noted that the hourly rate for lawyers for that type of case, if it weren’t a court appointment, would be \$125 per hour. The Court of Appeals

concluded that the court appointed rate of \$70 per hour was reasonable and used that rate for determining reasonable fees (\$70 is 56% of the reasonable rate).

In 2015, the Nebraska State Bar Association published an Economic Survey which among other things, presents the hourly rates charged by Nebraska lawyers by practice area. The data indicate that the average hourly rate for criminal defense in Nebraska is \$151-\$175 per hour. Using the logic set out in Lowery, a reasonable rate for criminal court appointments in Nebraska should be set between \$84 and \$98 per hour (56% of the reasonable rate).

The average hourly rate for juvenile law practitioners in Nebraska is \$126 to \$150 per hour. Using the logic set out in Lowery, a reasonable rate for juvenile court appointments in Nebraska should be set between \$70 and \$84.

Recommendation 2: A reasonable rate for criminal court appointments in Nebraska is between \$84 and \$98 per hour. A reasonable rate for juvenile court appointments in Nebraska is between \$70 and \$84.

Reimbursable Expenses

Currently, few districts provide guidance on which expenses are reimbursable. Currently, the fees and expenses submitted by court-appointed counsel are held to a “reasonably necessary” standard (Neb Rev Stat 29-3905) with little guidance for what is and is not reimbursable. While one judge may approve the submitted fees and expenses, another judge may reject them, even if both judges preside in the same district; what may seem reasonable to one judge may be deemed unreasonable to a judge in a neighboring district. Based on survey comments, whether mileage and travel time can be submitted, seems to differ widely across the state and is not always clearly articulated in the district. Take for example these comments from court appointed lawyers:

“It might be useful to know which counties pay for travel time and/or reimburse for mileage to and from court.”

“Courts need to pay for expenses e.g., investigators, polygraphs, handwriting experts, substance abuse evaluations, mental health evaluations.”

“There are no written standards for what can be billed and what can’t. I was told by a Douglas County bailiff I can’t bill for travel so I don’t, but it would be nice to have some written guidance... I also think it fairer to allow billing for travel time since most court-appointed clients are in jail, requiring travel to the jail to see them.”

“Douglas County Juvenile Court has a billing sheet with an explanation of the billing process. I tried to find the same for the District and County Courts and couldn’t.

“Do you get mileage and time or just mileage? This is approached differently depending upon what judge you are appearing before.”

In addressing these compensatory issues, the federal judiciary’s rules may be instructive. The Criminal Justice Act (1964) delineates more clearly which expenses are reimbursable. Travel, research, communications, photocopying, photographs, expert witnesses, et al., are generally reimbursable, while general office overhead, printing, personal items and services, et al., are not (see Appendix C).

Recommendation 3: Nebraska Supreme Court Rules § 6-1525, 6-1467 and 6-1704 should be amended to provide guidance on which expenses, including travel time and mileage, are reimbursable.

Felonies Bound from County to District Court

Presumably the rate paid in district court is higher than the rate paid in county court because the cases are more complex, carry stiffer penalties and require more skill/experience on behalf of the lawyer. What about felony cases that are bound over from county to district court? In some counties, felonies pending bind over to the District Court receive the hourly County Court rate. Given the complexity and work required on these cases, shouldn’t the rate of pay for these felonies be the same regardless of which court the case originates?

When this question was posed in a survey to lawyers, 83.7% responded that the rate of pay should be the same regardless of which court the case originates.

“There is more difficulty involved with a felony case bound over rather than a felony cases where a plea is negotiated and the client is allowed to plead to a reduced charge in county court.”

“Effectively the County gets a huge savings, as the initial client meeting, review of the police report (not the supplemental reports that are only given after the bind-over) and research into the elements of the crime are all done before the case is transferred at a \$50/hr rate instead of \$80/rate in Douglas County.”

This is not an issue in the majority of counties, because the majority of counties currently pay the same rate in both county and district court.

Table 5: Do counties pay the same or different rates in county vs. district court?	
District and County Pay Same Rate	82
District and County Pay Different Rates	11

The 11 counties that pay different rates in County and District Court are presented below. The difference in the rates paid between County and District Courts is not uniform. It ranges from \$5 to \$30 based on the county. The differential for most counties is \$15. In Buffalo and Scotts Bluff Counties the County Court rates are actually higher than the District Court rates.

Table 6: Counties with different county and district court rates			
County	County Court Rate	District Court Rate	Difference
Banner	\$70	\$95	\$25
Buffalo	\$75	\$65	-\$10
Cheyenne	\$70	\$85	\$15
Dakota	\$60	\$75	\$15
Deuel	\$70	\$85	\$15
Dodge	\$60	\$70	\$10
Douglas	\$50	\$80	\$30
Garden	\$70	\$85	\$15
Lancaster	\$50	\$75	\$25
Morrill	\$70	\$65	\$5
Scottsbluff	\$75	\$70	-\$5

In setting rates for county court vs. district court, it is again instructive to return to *State v. Lowery and Huff* (supra). Courts are instructed “to consider the nature of the litigation, the time and labor required, the novelty and difficulty of the questions raised, the skill required to properly conduct the case, the responsibility assumed, the care and diligence exhibited, the result of the suit, the character and standing of the attorney and the customary charges of the bar for similar services.”

Under this type of analysis, it would be difficult to argue that the hourly rates paid in County Court should exceed those in District Court. It would also support a standard rate for felonies regardless of where the case is originally filed.

Recommendation 4: The rate of pay in County Court in a county should not exceed the rate of pay in District Court.

Recommendation 5: The rate of pay for felonies should be the same regardless of whether the case originates in county or district court.

Judges Reducing Fees

The reduction of bills by trial court judges does not appear prevalent. When asked, “In the last year, have you ever had a fee reduced by a judge, only 14.4% of attorneys answered yes. Similarly, 79% of district judges and 67.7% of county judges report reducing lawyers’ fees only rarely. Still there may be areas for improvement.

Survey participants were asked, “When a judge reduces the fees of an appointed attorney, is the attorney given an explanation as to why their bill was reduced?” The difference in how lawyers and judges responded to this question is significant. While only 10.3% of lawyers indicated that the judge provided an explanation as to why their bill was reduced, 64.7% of District Court Judges and 72.4% of County Court Judges report that they provide an explanation.

Table 7: When a judge reduces the fees of an appointed attorney, is the attorney given an explanation as to why their bill was reduced?			
	Lawyer N=78	District Court N=34	County Court N=29
Yes	10.3%	64.7%	72.4%
No	41.0%	23.5%	24.1%
I’m Not Sure	48.7%	11.8%	3.5%

Judges were asked if in their district, whether there are any specific standards or guidelines that are used when deciding to lower the bill of a court appointed attorney. The majority of judges (88.2% of responding district court judges and 77.4% of County Court judges) responded that there were not.

Table 8: Are there any specific standards or guidelines that are used when deciding to lower the bill of a court appointed attorney?		
	District Court N=34	County Court N=31
Yes	2.9%	16.1%
No	88.2%	77.4%
I’m not sure	8.8%	6.5%

The lack of guidelines and standard as to what is billable/reimbursable can be problematic. If the presiding judge or county attorney rejects a particular reimbursement request, this action may appear to be arbitrary or subjective. Since there is no clear standard as to what is billable/reimbursable, then on what grounds can the proper authority deny *any* fees and expenses?

Recommendation 6: Again, Nebraska Supreme Court Rules § 6-1525, 6-1467 and 6-1704 should be amended to provide guidance on what is billable/reimbursable.

Appeal Process

Lawyers and judges were asked, “If a lawyer disagrees with a judge’s decision to reduce a fee, do you feel that there is a process to appeal that decision in order to resolve the dispute?” The majority of judges indicated that there was not. The majority of lawyers indicated that they were not sure.

Table 9: If a lawyer disagrees with a judge’s decision to reduce a fee, do you feel that there is a process to appeal that decision in order to resolve the dispute?			
	Lawyers N=101	District Court N=34	County Court N=31
Yes	14.9%	5.9%	9.7%
No	39.4%	70.6%	61.3%
I’m not sure	45.7%	14.7%	9.7%

In a review of every districts rules, none appear to provide an appeal process for fee disputes. However, the 4th District seems to have created a separate process for approving bills exceeding \$2,000. Local rule 4-11 states:

“When the award of fees is expected to exceed \$2,000, the judge to whom the case is assigned may, in the judge's discretion, request that the presiding judge, or, in the absence of the presiding judge, the acting presiding judge, appoint two additional judges who, together with the judge to whom the case is assigned, shall determine the fee by majority vote.”

Regarding standards and an appeal process, one judge commented,

“Attorney billing practices vary greatly. Some attorneys bill conservatively, despite a low hourly wage, while others bill liberally for the exact same services. Routine services, especially provided in county court (i.e. filing a motion for

discovery, reviewing a journal entry/order, attending a non-evidentiary 2 minute hearing) should all be billed the same. I am in support of uniform rules to (1) protect against abuses, (2) to ensure attorneys don't short-change themselves, and (3) to provide a method of review if the attorney feels aggrieved by the judge's determination."

Lawyers were asked, "Other than an appeal to the Supreme Court of Nebraska, would you favor a standardized appeals process in regards to reducing appointed attorney's fees?" The majority of lawyer respondents (60.2%) indicated that they would favor a standardized appeals process.

Table 10: Other than an appeal to the Supreme Court of Nebraska, would you favor a standardized appeals process in regards to reducing appointed attorney's fees?	
	Lawyers N=101
Yes	60.2%
No	10.2%
I'm not sure	29.6%

Lawyers and judges were then asked, "In an attorney fee appeals system who would be best for resolving fee disputes?" As an example, the CJA plan of implementation adopted by the U.S. District Court for Nebraska provides that attorneys' vouchers be submitted to the presiding judge for approval. If the judge questions any of the expenses, two steps follow. First, the voucher is submitted to a CJA Committee for review and recommendation; this committee consists of a district judge, magistrate, the federal public defender, the CJA Panel Attorney District Representative, and an *ex officio* member on staff in the public defender's office. Second, while the CJA Committee reviews the contested voucher, the attorney is contacted to not only inform her of the dispute but to also solicit additional input, information, and/or documentation. (Please refer to Appendix C for further details.)

Lawyer respondents favored a panel of lawyers (71.3%) or the NSBA Fee Arbitration Program (23%). District Judges favored a panel of judges (59.3%), followed by the NSBA Fee Arbitration Program,² or a panel of lawyers (14.8%). County Court Judges favored the NSBA Fee Arbitration Program (45.5%), followed by the concept of either a panel of judge or lawyers (27.3% respectively). There was little to no support for having appeals reviewed by court staff or the Office of the Public Defender.

² The Nebraska State Bar Association Legal Fee Arbitration Program provides a process for the expeditious resolution through voluntary arbitration of disputes involving fees charged by attorneys.

Table 11: In an attorney fee appeals system who would be best for resolving fee disputes?			
	Lawyers N=101	District Judges N=34	County Judges N=31
A panel of lawyers	71.3%	14.8%	27.3%
A panel of judges	1.2%	59.3%	27.3%
Court staff	0%	0%	0%
The Public Defender Office	4.6%	0%	0%
NSBA Free Arbitration Program	23.0%	25.9%	45.5%

Recommendation 7: Nebraska Supreme Court Rules § 6-1525, 6-1467 and 6-1704 should be amended to provide guidance on how a lawyer could appeal a fee reduction. The Committee strongly recommends that whatever administrative appeal process is adopted, that the decision-making body include representation from the criminal defense bar.

Appendix A: District Court Fees 2017

County	District	Rate/Fee	County	District	Rate/Fee	County	District	Rate/Fee
Nuckolls	1	95	Brown	8	100	Sioux	12	100
Fillmore	1	95	Valley	8	100	Grant	12	100
Pawnee	1	90	Howard	8	100	Box Butte	12	100
Gage	1	90	Cherry	8	100	Kimball	12	70
Richardson	1	90	Wheeler	8	100	Cheyenne	12	85
Jefferson	1	90	Keya Paha	8	100	Morrill	12	70
Saline	1	90	Custer	8	100	Dawes	12	100
Johnson	1	90	Loup	8	100	Scotts Bluff	12	70
Thayer	1	90	Garfield	8	100	Deuel	12	85
Nemaha	1	90	Blaine	8	100	Sheridan	12	100
Clay	1	95	Rock	8	100	Garden	12	85
Cass	2	80	Greeley	8	100	Banner	12	85
Otoe	2	80	Boyd	8	100			
Sarpy	2	85	Sherman	8	100			
Lancaster	3	75	Holt	8	100			
Douglas	4	80	Buffalo	9	65			
Platte	5	95	Hall	9	100			
Butler	5	95	Harlan	10	95			
Polk	5	95	Kearney	10	95			
Colfax	5	95	Phelps	10	95			
Saunders	5	95	Webster	10	95			
Hamilton	5	95	Adams	10	95			
Seward	5	95	Franklin	10	95			
Merrick	5	95	Logan	11	100			
York	5	95	Hayes	11	100			
Nance	5	95	Dawson	11	100			
Boone	5	95	McPherson	11	100			
Burt	6	75	Hitchcock	11	100			
Washington	6	75	Dundy	11	100			
Cedar	6	75	Perkins	11	100			
Dakota	6	75	Hooker	11	100			
Dixon	6	75	Frontier	11	100			
Dodge	6	70	Red Willow	11	100			
Thurston	6	75	Keith	11	100			
Pierce	7	75	Furnas	11	100			
Stanton	7	75	Arthur	11	100			
Antelope	7	75	Thomas	11	100			
Wayne	7	75	Lincoln	11	100			
Cuming	7	75	Gosper	11	100			
Knox	7	75	Chase	11	100			
Madison	7	75						

Appendix B: County Court Fees 2017

County	District	Rate/Fee	County	District	Rate/Fee	County	District	Rate/Fee
Pawnee	1	90	Cherry	8	100	Grant	12	100
Gage	1	90	Wheeler	8	100	Box Butte	12	100
Richardson	1	90	Keya Paha	8	100	Kimball	12	70
Jefferson	1	90	Custer	8	100	Cheyenne	12	70
Saline	1	90	Loup	8	100	Morrill	12	65
Johnson	1	90	Garfield	8	100	Dawes	12	100
Thayer	1	90	Blaine	8	100	Scotts Bluff	12	75
Nemaha	1	90	Rock	8	100	Deuel	12	70
Cass	2	80	Greeley	8	100	Sheridan	12	100
Otoe	2	80	Boyd	8	100	Garden	12	70
Sarpy	2	85	Sherman	8	100	Banner	12	70
Lancaster	3	50	Holt	8	100			
Douglas	4	50	Buffalo	9	75			
Platte	5	95	Hall	9	100			
Butler	5	95	Nuckolls	10	95			
Polk	5	95	Clay	10	95			
Colfax	5	95	Fillmore	10	95			
Saunders	5	95	Harlan	10	95			
Hamilton	5	95	Kearney	10	95			
Seward	5	95	Phelps	10	95			
Merrick	5	95	Webster	10	95			
York	5	95	Adams	10	95			
Nance	5	95	Franklin	10	95			
Boone	5	95	Logan	11	100			
Burt	6	75	Hayes	11	100			
Washington	6	75	Dawson	11	100			
Cedar	6	75	McPherson	11	100			
Dakota	6	60	Hitchcock	11	100			
Dixon	6	75	Dundy	11	100			
Dodge	6	60	Perkins	11	100			
Thurston	6	75	Hooker	11	100			
Pierce	7	75	Frontier	11	100			
Stanton	7	75	Red Willow	11	100			
Antelope	7	75	Keith	11	100			
Wayne	7	75	Furnas	11	100			
Cuming	7	75	Arthur	11	100			
Knox	7	75	Thomas	11	100			
Madison	7	75	Lincoln	11	100			
Brown	8	100	Gosper	11	100			
Valley	8	100	Chase	11	100			
Howard	8	100	Sioux	12	100			