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THE RIGHT TO COUNSEL IN ILLINOIS

EVALUATION OF ADULT CRIMINAL TRIAL-LEVEL INDIGENT DEFENSE SERVICES



JUNE 2021



SIXTH
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CENTER

The Right to Counsel in Illinois: Evaluation of Adult Criminal Trial-Level Indigent Defense Services
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SIXTH AMENDMENT CENTER
PO Box 15556
Boston, MA 02215
www.sixthamendment.org

Prepared by

The Sixth Amendment Center is a non-partisan, non-profit organization providing technical assistance and evaluation services to policymakers and criminal justice stakeholders. Its services focus on the constitutional requirement to provide effective assistance of counsel at all critical stages of a case to the indigent accused facing a potential loss of liberty in a criminal or delinquency proceeding. See SIXTH AMENDMENT CENTER, <https://sixthamendment.org/>.

For this evaluation, the Sixth Amendment Center worked in partnership with the Defender Initiative of the Seattle University School of Law. The Defender Initiative is part of the Fred T. Korematsu Center for Law and Equality, whose mission is to advance justice and equality through a unified vision that combines research, advocacy, and education.

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Sixth Amendment Center staff: Nancy Bennett, David Carroll, Lacey Coppage, Aditi Goel, Phyllis Mann, Jon Mosher, and Michael Tartaglia
Consultants: Robert C. Boruchowitz and Henderson Hill
Sixth Amendment Center Law Student Network interns: Buddy Bardenwerper, Tyson Burleigh, Brian Hurley, Grace Rhodehouse, Shayna Scott, and Jala Tomlinson

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Executive Summary

In 1963, the U.S. Supreme Court declared in *Gideon v. Wainwright* that it is an “obvious truth” that anyone accused of a crime who cannot afford the cost of a lawyer “cannot be assured a fair trial unless counsel is provided for him.” In the intervening 58 years, the U.S. Supreme Court has clarified that the Sixth Amendment right to counsel means every person who is accused of a crime is entitled to have an attorney provided at government expense to defend him in all federal and state courts whenever that person is facing the potential loss of his liberty and is unable to afford his own attorney. Moreover, the appointed lawyer needs to be more than merely a warm body with a bar card. The attorney must also be effective, the U.S. Supreme Court said again in *United States v. Cronin* in 1984, subjecting the prosecution’s case to “the crucible of meaningful adversarial testing.” Under *Gideon*, the Sixth Amendment right to effective counsel is an obligation of the states under the due process clause of the Fourteenth Amendment.

- 1. The State of Illinois delegates to its county boards and circuit court judges most of its constitutional obligation to ensure the provision of effective assistance of counsel to indigent criminal defendants in the trial courts. Yet the state does not have any oversight structure by which to know whether each county’s indigent defense system has a sufficient number of attorneys with the necessary time, training, and resources to provide effective assistance of counsel at every critical stage of a criminal case for each and every indigent defendant.**

This is the first of three findings of this report. As explained in chapter I, this report is the result of a statewide evaluation of the provision of the right to counsel in adult criminal cases at the trial level, conducted at the request of the Illinois Supreme Court. Through data collection and analysis, interviews with criminal justice stakeholders, and courtroom observations, the evaluation assessed indigent defense services against national standards and Sixth Amendment caselaw that establish the hallmarks of a structurally sound indigent representation system, which include the early appointment of qualified and trained attorneys, who have sufficient time and resources to provide effective representation under independent supervision. The absence of any of these factors can show that a system is presumptively providing ineffective assistance of counsel. This evaluation focuses closely on the practices of nine counties – Champaign, Cook, DuPage, Gallatin, Hardin, LaSalle, Mercer, Schuyler, and Stephenson – which taken together illustrate the wide variations among Illinois county governments and courts in their efforts to fulfill the Sixth Amendment right to counsel.

The State of Illinois delegates to its counties and trial court judges the responsibility for providing and overseeing attorneys to effectively represent indigent defendants, and it delegates to its counties nearly all of the responsibility for funding the right to counsel of indigent defendants. When a state chooses to delegate its federal constitutional responsibilities to its local governments and courts, the state must guarantee not only that these local bodies are capable of providing effective representation but also that they are in fact doing so. Yet Illinois is one of just seven states that do not have any state commission, state agency, or state officer with oversight of any aspect of trial-level indigent representation services in adult criminal cases.

Chapter II details the framework that Illinois has established for its county-level criminal justice systems and how that framework has been implemented in the nine sample counties. The indigent defense systems in the nine representative counties of this evaluation vary greatly. With 102 counties in the state, it is likely that any or all of those counties present even greater variations in their indigent defense systems.

Without oversight, the State of Illinois cannot accurately say how many people or cases, and of what case types, require appointed counsel nor by whom the representation is being provided, if at all, and the State of Illinois cannot know how much the provision of indigent representation *should* cost nor how to provide it effectively in all 102 counties. Instead, policy decisions about indigent defense systems are left to anecdote, speculation, and potentially even bias.

Chapters III through VII comprise the substantive assessment, which relate the basis of our second and third findings:

- 2. The state's limited framework for how county boards and circuit court judges are to establish and implement the indigent defense system in each county institutionalizes political and judicial interference with the appointed attorneys' independence to act in the stated legal interests of their indigent clients. This lack of independence causes systemic conflicts of interest that interfere with the provision of effective assistance of counsel.**
- 3. The indigent defense systems established in Illinois' counties lack oversight and accountability that can result in a constructive denial of the right to counsel to at least some indigent defendants, and in some instances can result in the actual denial of the right to counsel to at least some indigent defendants.**

An indigent defense system's effectiveness must be measured by the representation it provides to its appointed clients. The U.S. Supreme Court explained in *Cronic* that "[t]he right to the effective assistance of counsel" means that the defense must put the prosecution's case through the "crucible of meaningful adversarial testing." For this to occur, U.S. Supreme Court case law provides that an indigent person must be represented by a qualified and trained attorney, who is appointed early in the case, and who has sufficient time and resources to provide effective representation under independent supervision.

Chapter III looks specifically at the qualifications required for and manner of selecting the attorneys who provide right to counsel representation, along with the training and supervision they receive. Among the nine counties studied for this evaluation, the qualifications, training, and supervision required of and/or provided to indigent defense system attorneys are inadequate to ensure effective assistance of counsel. Some attorneys may be assigned to represent indigent clients in every type of case (criminal and civil) of all levels of complexity and severity and yet have little to no prior experience in criminal defense. The inadequacy of training requirements and the absence of supervision in most counties mean indigent defense attorneys may lack competency to handle the cases to which they are appointed.

Chapter IV contains a detailed discussion of the funding provided for necessary expenses in the cases of indigent defendants and the overhead and compensation of the attorneys appointed to represent them. The funding provided is frequently inadequate to ensure effective assistance of counsel, and the manner in which compensation is paid to indigent defense system attorneys often creates a conflict of interest that results in the constructive denial of the right to counsel. Some counties do not provide overhead or necessary case-related expenses for the effective representation of indigent defendants, instead requiring the indigent defense system attorneys to pay for such costs out of their fee. For example, in Hardin, Mercer, and Schuyler counties, any overhead and necessary administrative support comes out of indigent defense system attorneys' fees. Similarly, Gallatin County provides its contract part-time public defender a stipend of \$100 per month to cover overhead, but any additional expenses beyond the first \$100 per month must be paid by the public defender personally. LaSalle County provides the public defender with limited office space, but it is inadequate for the four part-time assistant public defenders who must share a single desk.

Chapter V explains how each defendant's Sixth Amendment guarantee of effective assistance of counsel is fulfilled or impeded throughout the life of a criminal case. In some circumstances, indigent defendants are actually deprived of counsel at a critical stage of their criminal case. In other instances, an indigent defense system attorney is appointed but under circumstances that cause a constructive denial of the right to counsel.

Some in-custody indigent defendants are required to choose between having a timely pre-trial release determination without being represented by counsel or delaying their pre-trial release determination to a later date when counsel can be present. As an example, a circuit court judge in Stephenson County acknowledges that his interpretation of the Illinois statutory right to counsel at bail differs from that of most other judges. Rather than ensuring that public counsel is present to represent the arrestee at the initial bail hearing, the judge permits the defendant the option of either: requesting counsel to be present at a bail hearing held the next court date, or having the judge set their bail without representation that day. The circuit court judge says colleagues have informed him that he is wrong about his application of the bail reform law, but the judge says he will continue until some higher authority tells him otherwise. The county's public defender, who is appointed by and serves at the will of the circuit court judges, is aware of the practice but has not taken any action to remedy the issue on behalf of indigent defendants in the county.

Some judges require or allow unrepresented indigent defendants to negotiate directly with prosecutors before the defendants are advised of and waive their right to appointed counsel. Prosecutors who speak directly with defendants, on their own volition or at the suggestion of the judge, risk violating their ethical duties. As the report of the National Right to Counsel Committee, *Justice Denied*, notes: “Not only are such practices of doubtful ethical propriety, but they also undermine defendants’ right to counsel.” For example, at the initial appearance in LaSalle County on a traffic offense (some traffic offenses are jailable misdemeanors), there does not seem to be any scenario in which a defendant who appears without counsel can avoid talking to the state’s attorney that day. The judge begins the proceedings by addressing all of the defendants who are present in the courtroom, saying: “The prosecutors will call your name. They will talk to you about your case. This is an opportunity for you to decide what you want to do.” Likewise, in Mercer County, before the traffic court proceedings begin, the state’s attorney talks individually to each defendant who is present in court that day without an attorney. There is not a public attorney in the courtroom.

For some indigent defendants who receive appointed counsel, it may be several days or even weeks before they learn the identity of the attorney representing them and/or have an opportunity to speak with that attorney.

Chapter VI assesses the time an appointed attorney must devote to each case and what is known and unknown about the workloads of the indigent defense system attorneys. In some counties, no one keeps track of the caseloads and/or workloads of indigent defense system attorneys; what caseload data is available shows public defense system attorneys’ workloads are excessive.

Assistant public defenders in Champaign County speak openly about their fear of “burnout” from excessive caseloads. One attorney describes having pretrial conferences scheduled with 50 clients at one court date and 100 more clients with pretrial conferences the very next day: “There are a number of people who I haven’t spoken with [by their court date]. So there’s often a line of up to 50 people waiting to speak with me before court.” Similarly, DuPage County public defender attorney workloads are excessive. One attorney estimates he is only able to review about 70% of the discovery in any given case, and worse, “there are days where I only get through about 10% of the discovery in a case.” Another said: “It’s like M.A.S.H. – you’re just triaging things that come in.” In Cook County, excessive caseloads are compounded by the absence of sufficient case-related resources. Assistant public defenders speak of feeling “overwhelmed,” of “crushing depression,” and of being alone “on an island” without adequate support. The pressure is felt by attorneys throughout the public defender office. As one assistant Cook County public defender put it: “We need bodies here. We don’t have time to go to the washroom and drink water. We need people.”

In *Strickland v. Washington*, the U.S. Supreme Court declared that “independence of counsel” is “constitutionally protected,” and “[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.” Regarding independence from judicial interference, the U.S. Supreme Court in *Powell v. Alabama* observed that the right to counsel rejects the notion that a

judge should direct the defense. And regarding independence from the executive and legislative branches of government, in the 1979 case of *Ferri v. Ackerman*, the U.S. Supreme Court stated that “independence” of appointed counsel to act as an adversary is an “indispensable element” of “effective representation.” Two years later, the Court observed in *Polk County v. Dodson* that states have a “constitutional obligation to respect the professional independence of the public defenders whom it engages.” Reflecting these commands, national standards state that the public defense function, including the attorneys it provides, must be “independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel.”

The State of Illinois has a constitutional obligation to protect the independence of the defense function and to ensure that the indigent defense systems established by county boards and circuit court judges are free from conflicts of interest that interfere with appointed counsel’s ability to render effective representation to each indigent defendant. Chapter VII examines the ways in which the indigent defense systems in each of the nine sample counties lack independence from the political and judicial branches of government, leading to systemic conflicts of interest that interfere with the provision of effective assistance of counsel and allow the deficiencies identified in this report to continue.

The county boards and circuit court judges are not maliciously or consciously trying to undermine the basic constitutional right to counsel. Rather, it is the framework established by the State of Illinois that makes all indigent defense system attorneys directly dependent for their jobs on remaining in the good graces of the county board and/or circuit court judges who hire them. Effective assistance of counsel cannot be ensured in an indigent defense system that places appointed attorneys in a position where, often subconsciously, the lawyers respond to power that some third party holds over them, creating a conflict of interest between the interests of the other party and the legal interests of the indigent defense system’s clients.

In 60 of the state’s 102 counties, the county government decides whether a public defender office exists. At any time, for any reason or no reason, the county board in each of these counties can wholly eliminate the public defender office and all of its employees. In all counties other than Cook, the circuit court judges hire the public defender and can fire the public defender at any time, for any reason or no reason, and the circuit court judges also determine the number (if any) of assistant public defenders and support staff in the public defender office, within the funding allocated and compensation set by the county board. In Cook County, the county board president hires the public defender for a six-year term, during which the public defender can only be removed for good cause or dereliction of duty, but the county board president can choose not to re-hire that public defender for any reason or no reason at the end of the six-year term, and the county board also determines the number (if any) and compensation of any assistant public defenders and support staff. In all counties, to whatever extent private attorneys are appointed, the circuit court judges are responsible for choosing the private attorneys to appoint and for deciding what “reasonable fee” to pay them.

To retain their own livelihoods, the indigent defense system attorneys inevitably, and often without realizing it, take into consideration what they perceive to be the desires of the county board and circuit court judges, rather than advocating solely on behalf of their appointed clients' legal interests, as is their ethical and constitutional duty. As the public defender in one Illinois county noted, the lack of structural independence from the county and courts is and will continue to be the greatest structural barrier for any indigent defense system, because each appointed public defender risks termination of employment should they seek the funding necessary to effectively represent all appointed clients. For example, one county's public defender does not ask for additional resources needed by the public defender office to effectively represent its clients, saying "it doesn't hurt" to get the same budget amount year after year. The public defender fears that his budget will be cut every year and considers it a victory when that does not happen. In a different county, the public defender has not sought an increase in his compensation, because the county is in tough financial times. In a third county, the part-time public defender has not asked for county benefits, despite believing he is entitled to them, because he does not want to appear to rock the boat with regard to county funders.

Because the appointed attorneys in Illinois are first beholden for their livelihoods to the political and judicial branches of government, they:

- fail to advocate for sufficient resources necessary for the effective representation of appointed clients;
- work for fixed fee compensation that pits their own financial interests against the legal interests of their appointed clients;
- pay personally for overhead and/or case-related expenses of their appointed clients' cases, pitting their own financial interests against the legal interests of their appointed clients;
- handle excessive caseloads and workloads that prevent providing effective assistance of counsel to each individual indigent defendant;
- fail to object when indigent defendants are ordered to pay for costs of their representation;
- fail to advocate for the constitutional and statutory rights of indigent defendants; and
- fail to provide a voice for indigent defendants in the criminal justice system.

In Chapter VIII, the report makes two recommendations to rectify the deficiencies found during this evaluation.

RECOMMENDATION 1. The State should statutorily create, and appropriately fund, an independent Illinois public defense commission to oversee trial-level indigent defense services and authorize the public defense commission to promulgate and enforce binding standards.

RECOMMENDATION 2. The Illinois public defender commission should have statutory authority to carry out its duties through the creation of a central office of indigent defense services. The public defender commission should be authorized to hire an executive attorney to employ permanent central office staff to provide training and regional supervision of indigent defense services throughout the state.

Because the constitutional right to counsel is an obligation of state government, the State of Illinois has an affirmative duty to ensure effective public defense representation to each and every indigent defendant facing a potential loss of liberty in a criminal proceeding. National standards first unequivocally declare “there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.” Second, heeding the U.S. Supreme Court’s admonitions regarding the independence of the defense function, national standards require that “[t]he public defense function, including the selection, funding, and payment of defense counsel, is independent.” Third, national standards agree that the best way to protect defense counsel independence and ensure state oversight of right to counsel services is by establishing an independent statewide public defense commission.

Thirty states have created some form of a commission system, and there is no one cookie-cutter model for a commission that must be imposed on each state. At minimum, a commission should be responsible for oversight of trial-level representation throughout the state. The members of the commission should be selected by diverse appointing authorities, so that no single branch of government has the ability to usurp power over the chief defender or exert outsized influence over the delivery of public defense services. And the commission should be authorized to establish, implement, and enforce mandatory standards regarding the provision of the right to counsel, within the parameters set by state law. Other states provide examples, explained in this report, of methods to implement an independent oversight structure in compliance with standards, including: establishing a unified state system; providing state funding to local governments to enable compliance; or assessing penalties on local governments for non-compliance.

The State of Illinois has a fiduciary duty to taxpayers to exercise oversight of the system it establishes to provide the Sixth Amendment right to counsel. For this reason, there should be a central office, led by an executive attorney and executive staff, to help oversee all indigent defense services in the state. In order to effectively and efficiently collect and analyze the information needed to accurately project the number and type of attorneys and resources necessary to provide consistently effective representation, the Illinois legislature should appropriate necessary state funds for adequate professional staff positions devoted full time to training, compliance, finance, information technology, and research and data analysis.

Finally, the Illinois legislature should require the commission, through its central office, to submit periodic reports to the legislature regarding the status of right to counsel services statewide on the key indicators of systemic effectiveness under *United States v. Cronin*, which include the early appointment of qualified and trained attorneys, who have sufficient time and resources to provide effective representation under independent supervision.

THE RIGHT TO COUNSEL IN ILLINOIS

EVALUATION OF ADULT CRIMINAL TRIAL-LEVEL
INDIGENT DEFENSE SERVICES

JUNE 2021

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Chapter I

The right to counsel and this evaluation

There are 102 counties in the State of Illinois. With only limited guidance and assistance from the state, each county's government, along with the judges of the trial court for the county, are left to decide how to provide and pay for attorneys to represent the indigent people who are charged with crimes in the county that carry incarceration as a possible penalty. This evaluation focuses closely on the practices of nine counties, which taken together illustrate the wide variations among Illinois county governments and courts in their efforts to fulfill the Sixth Amendment right to counsel.

A. The right to counsel in Illinois

The Sixth Amendment to the United States Constitution states that in “all criminal prosecutions” the accused shall enjoy the right, among others, to “have the Assistance of Counsel for his defence.”¹ In 1963, the U.S. Supreme Court declared it an “obvious truth” that anyone accused of a crime who cannot afford the cost of a lawyer “cannot be assured a fair trial unless counsel is provided for him.”² Since *Gideon v. Wainwright*, the Sixth Amendment right to counsel means every person who is accused of a crime is entitled to have an attorney provided at government expense to defend him in all federal and state courts whenever that person is facing the potential loss of his liberty and is unable to afford his own attorney.³ Moreover, the appointed lawyer needs to be more than merely a warm body with a bar card.⁴ The attorney must also be effective,⁵ subjecting the prosecution's case to “the crucible of meaningful adversarial testing.”⁶

¹ U.S. CONST. amend. VI.

² *Gideon v. Wainwright*, 372 U.S. 335 (1963).

³ *Gideon v. Wainwright*, 372 U.S. 335 (1963) (felonies); *Douglas v. California*, 372 U.S. 353 (1963) (direct appeal); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (misdemeanors); *Alabama v. Shelton*, 505 U.S. 654 (2002) (including misdemeanors with suspended sentences); *Halbert v. Michigan*, 545 U.S. 605 (2005) (including appeals challenging a sentence imposed following a guilty plea where the sentence was not agreed to in advance).

⁴ As the Court noted in *Strickland v. Washington*, 466 U.S. 668, 685 (1984), “[t]hat a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command.”

⁵ *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (“It has long been recognized that the right to counsel is the right to the effective assistance of counsel.”). To be effective, an attorney must be reasonably competent, providing to the particular defendant in the particular case the assistance demanded of attorneys in criminal cases under prevailing professional norms, such as those “reflected in American Bar Association standards and the like.” *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984).

⁶ *United States v. Cronin*, 466 U.S. 648, 656 (1984).

The Supreme Court has expressly held that the Sixth Amendment requires the appointment of counsel for the poor upon their request, not only in felonies, but also when facing the possibility of jail time in misdemeanors and on direct appeals.⁷ Indigent children in delinquency proceedings, no less than adults in criminal courts, are entitled to appointed counsel when facing the loss of liberty.⁸

The Illinois Constitution guarantees that, “[i]n criminal prosecutions, the accused shall have the right to appear and defend in person and by counsel; . . .”⁹ In criminal proceedings at the trial level, “[e]very person charged with an offense shall be allowed counsel before pleading to the charge.”¹⁰ Counsel “shall” be appointed “if the court determines that the defendant is indigent and desires counsel” in every case that carries a penalty other than “fine only.”¹¹ Children are provided appointed counsel in both delinquency offenses¹² and proceedings for “minors requiring authoritative intervention”¹³ (what many states refer to as status offenses). On direct appeal, the court “shall” appoint counsel “if the court determines that the defendant desires counsel on appeal but is indigent.”¹⁴

“States are free to provide greater protections in their criminal justice system than the Federal Constitution requires,”¹⁵ but they cannot provide less. Though the federal Constitution does

⁷ *Douglas v. California*, 372 U.S. 353 (1963) (direct appeal); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (misdemeanors); *Alabama v. Shelton*, 505 U.S. 654 (2002) (including misdemeanors with suspended sentences); *Halbert v. Michigan*, 545 U.S. 605 (2005) (including appeals challenging a sentence imposed following a guilty plea where the sentence was not agreed to in advance).

⁸ *In re Gault*, 387 U.S. 1 (1967). “[I]t would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase ‘due process.’ Under our Constitution, the condition of being a boy does not justify a kangaroo court.” *Id.* at 27-28. “A proceeding where the issue is whether the child will be found to be ‘delinquent’ and subjected to the loss of his liberty for years is comparable in seriousness to a felony prosecution. The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child ‘requires the guiding hand of counsel at every step in the proceedings against him.’ . . . [T]he assistance of counsel is essential for purposes of waiver proceedings, [and] we hold now that it is equally essential for the determination of delinquency, carrying with it the awesome prospect of incarceration in a state institution until the juveniles reaches the age of 21.” *Id.* at 36.

⁹ ILL. CONST. art. I, § 8.

¹⁰ 725 ILL. COMP. STAT. § 5/113-3(a) (2018).

¹¹ 725 ILL. COMP. STAT. § 5/113-3(b) (2018); ILL. SUP. CT. R. 576 (explaining for petty offense ordinance violations: “A defendant has a right to be represented by an attorney; however, there shall be no right to appointment of counsel in suits for violation of ordinances for which the penalty does not include the possibility of a jail term.”). Where a child under the age of 17 is accused in a criminal proceeding (other than one where the penalty is a fine only and most Illinois Vehicle Code proceedings), the child cannot waive the right to counsel. 725 ILL. COMP. STAT. § 5/115-1.5 (2018).

¹² Illinois law prohibits children from waiving their right to counsel in delinquency proceedings, and children under the age of 15 in most serious delinquency matters “must be represented by counsel throughout the entire custodial interrogation of the minor.” 705 ILL. COMP. STAT. § 405/5-170 (2018).

¹³ 705 ILL. COMP. STAT. § 405/1-5(1) (2018).

¹⁴ 725 ILL. COMP. STAT. § 5/121-13(a) (2018); ILL. SUP. CT. R. 607(a) (eff. July 1, 2017).

¹⁵ *California v. Ramos*, 463 U.S. 992, 1014 (1983). *See, e.g., Oregon v. Hass*, 420 U.S. 714, 719 (1975); *Cooper v. California*, 386 U.S. 58, 62 (1967); *O’Connor v. Johnson*, 287 N.W.2d 400, 405 (Minn. 1979) (“The states may, as the United States Supreme Court has often recognized, afford their citizens greater protection than the safeguards guaranteed in the Federal Constitution. Indeed, the states are ‘independently responsible for safeguarding the rights

not require it,¹⁶ Illinois statutorily guarantees appointed counsel to death-sentenced defendants who lack the means to obtain an attorney in their post-conviction proceedings,¹⁷ and in all post-conviction proceedings where the petition is not dismissed as frivolous or patently without merit.¹⁸ In civil matters, (among other types of cases) Illinois appoints counsel to represent children who are the “subject of” every abuse & neglect or dependency case,¹⁹ and the state also provides public counsel to represent indigent parents, guardians, legal custodians, or responsible relatives who are “parties respondent” in any abuse & neglect, dependency, minor requiring authoritative intervention, or delinquency proceeding.²⁰

The scope of this evaluation is limited to the provision of counsel to indigent adults charged with crimes in the Illinois trial courts.²¹ In every Illinois county, whatever indigent defense system the county supervisors and trial court judges have created must provide representation to indigent people in all of the types of cases for which Illinois provides a right to counsel. In many Illinois counties, the same lawyers who are appointed to represent adults in the criminal courts are also appointed to represent children in juvenile proceedings and both adults and children in some civil matters.

of their citizens.”); *South Dakota v. Opperman*, 247 N.W.2d 673, 674 (S.D. 1976) (“There can be no doubt that this court has the power to provide an individual with greater protection under the state constitution than does the United States Supreme Court under the federal constitution.”).

¹⁶ *Murray v. Giarratano*, 492 U.S. 1, 10 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 555-57 (1987); *Ross v. Moffitt*, 417 U.S. 600, 610-12, 617-18 (1974).

¹⁷ 725 ILL. COMP. STAT. § 5/122-2.1(a)(1) (2018).

¹⁸ 725 ILL. COMP. STAT. § 5/122-4 (2018).

¹⁹ 705 ILL. COMP. STAT. § 405/1-5(1) (2018).

²⁰ 705 ILL. COMP. STAT. § 405/1-5(1) (2018).

²¹ There are circumstances in which a child is prosecuted in an adult criminal court in Illinois and so falls within the scope of this evaluation. A person 17 or younger at the time of alleged commission of an offense cannot be prosecuted under the criminal laws and will instead be dealt with in juvenile proceedings, except in six circumstances. 705 ILL. COMP. STAT. § 405/5-120 (2018).

- Children under 18 years old can be prosecuted in the criminal courts for violations of a traffic, boating, or fish and game law, or of a municipal or county ordinance. 705 ILL. COMP. STAT. § 405/5-125 (2018).
- A child of 16 or 17 accused of first degree murder, aggravated criminal sexual assault, or aggravated battery with a firearm where the child discharged the weapon is automatically prosecuted in adult criminal court. 705 ILL. COMP. STAT. § 405/5-130(1) (2018).
- A child of 15 or older is presumptively transferred to adult criminal court if the state’s attorney files a petition charging a forcible felony and seeking criminal prosecution. 705 ILL. COMP. STAT. § 405/5-805(2)(a) (2018).
- A child of 13 or older may be transferred to adult criminal court if the state’s attorney files a petition charging a crime and seeking criminal prosecution, where a juvenile judge finds probable cause and that “it is not in the best interests of the public” to proceed in delinquency proceedings. 705 ILL. COMP. STAT. § 405/5-805(3)(a) (2018).
- There is a rebuttable presumption that a child 13 or older will be sentenced under the criminal law if the state’s attorney files a petition charging a crime that would be a felony if committed by an adult and seeking an extended jurisdiction juvenile prosecution. 705 ILL. COMP. STAT. § 405/5-810(1) (2018).
- Any child 13 or older who is the subject of a petition for adjudication of wardship that alleges a crime may, with consent of their attorney, ask to be transferred to adult criminal court. 705 ILL. COMP. STAT. § 405/5-130(9) (2018).

B. A brief history of providing the right to counsel in Illinois

In 1963, the U.S. Supreme Court held in *Gideon v. Wainwright* that providing the Sixth Amendment right to effective assistance of counsel for the indigent accused in state courts is an obligation of the states under the due process clause of the Fourteenth Amendment.²² Every state in the nation must have a system for providing an attorney to represent each indigent defendant who is charged with a crime and faces the possible loss of their liberty. Because the “responsibility to provide defense services rests with the state,” national standards as summarized in the *ABA Ten Principles of a Public Defense Delivery System* unequivocally declare “there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.”²³

The interrelated roles of the state, counties, judges, and lawyers in providing the right to counsel in Illinois have developed slowly over the past two centuries. Today, the State of Illinois delegates to its counties and trial court judges the responsibility for providing and overseeing attorneys to effectively represent indigent defendants, and it delegates to its counties nearly all of the responsibility for funding the right to counsel of indigent defendants. When a state chooses to delegate its federal constitutional responsibilities to its local governments and courts, the state must guarantee not only that these local bodies are capable of providing effective representation but also that they are in fact doing so.²⁴

Attorneys conscripted without pay to represent indigent defendants. Since achieving statehood in 1818, Illinois’ earliest constitutions and statutory provisions provided indigent defendants a right to appointed counsel in criminal cases,²⁵ while contemporaneous Illinois Supreme Court decisions held that the appointed lawyers were not entitled to be paid for their services.²⁶

²² *Gideon v. Wainwright*, 372 U.S. 335, 343-45 (1963).

²³ AMERICAN BAR ASS’N, *ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM*, Principle 2 cmt. (2002).

²⁴ *Cf. Robertson v. Jackson*, 972 F.2d 529, 533 (4th Cir. 1992) (although administration of a food stamp program was turned over to local authorities, “ultimate responsibility” . . . remains at the state level.”); *Osmunson v. State*, 17 P.3d 236, 241 (Idaho 2000) (where a duty has been delegated to a local agency, the state maintains “ultimate responsibility” and must step in if the local agency cannot provide the necessary services); *Claremont School Dist. v. Governor*, 794 A.2d 744 (N.H. 2002) (“While the State may delegate [to local school districts] its duty to provide a constitutionally adequate education, the State may not abdicate its duty in the process.”); Letter and white paper from American Civil Liberties Union Foundation *et al* to the Nevada Supreme Court, regarding Obligation of States in Providing Constitutionally-Mandated Right to Counsel Services (Sept. 2, 2008) (“While a state may delegate obligations imposed by the constitution, ‘it must do so in a manner that does not abdicate the constitutional duty it owes to the people.’”), http://www.nlada.net/sites/default/files/nv_delegationwhitepaper09022008.pdf.

²⁵ ILL. CONST. of 1818, art. VIII, § 9; ILL. CONST. of 1848, art. XIII, § 9; ILL. CONST. of 1870, art. II, § 9; ILL. CRIM. CODE of 1874, div. XIII, § 2 (“Every person charged with crime shall be allowed counsel, and when he shall state upon oath that he is unable to procure counsel, the court shall assign him competent counsel, who shall conduct his defense.”). *See Johnson v. Whiteside County*, 110 Ill. 22, 23-24 (Ill. 1884) (noting that the provisions of the Criminal Code of 1874, requiring a court to appoint counsel for an indigent criminal defendant, had been in force and unchanged since 1807 when Illinois was part of Indiana Territory); Charles Mishkin, *The Public Defender*, 22 J. CRIM. L. & CRIMINOLOGY 489, 491 (1931).

²⁶ *Johnson v. Whiteside County*, 110 Ill. 22, 25-26 (Ill. 1884) (“There is no statute or rule of the common law that imposes the duty of paying attorney’s fees for defending paupers from criminal accusations, and the courts

Creation of county public defender offices. The first county public defender office in Illinois was established by the Cook County board of commissioners in 1930, though a state appellate court held that the county board lacked statutory authority to do so at that time.²⁷ The problem was cured in 1933, when the state legislature statutorily authorized counties of more than 500,000 – then, only Cook County – to create a public defender office (and therefore to spend public funds to provide counsel to indigent people charged with crimes).²⁸ In 1949, the Illinois legislature required a public defender office to be established in every county with a population of 35,000 or more,²⁹ and the law remains the same today, although smaller counties are also authorized to establish a public defender office if they choose to do so.³⁰

Paying private attorneys to represent indigent defendants. In 1929, the Illinois legislature for the first time authorized private attorneys to be paid for their appointed representation of indigent defendants, but only in capital cases.³¹ It was not until the adoption of the Code of Criminal Procedure of 1963, taking effect on January 1, 1964, that the Illinois legislature authorized private attorneys (attorneys who do not work in a public defender office) to be paid a “reasonable fee” for their work when appointed to represent indigent defendants in non-capital felony and misdemeanor cases.³²

State makes limited financial contribution to county indigent defense systems. Illinois counties are responsible in the first instance for providing all of the funding necessary to represent indigent defendants in criminal cases in the trial courts.³³ Today, the state provides only limited financial assistance, in two ways:

- state reimbursement of a portion of the county’s public defender salary (in every county that appoints a public defender – today, all 102 counties); and
- state appropriations to the Office of the State Appellate Defender to provide certain services to the county indigent defense systems.

Effective July 1, 2002, the state, for the first time, committed to reimburse counties for 66 2/3 percent of the public defender’s compensation in every county that appoints a public defender.³⁴ The governor at that time hailed the legislation as a “victory for criminal justice reform” and “a vital step towards a more fair, just and accurate criminal justice system,” and went on to say:

have no power to enact laws authorizing counties to levy taxes for such purposes. . . . We are satisfied that we have announced the true rule in *Vise v. Hamilton County* . . .”; *Vise v. Hamilton County*, 19 Ill. 78, 79 (Ill. 1857) (“In criminal prosecutions, the accused has the right to be heard, and to defend by himself and counsel, and . . . the court, in case of inability of the accused to obtain counsel, will appoint counsel for him, and may compel the counsel, as an officer of the court, subject to its authority, to defend the accused against unjust conviction. . . . The [appointed attorneys] but performed an official duty, for which no compensation is provided.”).

²⁷ See *Cocot v. Bd. of Comm’rs of Cook Cty.*, 273 Ill. App. 75, 83 (Ill. App. Ct. 1933).

²⁸ 1933 ILL. LAWS, p. 430, § 1 (enacting CAHILL’S ST. ch. 37, ¶ 539 *et seq.*).

²⁹ 1949 ILL. LAWS, p. 676, §§ 1-2.

³⁰ 55 ILL. COMP. STAT. §§ 5/3-4001, 5/3-4002 (2018).

³¹ CAHILL’S REV. STAT. ¶¶ 754, 754[1] (1929). See Charles Mishkin, *The Public Defender*, 22 J. CRIM. L. & CRIMINOLOGY 489, 491 (1931).

³² 38 ILL. COMP. STAT. ANN. § 113-3(c) (1963).

³³ 55 ILL. COMP. STAT. §§ 5/3-4007 to 5/3-4011 (2018); 725 ILL. COMP. STAT. § 5/113-3(c) (2018).

³⁴ Ill. P.A. 92-508 (H.B. 549) (eff. July 1, 2002) (amending 55 ILL. COMP. STAT. § 5/3-4007).

While not explicitly stated in this legislation, the State funding that this bill will make possible is meant to supplement county budgets for their public defenders, not replace it. The State funding contemplated by this legislation will free up county funds which should then be used to leverage other criminal justice improvements by funding programs and services that will further enhance the quality of defender services in each county. To simply work a budget reallocation of State funds for already allocated and expended county funds, would be acting contrary to the intent and will of the Illinois General Assembly and the Governor of this State.³⁵

The state's statutory promise to counties was limited, effective July 1, 2011, to reimbursing counties "subject to appropriation" of funding by the legislature.³⁶ The following table shows the state's total reimbursement to all 102 counties for public defender compensation from FY 2014 through FY 2019.³⁷

State's Reimbursement to Counties for Public Defender Compensation

FY 2014	FY 2015	FY 2016	FY 2017	FY 2018	FY 2019
\$6,351,400	\$6,395,661	\$5,966,876	\$6,571,258	\$6,692,631	\$6,900,595

The state appellate defender has been allowed by state law (though not required): to "provide investigative services to appointed counsel and county public defenders" since before January 1, 2000,³⁸ and to "provide county public defenders with the assistance of expert witnesses and investigators" in capital cases since January 1, 2000,³⁹ and in all criminal cases since August 17, 2012.⁴⁰ During all of those years, through at least FY 2018, the legislature has not made any general fund appropriations to the state appellate defender's office for it to provide investigative or expert witness assistance in adult criminal non-capital trial-level cases.⁴¹

³⁵ Governor George H. Ryan, Amendatory Veto of H.B. 549 (Aug. 10, 2001) (requesting delay of effective date to July 1, 2002) (emphasis in original).

³⁶ Ill. P.A. 97-72 § 20-10 (S.B. 335) (eff. July 1, 2011) (amending 55 ILL. COMP. STAT. § 5/3-4007).

³⁷ See ILLINOIS DEPARTMENT OF REVENUE ASSESSOR EDUCATION SYSTEM, PAID PUBLIC DEFENDERS COUNTY REPORT: FISCAL YEAR 2019; ILLINOIS STATE COMPTROLLER, DETAILED ANNUAL REPORT OF REVENUES AND EXPENDITURES: ILLINOIS FISCAL YEAR 2018, at 305; ILLINOIS STATE COMPTROLLER, DETAILED ANNUAL REPORT OF REVENUES AND EXPENDITURES: ILLINOIS FISCAL YEAR 2017, at 300; ILLINOIS STATE COMPTROLLER, DETAILED ANNUAL REPORT OF REVENUES AND EXPENDITURES: ILLINOIS FISCAL YEAR 2016, at 273; ILLINOIS STATE COMPTROLLER, DETAILED ANNUAL REPORT OF REVENUES AND EXPENDITURES: ILLINOIS FISCAL YEAR 2015, at 411; ILLINOIS STATE COMPTROLLER, DETAILED ANNUAL REPORT OF REVENUES AND EXPENDITURES: ILLINOIS FISCAL YEAR 2014, at 440.

³⁸ 725 ILL. COMP. STAT. § 105/10(c)(4) (2018). See Ill. P.A. 91-589, § 35 (S.B. 574), eff. Jan. 1, 2000 (showing text of statute in existence at time of Jan. 1, 2000 amendment)

³⁹ See Ill. P.A. 91-589, § 35 (S.B. 574), eff. Jan. 1, 2000 (enacting 725 Ill. Comp. Stat. § 105/10(c)(5)); Ill. P.A. 94-340, § 10 (S.B. 469), eff. Jan. 1, 2006; Ill. P.A. 96-1148, § 5 (H.B. 5410), eff. July 21, 2010; Ill. P.A. 97-1003, § 5 (H.B. 5441), eff. Aug. 17, 2012 (deleting the substantive text of 725 Ill. Comp. Stat. § 105/10(c)(5)).

⁴⁰ 725 ILL. COMP. STAT. § 105/10(c)(5.7) (2018). See Ill. P.A. 97-1003, § 5 (H.B. 5441), eff. Aug. 17, 2012 (enacting 725 ILL. COMP. STAT. § 105/10(c)(5.7)).

⁴¹ See ILLINOIS STATE COMPTROLLER, ILLINOIS DETAILED ANNUAL REPORT OF REVENUES AND EXPENDITURES: ILLINOIS FISCAL YEAR [individual reports for all years 1997 through 2019].

According to the state appellate defender's office, it received federal grant funds in the amount of \$113,717

Similarly, the state appellate defender has been allowed by state law (though not required) to “provide training to county public defenders” since August 17, 2012.⁴² Prior to the statutory authorization to provide this training, during FY 2007 through FY 2009, the state made general fund appropriations (of \$40,000, then \$20,000, then \$20,000) to the state appellate defender’s office for it to do so; there was no state general fund appropriation for this training during FY 2010 and FY 2011.⁴³ Since statutorily authorizing the office to provide training, from FY 2012 through FY 2018, the state made general fund appropriations to the state appellate defender’s office for “statewide training to public defenders” of:⁴⁴

**State’s General Fund Appropriations to State Appellate Defender’s Office
for Statewide Training of Public Defenders**

FY 2012	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017	FY 2018
\$67,000	\$63,000	\$63,000	\$61,600	\$63,000	\$63,000	\$63,000

C. This evaluation

In early 2018, the Illinois Supreme Court applied to the U.S. Department of Justice, Bureau of Justice Assistance, for help in obtaining a statewide evaluation of the indigent defense system(s) in Illinois. On October 2, 2018, the Bureau of Justice Assistance approved a grant for the Sixth Amendment Center, in partnership with the Defender Initiative at Seattle University School of Law, to conduct a statewide evaluation of adult criminal trial-level indigent defense services in Illinois. The Sixth Amendment Center began gathering data and conducting background research immediately.

during FY 2018 to assist public defenders in counties with 2010 populations of less than 400,000 with “contracting with expert witnesses and investigative services in the appropriate cases.” OFFICE OF THE STATE APPELLATE DEFENDER, ANNUAL REPORT FISCAL YEAR – 2018, at 4. There are 97 such counties (excluding Cook, DuPage, Kane, Lake, and Will counties), so this sum would allow for an average of \$1,172 per county.

⁴² 725 ILL. COMP. STAT. § 105/10(c)(5.5) (2018). See Ill. P.A. 97-1003, § 5 (H.B. 5441), eff. Aug. 17, 2012 (enacting 725 ILL. COMP. STAT. § 105/10(c)(5.5)).

⁴³ See ILLINOIS STATE COMPTROLLER, ILLINOIS DETAILED ANNUAL REPORT OF REVENUES AND EXPENDITURES: ILLINOIS FISCAL YEAR 2007, at 153; ILLINOIS STATE COMPTROLLER, ILLINOIS DETAILED ANNUAL REPORT OF REVENUES AND EXPENDITURES: ILLINOIS FISCAL YEAR 2008, at 152; ILLINOIS STATE COMPTROLLER, ILLINOIS DETAILED ANNUAL REPORT OF REVENUES AND EXPENDITURES: ILLINOIS FISCAL YEAR 2009, at 162; ILLINOIS STATE COMPTROLLER, ILLINOIS DETAILED ANNUAL REPORT OF REVENUES AND EXPENDITURES: ILLINOIS FISCAL YEAR 2010; ILLINOIS STATE COMPTROLLER, ILLINOIS DETAILED ANNUAL REPORT OF REVENUES AND EXPENDITURES: ILLINOIS FISCAL YEAR 2011.

⁴⁴ See ILLINOIS STATE COMPTROLLER, DETAILED ANNUAL REPORT OF REVENUES AND EXPENDITURES: ILLINOIS FISCAL YEAR 2012, at 139-40; ILLINOIS STATE COMPTROLLER, DETAILED ANNUAL REPORT OF REVENUES AND EXPENDITURES: ILLINOIS FISCAL YEAR 2013, at 147; ILLINOIS STATE COMPTROLLER, DETAILED ANNUAL REPORT OF REVENUES AND EXPENDITURES: ILLINOIS FISCAL YEAR 2014, at 169; ILLINOIS STATE COMPTROLLER, DETAILED ANNUAL REPORT OF REVENUES AND EXPENDITURES: ILLINOIS FISCAL YEAR 2015, at 147; ILLINOIS STATE COMPTROLLER, DETAILED ANNUAL REPORT OF REVENUES AND EXPENDITURES: ILLINOIS FISCAL YEAR 2016, at 149; ILLINOIS STATE COMPTROLLER, DETAILED ANNUAL REPORT OF REVENUES AND EXPENDITURES: ILLINOIS FISCAL YEAR 2017, at 169; ILLINOIS STATE COMPTROLLER, DETAILED ANNUAL REPORT OF REVENUES AND EXPENDITURES: ILLINOIS FISCAL YEAR 2018, at 179.

Map of Illinois sample counties, and appellate judicial districts

Stephenson County

pop. 2010 census: 47,711
 pop. 2019 est.: 44,498
 county seat: Freeport
 trial judicial circuit: 15th
 appellate judicial district: 2nd

DuPage County

pop. 2010 census: 916,924
 pop. 2019 est.: 922,921
 county seat: Wheaton
 trial judicial circuit: 18th
 appellate judicial district: 2nd

Mercer County

pop. 2010 census: 16,434
 pop. 2019 est.: 15,437
 county seat: Aledo
 trial judicial circuit: 14th
 appellate judicial district: 3rd

Cook County

pop. 2010 census: 5,194,675
 pop. 2019 est.: 5,150,233
 county seat: Aledo
 trial judicial circuit: Cook County
 appellate judicial district: 1st

LaSalle County

pop. 2010 census: 113,924
 pop. 2019 est.: 108,669
 county seat: Ottawa
 trial judicial circuit: 13th
 appellate judicial district: 3rd

Champaign County

pop. 2010 census: 201,081
 pop. 2019 est.: 209,689
 county seat: Urbana
 trial judicial circuit: 6th
 appellate judicial district: 4th

Schuyler County

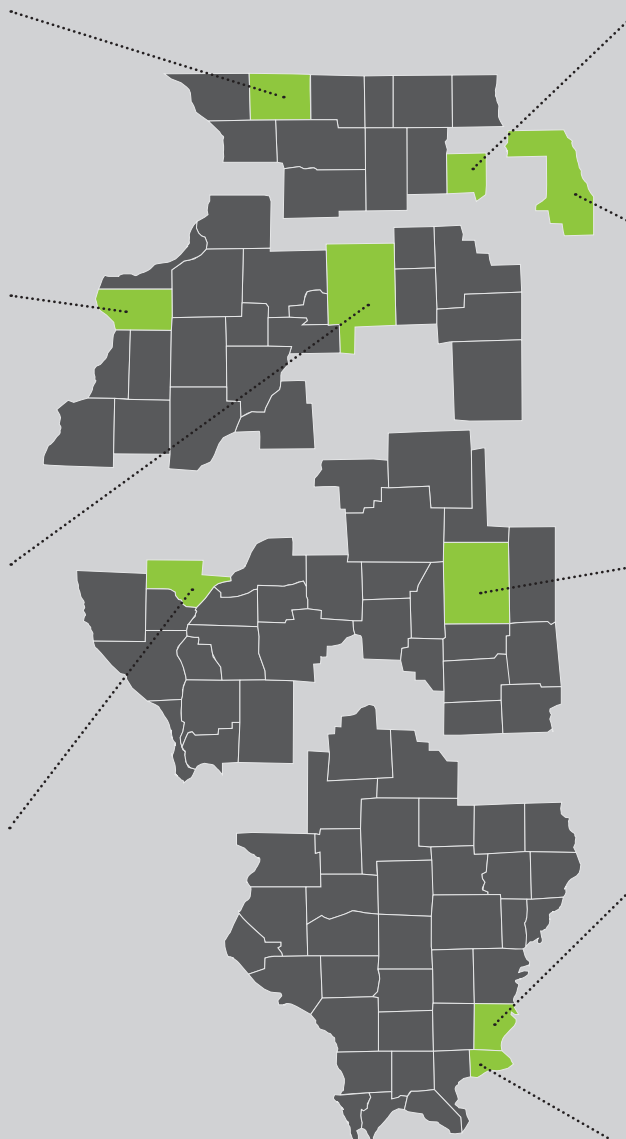
pop. 2010 census: 7,544
 pop. 2019 est.: 6,768
 county seat: Rushville
 trial judicial circuit: 8th
 appellate judicial district: 4th

Gallatin County

pop. 2010 census: 5,589
 pop. 2019 est.: 4,828
 county seat: Shawneetown
 trial judicial circuit: 2nd
 appellate judicial district: 5th

Hardin County

pop. 2010 census: 4,320
 pop. 2019 est.: 3,821
 county seat: Elizabethtown
 trial judicial circuit: 2nd
 appellate judicial district: 5th



Limitations of time and resources prevent most any evaluation from considering every court, indigent defense system, and service provider in a state the size of Illinois. Thus, in March 2019, the Illinois Pre-Trial Practices Commission⁴⁵ selected ten counties as a representative sample of Illinois' diversity in population size, geographic location, rural and suburban and urban centers, and types of indigent defense representation systems believed to be used. Although ten sample counties were originally selected, Madison County ultimately had to be eliminated due to the coronavirus pandemic, leaving the nine representative counties of Champaign, Cook, DuPage, Gallatin, Hardin, LaSalle, Mercer, Schuyler, and Stephenson.

This evaluation was well underway when the coronavirus was detected in the U.S., and the circumstances of the pandemic required some aspects of the evaluation to be conducted in a manner different than that normally employed. The pandemic prevented in-person travel to two of the nine representative counties, which happened to be mid-sized counties, and caused a third mid-sized county to be eliminated from what was originally intended as a ten-county sample. Some sections of the report therefore provide greater detail about Illinois' smaller counties and largest county in some sections of this report.

Methodology. The overall evaluation of Illinois' indigent representation systems and in-depth evaluation of the nine representative counties have been carried out independently and objectively through three basic components.

Data collection and analysis. Information about how a jurisdiction provides right to counsel services exists in a variety of forms, from statistical information to policies and procedures. The site teams obtained and

This evaluation and the coronavirus pandemic

This report evaluates the provision of the Sixth Amendment right to counsel in Illinois based on the laws and procedures of the criminal justice system when there is not a pandemic.

The pandemic procedures in place during much of the evaluation period and at the time of this report's release are, at least for now, considered to be temporary. Even as increasing numbers of people are vaccinated, nobody knows how long the pandemic will go on and how the temporary pandemic procedures will change as the justice system learns and adapt. Nobody can know, today, how much of the temporary changes made to criminal justice procedures during the pandemic may be permanently adopted into state law and court rules.

The data included in this report, for the most part, concludes with Illinois' FY 2019, so it reflects circumstances in the criminal justice system pre-pandemic. It is reasonable for criminal justice system policymakers to expect both fiscal resources and attorney workloads to be dramatically affected for so long as the pandemic continues and quite likely for some number of years following its conclusion.

⁴⁵ At the end of December 2017, the Illinois Supreme Court created a "Pre-Trial Practices Commission" to study, "among other things, pre-trial detention costs. Obviously, the extent to which the indigent accused has access to effective representation has a direct impact on the number of people detained pre-trial," according to the Administrative Office of the Illinois Courts.

Understanding *Cronic* through the American Bar Association’s *ABA Ten Principles of a Public Defense Delivery System*

Adopted by the ABA House of Delegates in 2002, the *ABA Ten Principles*^a are self-described as constituting “the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney.” The *Ten Principles* include the markers of a *Cronic* analysis: independence of the defense function (Principle 1); effective representation by counsel at all critical stages (Principles 3 and 7); sufficiency of time and resources (Principles 4, 5, and 8); and qualifications, supervision, and training of attorneys (Principles 6, 9, and 10).

^a AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (Feb. 2002), available at https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf.

analyzed extensive amounts of hard copy and electronic information from both state and local sources.

Court observations. Right to counsel services in any jurisdiction involve interactions among at least three critical processes: (1) the process individuals experience as their cases advance from accusation through disposition; (2) the process the appointed attorney experiences while representing each person at the various stages of a case; and (3) the substantive laws and procedural rules that govern the justice system in which indigent representation is provided. Between April and December of 2019, in-person interviews and court observations were conducted in Cook (three times), Gallatin, Hardin, LaSalle, Mercer, Schuyler, and Stephenson counties. A follow-up visit to Cook County and site visits to Champaign and DuPage counties were intended to take place between March and July of 2020 but had to be cancelled due to the coronavirus pandemic, causing the balance of the evaluation to be conducted remotely and without the benefit of court observations.

Interviews. No individual component of the justice system operates in a vacuum. Rather, the policy decisions of one component necessarily affect another. Because of this, interviews were conducted orally and in writing with a broad cross-section of stakeholders before, during, and after site visits to Illinois, including judges, court administrators, prosecutors, defense attorneys, court personnel, law enforcement, probation officials, and county officials and their staff.

Assessment criteria. Sixth Amendment case law and national standards for right to counsel services establish the uniform baseline measure for providing attorneys to indigent people, along with the requirements of local and federal laws. The criteria used to assess the effectiveness of indigent defense systems and the attorneys who work within them come primarily from two U.S. Supreme Court cases that were decided on the same day: *United States v. Cronic*⁴⁶ and *Strickland v. Washington*.⁴⁷ *Strickland* looks at a case after it is final, to determine retrospectively whether the lawyer provided ineffective assistance of counsel,

⁴⁶ 466 U.S. 648 (1984).

⁴⁷ 466 U.S. 668 (1984).

applying the two-pronged test of whether the appointed lawyer's actions were unreasonable and prejudiced the outcome of the case. *Cronic* explains that, if certain systemic factors are present (or necessary factors are absent) at the outset of a case, then a court should presume that ineffective assistance of counsel will occur.

Hallmarks of a structurally sound indigent defense system under *Cronic* include the early appointment of qualified and trained attorneys, who have sufficient time and resources to provide effective representation under independent supervision. The absence of any of these factors can show that a system is presumptively providing ineffective assistance of counsel.

The coronavirus pandemic & Illinois' justice system

During the course of this evaluation, the coronavirus pandemic struck the United States and worldwide. As has been widely reported, the novel coronavirus that causes the Covid-19 disease was first detected in late-December 2019 in Wuhan, Hubei Province in China.^a The first U.S. case was confirmed on January 21, 2020 in Washington state.^b The second U.S. case – and the first case in Illinois – was confirmed just three days later on January 24, 2020.^c On March 11, 2020, the World Health Organization officially declared the coronavirus outbreak a pandemic.^d

With 11 confirmed cases and indications of community transmission in Illinois, on March 9, 2020, Governor J.B. Pritzker formally declared a disaster in the state.^e Eleven days later, on March 20, 2020, the governor issued a statewide “stay at home” order, requiring individuals to remain in their homes other than for essential activities, closing all non-essential businesses and operations, and prohibiting gatherings of more than ten people.^f Between March of 2020 and the release of this report, with the number of tests, cases, deaths, and vaccine administrations being reported daily, Illinois (like the rest of the world) has frequently adjusted what people are allowed and disallowed to do within the state.^g

Following the governor’s disaster proclamation, the Illinois Supreme Court issued a memorandum to the judicial branch on March 11, 2020, anticipating the possible need for changes to court operations and services,^h followed by a public statement on March 13, 2020, suggesting that court events might need to be rescheduled or held remotely.ⁱ On March 17, 2020, the Illinois Supreme Court formally ordered all courts in the state to establish “temporary procedures to minimize the impact of Covid-19 on the court system, while continuing to provide access to justice,”^j and on March 20, 2020, authorized all courts to “continue trials for the next 60 days and until further order of this Court.”^k

The chief judge in each circuit is responsible for adopting local Covid-19 plans and a schedule to hear court matters, keeping in mind that “local conditions may change, and their plans should contain contingencies,”^l and taking into consideration the *Supreme Court Guidelines for Resuming Illinois Judicial Branch Operations During the COVID-19 Pandemic*.^m With 24 circuits in the state and conditions in an ongoing state of flux, the procedures temporarily in place differ from circuit to circuit and continue to change fairly frequently within each circuit.ⁿ

^a *WHO Statement regarding cluster of pneumonia cases in Wuhan, China*, WORLD HEALTH ORGANIZATION (Jan. 9, 2020); *Public Health Screening to Begin at 3 U.S. Airports for 2019 Novel Coronavirus (“2019-nCoV”)*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Jan. 17, 2020).

^b *First Travel-related Case of 2019 Novel Coronavirus Detected in United States*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Jan. 21, 2020).

^c *Second Travel-related Case of 2019 Novel Coronavirus Detected in United States*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Jan. 24, 2020); *City of Chicago Announces First Local Patient with Travel-Related Case of 2019-Novel Coronavirus*, ILLINOIS DEPARTMENT OF PUBLIC HEALTH (Jan. 24, 2020).

^d *WHO Director-General’s opening remarks at the media briefing on COVID-19 – 11 March 2020*, WORLD HEALTH ORGANIZATION (Mar. 11, 2020).

^e Illinois Gubernatorial Disaster Proclamation (Mar. 9, 2020).

^f Illinois Exec. Order No. 2020-10 (Mar. 20, 2020).

^g By February 6, 2021, the governor had issued 77 executive orders and 12 proclamations in response to COVID-19. See STATE OF ILLINOIS (COVID-19) RESPONSE, <https://coronavirus.illinois.gov/sl/>.

^h Memorandum from Chief Justice and Justices of the Supreme Court of Illinois to Chairman of the Executive Committee, et al (Mar. 11, 2020).

ⁱ Press Release, Supreme Court of Illinois, Illinois Court Procedures for COVID-19; Supreme Court Livestream (Mar. 13, 2020).

^j Order, *In re Illinois Courts Response to COVID-19 Emergency*, M.R. 30370 (Ill. Mar. 17, 2020).

^k Order, *In re Illinois Courts Response to COVID-19 Emergency / Impact on Trials*, M.R. 30370 (Ill. Mar. 20, 2020).

^l Order, *In re Illinois Courts Response to COVID-19 Emergency*, M.R. 30370 (Ill. May 20, 2020).

^m Order, *In re Illinois Courts Response to COVID-19 Emergency*, M.R. 30370 (Ill. May 20, 2020). See ILLINOIS SUPREME COURT, SUPREME COURT GUIDELINES FOR RESUMING ILLINOIS JUDICIAL BRANCH OPERATIONS DURING THE COVID-19 PANDEMIC (May 20, 2020).

ⁿ See *Court Reestablishment Plans, in COVID-19 Information and Updates*, ILLINOIS COURTS, <http://www.illinoiscourts.gov/Administrative/covid-19.asp>.

Chapter II

The criminal justice system

Criminal justice is often referred to metaphorically as a three-legged stool, relying on judges, prosecutors, and defense attorneys in equal measure. Each leg of the stool has different responsibilities, but the structures, policy decisions, and procedures of each affect the others.

The trial-level right to counsel in Illinois is carried out in the circuit courts of each of the counties. Decisions about the number and type of criminal cases in the circuit courts are made by law enforcement officers as they make arrests and by state's attorneys as they institute prosecution. The indigent defense system attorneys in each Illinois county have no control over the number of criminal cases they are appointed to defend in the trial courts, and each indigent defense system attorney must effectively represent each and every person to whom they are appointed.

For comparative purposes, all descriptive information in this chapter about the criminal justice systems in the nine sample counties is provided for FY 2019. Fiscal years differ among the representative counties and the state. FY 2019 ends:

- June 30, 2019 – for the state
- November 30, 2019 – for the counties of Cook, DuPage, Gallatin, Hardin, LaSalle, Mercer, and Schuyler
- December 31, 2019 – for the counties of Champaign and Stephenson

The information in this chapter focuses on the date of June 30, 2019, at which point all representative counties and the state were within their FY 2019.

A. The courts and judges

There are three levels of courts in Illinois: the Supreme Court, the Appellate Court, and the circuit courts.⁴⁸

⁴⁸ ILL. CONST. art. VI, § 1.

1. Appellate courts

Illinois Supreme Court. The Illinois Supreme Court, with seven elected justices, is the court of last resort and primarily exercises discretionary review.⁴⁹ The supreme court has general administrative and supervisory authority over all Illinois courts, exercised by the chief justice.⁵⁰

Illinois Appellate Court. There is one Illinois Appellate Court, made up of 42 elected appellate court justices.⁵¹ For appellate purposes, the state is divided into five judicial districts, with at least three justices sitting in each district (collectively referred to as a branch of the appellate court).⁵² Each judicial district branch hears the direct appeals (other than any direct appeals to the Illinois Supreme Court) arising out of the trial courts that are geographically located within that judicial district.⁵³

2. Trial courts

The circuit courts are the only trial-level courts in Illinois.⁵⁴ For trial purposes, the state is divided into 24 judicial circuits, with one to 12 counties located within each circuit.⁵⁵ Each judicial circuit court is considered a single body, made up of multiple elected circuit judges and appointed associate judges.⁵⁶ The combined number of circuit judges and associate judges in a single judicial circuit ranges from as few as 10 to approximately 380.⁵⁷ The chief judge of each

⁴⁹ ILL. CONST. art. VI, § 4; 705 ILL. COMP. STAT. §§ 5/7, 8 (2018); 705 ILL. COMP. STAT. § 25/8.2 (2018). Prior to abolition of the death penalty effective July 1, 2011, the supreme court heard death sentence cases on direct appeal from the trial court. ILL. CONST. art. VI, § 4(b); 725 ILL. COMP. STAT. § 5/119-1(a) (2018) (eff. July 1, 2011).

⁵⁰ ILL. CONST. art. VI, § 16; ILL. S. CT. R. 30. The supreme court justices select a chief justice to serve a three-year term. Ill. Const. art. VI, § 3. The chief justice is also the chairperson of the “Judicial Conference,” required by the state’s constitution to “consider the work of the courts and to suggest improvements in the administration of justice.” ILL. CONST. art. VI, § 17; ILL. S. CT. R. 41.

⁵¹ Eighteen justices are elected from the First Judicial District and six justices are elected from each of the other four judicial districts. ILL. CONST. art. VI, § 10; 705 ILL. COMP. STAT. § 25/1 (2018) (as in effect, after changes made by P.A. 89-719 were held unconstitutional).

⁵² ILL. CONST. art. VI, §§ 2, 5; 705 ILL. COMP. STAT. §§ 20/1 – 5, 25/1 (2018) (as in effect, after repeal by P.A. 89-719 was held unconstitutional); 705 ILL. COMP. STAT. § 25/18 (2018); ILL. S. CT. R. 22(a)(1), (b), (d).

⁵³ ILL. CONST. art. VI, § 6; 705 ILL. COMP. STAT. §§ 25/8.1, 9 (2018).

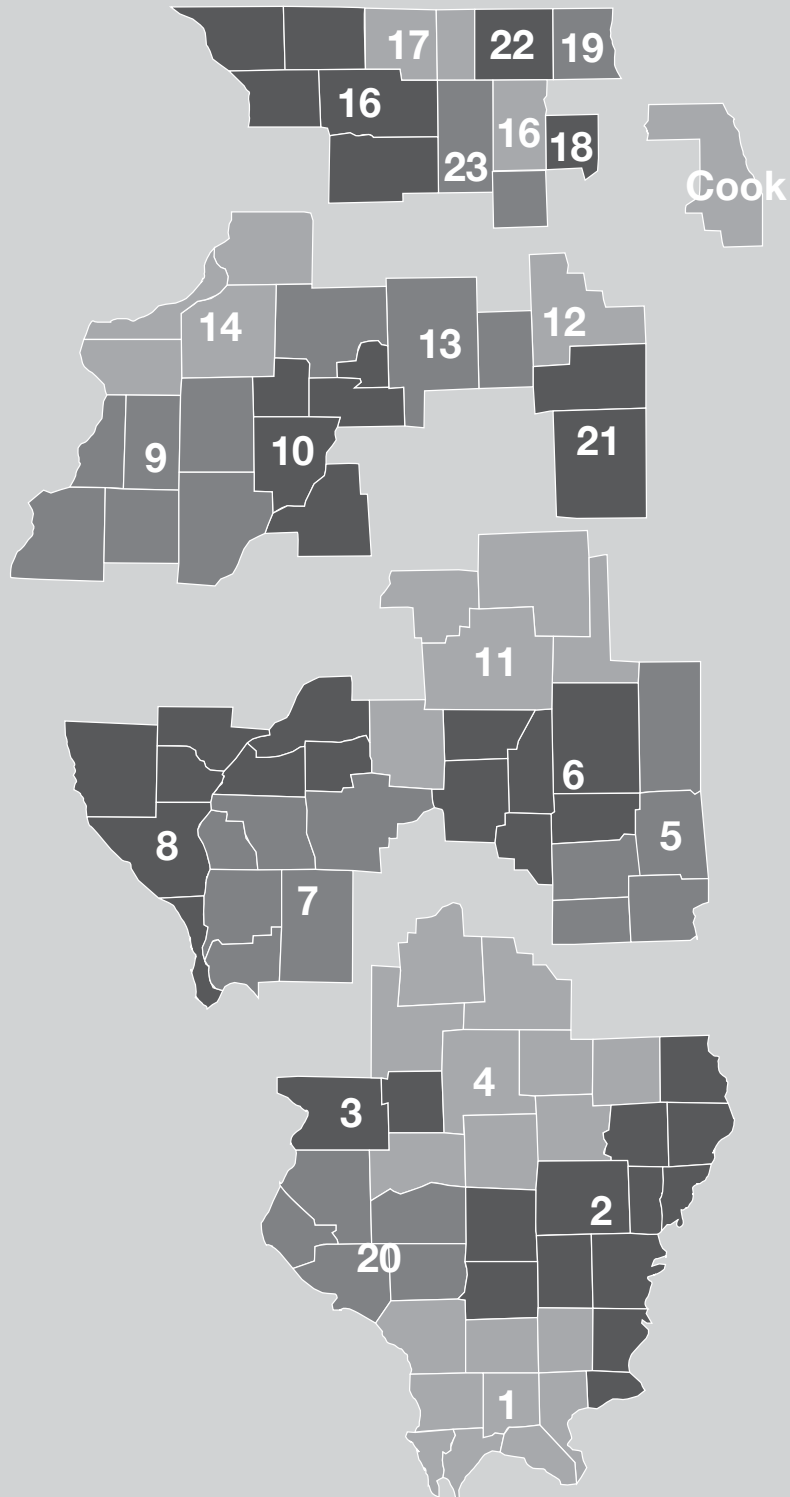
⁵⁴ ILL. CONST. art. VI, § 9; 705 ILL. COMP. STAT. §§ 35/25, 26 (2018).

⁵⁵ ILL. CONST. art. VI, § 7(a); 705 ILL. COMP. STAT. § 35/1 (2018). There are six single-county circuits (Cook, DuPage, Kane, Lake, McHenry, and Will), and the other 18 circuits each cover between two and 12 counties. 705 ILL. COMP. STAT. § 35/1 (2018). The counties within each judicial circuit are responsible for funding the courthouses and the rooms and offices for and expenses of the circuit court and circuit court clerk. 55 ILL. COMP. STAT. § 5/5-1106 (2018).

⁵⁶ ILL. CONST. art. VI, § 7(b); 705 ILL. COMP. STAT. § 35/1 (2018). Within each circuit, “at large” circuit judges are elected by all of the voters of the circuit and “resident” circuit judges are elected by the voters of a geographically defined subcircuit or single county, but all circuit judges have exactly the same jurisdiction and authority within the circuit. ILL. CONST. art. VI, § 7(b); 705 ILL. COMP. STAT. § 35/26 (2018). *See, e.g.*, 705 ILL. COMP. STAT. §§ 22/1 through 90 (2018); 705 ILL. COMP. STAT. § 35/0.01 through 36 (2018); 705 ILL. COMP. STAT. § 40/0.1 through 3 (2018); 705 ILL. COMP. STAT. § 50/1 through 4 (2018). In each circuit, associate judges are appointed to four-year terms by vote of the circuit judges. ILL. CONST. art. VI, §§ 8, 10; ILL. S. CT. R. 39.

⁵⁷ ILL. CONST. art. VI, §§ 7(b), 8; 705 ILL. COMP. STAT. §§ 22/1 – 90, 35/0.01 – 36, 40/0.1 – 3, 45/2 – 6, 50/1 – 4 (2018). *See Illinois Circuit Court Judges by Circuit*, ILLINOIS COURTS, <http://illinoiscourts.gov/CircuitCourt/>

Map of Illinois, showing appellate judicial districts and trial-level judicial circuits



circuit can assign each of the circuit judges and associate judges to specialized divisions and/or to sit at one or more court locations within the circuit.⁵⁸

Circuit court organization and scheduling. Across the 24 judicial circuits, and at the court locations in each county within each circuit, there are significant differences in how the circuit courts operate and schedule their work. In each county, the indigent defense system must provide attorneys for criminal proceedings before as many judges and at as many locations and times as are scheduled by the circuit court. Among the nine sample counties of this evaluation, the courts in Hardin and Gallatin counties illustrate one extreme, while the courts in Cook County represent the opposite extreme.

Circuit court in Hardin and Gallatin counties. Hardin County and Gallatin County, along with 10 other counties, are in the Second Judicial Circuit. The circuit has a combined total of 17 circuit and associate judges who are collectively responsible for all of the trial-level cases of every type in all 12 counties. Hardin and Gallatin counties have the smallest populations by far of the 12 counties in the circuit (they are the first and fifth least populous counties in the state), so fewer judges are needed for fewer days to handle all of the cases than in the other more populous counties of the circuit.

For all criminal cases in Hardin County, one judge conducts all criminal court proceedings on Tuesday of each week. For all criminal cases in Gallatin County, one judge conducts all criminal court proceedings on Monday of each week.

Circuit court in Cook County. Cook County is the most populous county in the state (more than five times that of any other Illinois county and home to over 40% of the state's people), and it is the only county in its judicial circuit. The Circuit Court of Cook County has a combined total of approximately 380 circuit and associate judges who are collectively responsible for all of the trial-level cases of every type heard in 15 separate locations spread across Chicago and its surrounding suburbs.⁵⁹ These judges are assigned into ten divisions and six municipal districts, each with its own presiding judge and responsibility for certain types and stages of cases.⁶⁰

Criminal cases in Cook County are allocated to three of the divisions (domestic violence, criminal, and pretrial) and all six of the municipal districts,⁶¹ with a large number of judges

CircuitCourtJudges/Judges.asp (last visited Dec. 5, 2020).

⁵⁸ ILL. CONST. art. VI, § 7(c); ILL. S. CT. R. 21(c). In each judicial circuit, the circuit judges by “secret ballot” select a chief judge to serve at their pleasure. ILL. CONST. art. VI, § 7(c).

⁵⁹ *Court Locations Map*, CIRCUIT COURT OF COOK COUNTY, <http://www.cookcountycourt.org/ABOUT-THE-COURT/Court-Locations>.

⁶⁰ Operation, Gen. Order No. 1.2 (Cook County Cir. Ct., eff. Aug. 1, 1996); County Department, Gen. Order No. 1.2,2.1 (Cook County Cir. Ct., eff. various dates); Juvenile Justice and Child Protection Department, Gen. Order No. 1.2,2.2 (Cook County Cir. Ct., eff. Aug. 1, 1996); Municipal Department, Gen. Order No. 1.2,2.3 (Cook County Cir. Ct., eff. various dates). See *Organization of the Circuit Court*, CIRCUIT COURT OF COOK COUNTY, <http://www.cookcountycourt.org/ABOUT-THE-COURT/Organization-of-the-Circuit-Court>; *Offices of the Presiding Judges*, CIRCUIT COURT OF COOK COUNTY, <http://www.cookcountycourt.org/ABOUT-THE-COURT/Offices-of-the-Presiding-Judges#103272-chancery-division>.

⁶¹ County Department, Gen. Order No. 1.2,2.1 (Cook County Cir. Ct., eff. various dates); Municipal Department,

sitting in 10 separate court facility locations.⁶² Various stages of criminal court proceedings are heard every day of the year, weekends and holidays included. The table at page 22 shows the complex organization and scheduling for criminal cases in the Circuit Court of Cook County.

Circuit court responsibility for indigent defense system. The State of Illinois has delegated responsibility for certain aspects of the counties' indigent defense systems to the judicial circuit within which a county is located. Illinois statutes provide that:

- A public defender in all counties other than Cook is selected by majority vote of the circuit judges of the circuit in which the county is located, and the public defender holds office at the pleasure of those judges.⁶³
- In all counties other than Cook, the circuit judges, of the circuit in which the county is located, determine the number of assistant public defenders and support staff that are “necessary for the proper discharge of the duties” of the public defender office.⁶⁴
- In counties other than Cook, DuPage, Kane, Lake, and Will, the circuit court must approve all public defender overhead and case-related expenses “as being necessary and proper” *before* the county pays the expense.⁶⁵
- Whenever a private attorney (rather than a public defender or assistant public defender) is appointed to represent an indigent person in any county, the judges choose which private attorney to appoint.⁶⁶
- In all counties, the judges determine the amount of the “reasonable fee” to pay private attorneys for their work when appointed to represent indigent defendants in criminal cases, including for reimbursement of case-related expenses the attorney incurred in representing the indigent defendant.⁶⁷

Gen. Order No. 1.2,2.3 (Cook County Cir. Ct., eff. various dates).

⁶² See *Criminal Division Home*, CIRCUIT COURT OF COOK COUNTY, <http://www.cookcountycourt.org/ABOUT-THE-COURT/County-Department/Criminal-Division>; *Domestic Violence Home*, CIRCUIT COURT OF COOK COUNTY, <http://www.cookcountycourt.org/ABOUT-THE-COURT/County-Department/Domestic-Violence>; *Pretrial Division Home*, CIRCUIT COURT OF COOK COUNTY, <http://www.cookcountycourt.org/ABOUT-THE-COURT/County-Department/Pretrial-Division>; *First Municipal District Home*, Circuit Court of Cook County, <http://www.cookcountycourt.org/ABOUT-THE-COURT/Municipal-Department/First-Municipal-District-Chicago>; *Municipal District 2*, CIRCUIT COURT OF COOK COUNTY, <http://www.cookcountycourt.org/ABOUT-THE-COURT/Municipal-Department/Second-Municipal-District-Skokie>; *Municipal District 3*, CIRCUIT COURT OF COOK COUNTY, <http://www.cookcountycourt.org/ABOUT-THE-COURT/Municipal-Department/Third-Municipal-District-Rolling-Meadows>; *Municipal District 4*, CIRCUIT COURT OF COOK COUNTY, <http://www.cookcountycourt.org/ABOUT-THE-COURT/Municipal-Department/Fourth-Municipal-District-Maywood>; *Municipal District 5*, CIRCUIT COURT OF COOK COUNTY, <http://www.cookcountycourt.org/ABOUT-THE-COURT/Municipal-Department/Fifth-Municipal-District-Bridgeview>; *Sixth Municipal District*, CIRCUIT COURT OF COOK COUNTY, <http://www.cookcountycourt.org/ABOUT-THE-COURT/Municipal-Department/Sixth-Municipal-District-Markham>.

⁶³ 55 ILL. COMP. STAT. § 5/3-4004 (2018).

⁶⁴ 55 ILL. COMP. STAT. § 5/3-4008 (2018).

⁶⁵ 55 ILL. COMP. STAT. § 5/3-4009 (2018).

⁶⁶ 55 ILL. COMP. STAT. § 5/3-4006 (2018); 725 ILL. COMP. STAT. § 5/113-3(b) (2018).

⁶⁷ 725 ILL. COMP. STAT. § 5/113-3(c), (e) (2018).

Criminal Case Progression Through the Cook County Circuit Court

	County Department			Municipal Department					
	Domestic Violence Division	Criminal Division	Pretrial Division	First Municipal District (Chicago)	Second Municipal District (Skokie)	Third Municipal District (Rolling Meadows)	Fourth Municipal District (Maywood)	Fifth Municipal District (Bridgeview)	Sixth Municipal District (Markham)
bail determination (in-custody only)	all case types everywhere in the county								
weekday arrests					suburban felonies and misds.	suburban felonies and misds.	suburban felonies and misds.	suburban felonies and misds.	suburban felonies and misds.
initial appearance	Chicago domestic violence felonies and misds.	Chicago (not DV) felonies		Chicago (not DV) misds.	suburban felonies and misds.	suburban felonies and misds.	suburban felonies and misds.	suburban felonies and misds.	suburban felonies and misds.
preliminary hearing (felonies only)	Chicago domestic violence felonies		Chicago (not DV) felonies – serious	Chicago (not DV) felonies – low level	Chicago (not DV) felonies – low level				
					suburban felonies	suburban felonies	suburban felonies	suburban felonies	suburban felonies
trial	Chicago domestic violence felonies – class 4 and misds.	Chicago domestic violence felonies – class 1, 2, 3		Chicago domestic violence felonies – class 1, 2, 3					
	Chicago (not DV) misds. – jury trials	Chicago (not DV) felonies		Chicago (not DV) misds. – bench trials	Chicago (not DV) felonies – other than murder			Chicago (not DV) felonies – other than murder	
					suburban felonies and misds.	suburban felonies and misds.	suburban felonies and misds.	suburban felonies and misds.	suburban felonies and misds.

Note – suburban cases are heard in the suburban district (second through sixth) in which the crime is alleged to have occurred.

B. The prosecution

Prosecutorial authority in Illinois is divided into four categories.

1. Attorney general

The attorney general is the legal officer of the state.⁶⁸ Among other duties, the attorney general represents the state in all cases in the Illinois Supreme Court and can assist in any trial-level prosecution.⁶⁹ The attorney general may prosecute at both trial and appeal any criminal non-support cases that are referred by the Department of Healthcare and Family Services.⁷⁰

2. State's attorneys appellate prosecutor

The Office of the State's Attorneys Appellate Prosecutor is a state agency in the judicial branch.⁷¹ The office represents the state on appeal, when requested to do so, in all cases arising out of counties other than Cook.⁷² Additionally, the office conducts training and provides "technical trial assistance" for all state's attorneys and law enforcement officers.⁷³

3. State's attorney, in each county

Each county is required to elect a state's attorney to a four-year term, although counties can choose to band together to jointly elect a single state's attorney if they wish.⁷⁴ While in office, a state's attorney is prohibited from the private practice of law, so the elected state's attorney works full-time.⁷⁵

Broadly, the state's attorney is the county's trial lawyer, responsible to "commence and prosecute all actions, suits, indictment and prosecutions, civil and criminal, in the circuit court for his county, in which the people of the State or county may be concerned."⁷⁶ For adult

⁶⁸ ILL. CONST. art. V, § 15.

⁶⁹ 15 ILL. COMP. STAT. § 205/4 (2018).

⁷⁰ 725 ILL. COMP. STAT. § 16/7 (2018).

⁷¹ 725 ILL. COMP. STAT. § 210/3 (2018). The office is overseen by a 10-member board of governors. 725 ILL. COMP. STAT. § 210/3(a) (2018). The board appoints the director of the office, who serves at the pleasure of the board and sets the number of employees in the office along with its budget. 725 ILL. COMP. STAT. §§ 210/4.02, 4.05, 7.01 (2018). The office staff includes the director, four deputy directors, and staff attorneys and administrative employees as necessary. 725 ILL. COMP. STAT. § 210/6 (2018). There is required to be an office location in each of the 2nd, 3rd, 4th, and 5th judicial districts. 725 ILL. COMP. STAT. § 210/4.04 (2018). Funding for the board and offices comes roughly two-thirds from the state's general revenue fund and one-third from counties that use the services of the office (on a pro rata share based on population). 725 ILL. COMP. STAT. §§ 210/9, 210/9.01, 210/9.02, 210/9.03 (2018).

⁷² 725 ILL. COMP. STAT. § 210/4.01(a) (2018). During FY 2018, attorneys in the office represented the state on appeals arising out of all counties other than Cook and one county in the second judicial district. *District Offices*, ILL. STATE'S ATTORNEYS APPELLATE PROSECUTOR, http://www.ilsaap.org/district_offices.htm.

⁷³ 725 ILL. COMP. STAT. § 210/4.10 (2018).

⁷⁴ ILL. CONST. art. VI, § 19; 55 ILL. COMP. STAT. §§ 5/3-9010 through 9012 (2018).

⁷⁵ ILL. CONST. art. VI, § 19; 55 ILL. COMP. STAT. § 5/4-2001(b) (2018).

⁷⁶ 55 ILL. COMP. STAT. § 5/3-9005(a)(1) (2018).

criminal cases, the state's attorney is responsible for prosecuting all felonies and misdemeanors arising in the county,⁷⁷ including county ordinance violations.⁷⁸ In addition to adult criminal cases, the state's attorney also handles in the circuit court: juvenile proceedings, involuntary mental health commitments, and some other civil matters such as civil child support enforcement and termination of parental rights.

The state legislature sets the salary paid to each state's attorney (based on the county's population as of the last federal census).⁷⁹ The county (or counties) out of which a state's attorney is elected is responsible for paying 33 1/3 percent of the state's attorney's salary that was in effect on December 31, 1988, while the state pays the remainder.⁸⁰

Counties are responsible for setting and paying the compensation of assistant state's attorneys (with the state paying a portion of the salary of some number of assistant state's attorneys in certain counties⁸¹) and for funding the overhead and expenses of the state's attorney's office.⁸² Within the funding allocated by a county, a state's attorney "shall control the internal operations of his or her office and procure the necessary equipment, materials, and services to perform the duties of that office" and selects the assistant state's attorneys authorized by the county to be hired.⁸³

State's attorney offices vary across Illinois in terms of their number of employees, number of office locations, organizational structure, and resources. The differences result primarily from the population size of the county, the funding the county is willing to provide, and the decisions made by the elected state's attorney about how to allocate resources within the office.

- Every Illinois county has a full-time elected state's attorney. The state's attorneys in office at the time of this evaluation were elected in November of 2016.
- Some state's attorneys operate alone with no assistant state's attorneys and no support staff, while others oversee large offices. In the nine sample counties during this evaluation, the state's attorney had the assistance of the following number of full-time equivalent positions:

⁷⁷ 55 ILL. COMP. STAT. § 5/3-9005(a)(6) (2018).

⁷⁸ 55 ILL. COMP. STAT. § 5/3-9005(a)(3) (2018) ("The duty of each State's Attorney shall be . . . [t]o commence and prosecute all actions and proceedings brought by any county officer in his official capacity . . .").

⁷⁹ ILL. CONST. art. VI, § 19; 55 ILL. COMP. STAT. §§ 5/4-2001(a), 5/4-3001(a) (2018).

⁸⁰ 55 ILL. COMP. STAT. §§ 5/4-2001(a), 5/4-3001(a) (2018).

⁸¹ The state contributes funds for the salary of some number of assistant state's attorneys: in counties other than Cook where a state mental health institution or correctional institution or senior institution of higher education is located; and in any county including Cook that chooses to participate in prosecution of alcohol-related traffic offenses. 55 ILL. COMP. STAT. §§ 5/4-2001(c), (e), (f), (h), 5/4-3001(b) (2018).

⁸² 55 ILL. COMP. STAT. §§ 5/4-2003, 5/4-2005, 5/5-1106 (2018).

⁸³ 55 ILL. COMP. STAT. §§ 5/3-9006(a), 5/4-2003 (2018).

State’s Attorney Offices in the Nine Sample Counties in FY 2019

County	State’s attorney	Assistant state’s attorneys	Support staff
Hardin County	full-time	0	0
Gallatin County	full-time	0	1
Schuyler County	full-time	0	1
Mercer County	full-time	1	3.5
Stephenson County	full-time	5	4
LaSalle County	full-time	12	12
Champaign County	full-time	21	21
DuPage County ⁸⁴	full-time	combined ⁸⁵ 140	
Cook County ⁸⁶	full-time	combined 1,125.1	

- In all counties, all of the attorneys and support staff in the state’s attorney office are county employees who are eligible to receive county benefits in addition to their compensation to the same extent as other employees in the county.
- Some state’s attorney offices have staff investigators (among their support staff), but in all counties the state’s attorney has at their disposal the entire investigative resources of multiple law enforcement agencies, including the county sheriff, local police forces, and the Illinois state police, as well as any number of other state agencies with law enforcement responsibilities.

4. Municipal prosecutors

Cities and villages in Illinois may choose to have their own municipal prosecutor to prosecute violations of their municipal ordinances,⁸⁷ which can carry jail time as a possible punishment.⁸⁸ In DuPage County, for example, some of the municipalities within the county contract with private attorneys to prosecute municipal traffic offenses. Municipal prosecutors within DuPage County have first option to prosecute traffic cases initiated by the municipality’s law enforcement officers (while the state’s attorney prosecutes traffic cases initiated by the sheriff’s office or the state police).

⁸⁴ The assistant state’s attorneys and support staff in DuPage County are assigned to one of three bureaus (criminal, civil, and administration). Within the criminal bureau, attorneys are further divided into four divisions, and each division handles certain types of cases.

⁸⁵ At least 90 of these positions are assistant state’s attorneys.

⁸⁶ The state’s attorney in Cook County has 17 physical office locations, dispersed across the county. The assistant state’s attorneys and support staff are assigned to one of eight bureaus & task forces, and attorneys are usually further divided into specific divisions or units that are responsible for handling only certain types of cases or stages of cases.

⁸⁷ 65 ILL. COMP. STAT. § 5/1-2-1.1 (2018) (authorizing a municipality’s “corporate attorney” to “prosecute violations of penal ordinances” before the circuit court).

⁸⁸ 65 ILL. COMP. STAT. §§ 5/1-2-1, 1-2-1.1, 1-2-1.2, 1-2-8, 1-2-9 (2018) (municipality penal ordinances); 55 ILL. COMP. STAT. §§ 5/5-1113, 5-1116 (2018) (county penal ordinances).

C. The indigent defense systems

Representation of indigent people in Illinois is divided into two levels.

1. State appellate defender

The Office of the State Appellate Defender is a state agency in the judicial branch.⁸⁹ The office represents indigent defendants on appeal in criminal and delinquent minor proceedings when appointed by a court to do so.⁹⁰ In adult criminal cases, the office is appointed in the vast majority of the appeals from all counties, although the Cook County public defender office handles some indigent criminal appeals. The appellate defender office also operates an “Expungement Program” that provides information about expungements but does not represent people in obtaining expungements.⁹¹ Additionally, the office conducts training for county public defenders.⁹² Although the office is allowed to provide investigative and expert witness assistance to county indigent defense systems,⁹³ it does not do so because the state does not appropriate funds for that purpose.⁹⁴

2. Indigent defense system, in each county

Illinois has delegated responsibility to each county government and/or the circuit court judges to provide and oversee an indigent defense system for the trial-level representation of indigent people, and the counties bear responsibility for nearly all of the necessary funding of those systems. Each county must establish an indigent defense system capable of providing enough attorneys to effectively represent all indigent people to whom they are appointed by a court in all of the types of cases for which Illinois law provides a right to counsel, including: criminal cases

⁸⁹ 725 ILL. COMP. STAT. § 105/3 (2018). The office is overseen by a nine-member commission. 725 ILL. COMP. STAT. § 105/4 (2018). The judges of the Illinois Supreme Court by majority vote appoint the State Appellate Defender to a four-year term, removable only for cause and after a hearing, but the commission may recommend removal if it has reasonable grounds for doing so. 725 ILL. COMP. STAT. §§ 105/5, 105/6(c) (2018). The office staff includes the State Appellate Defender, five deputy defenders (one for each judicial district), and assistant appellate defenders and administrative employees as necessary. 725 ILL. COMP. STAT. § 105/9 (2018). The office *may* “maintain a panel of private attorneys available to serve as counsel on a case basis” and *may* “institute a competitive bidding program under which contracts for the services of attorneys in non-death penalty criminal appeals are awarded to the lowest responsible bidder” in which “gross compensation for completing of a case shall be \$40 per hour but shall not exceed \$2,000 per case.” 725 ILL. COMP. STAT. §§ 105/10(c), 105/10.5 (2018).

⁹⁰ 725 ILL. COMP. STAT. § 105/10(a) (2018).

⁹¹ 725 ILL. COMP. STAT. § 105/10.6 (2018).

⁹² 725 ILL. COMP. STAT. § 105/10(c)(5.5) (2018).

⁹³ 725 ILL. COMP. STAT. § 105/10(c)(4), (5.7) (2018).

⁹⁴ See ILLINOIS STATE COMPTROLLER, ILLINOIS DETAILED ANNUAL REPORT OF REVENUES AND EXPENDITURES: ILLINOIS FISCAL YEAR [individual reports for all years 1997 through 2019].

According to the state appellate defender’s office, it received federal grant funds in the amount of \$113,717 during FY 2018 to assist public defenders in counties with 2010 populations of less than 400,000 with “contracting with expert witnesses and investigative services in the appropriate cases.” OFFICE OF THE STATE APPELLATE DEFENDER, ANNUAL REPORT FISCAL YEAR – 2018, at 4. There are 97 such counties (excluding Cook, DuPage, Kane, Lake, and Will counties), so this sum would allow for an average of \$1,172 per county.

that carry incarceration as a penalty; juvenile delinquency and “minors requiring authoritative intervention” cases; parents and children in abuse and neglect cases; and some other types of civil cases. (See pages 5 to 7, discussing the right to counsel in Illinois.)

a. The state’s framework for county indigent defense systems

State law requires that all representation of indigent people in the Illinois circuit courts is provided either through a public defender office, through private attorneys, or through both.⁹⁵ In establishing these choices, the Illinois legislature explains:

The General Assembly recognizes that quality legal representation in criminal and related proceedings is a fundamental right of the people of the State of Illinois and that there should be no distinction in the availability of quality legal representation based upon a person’s inability to pay. Therefore, it is the intent of the General Assembly to provide for effective county public defender systems throughout the State and encourage the active and substantial participation of the private bar in the representation of indigent defendants.⁹⁶

To provide attorneys to represent indigent adults in criminal cases in the trial courts, state law requires:

- In counties that have a public defender office:
 - the public defender must represent all indigent people to whom they are appointed by the court⁹⁷ – this is the default; and
 - alternatively, “with the consent of the defendant and where the court finds that the rights of the defendant would be prejudiced by the appointment of the public defender,” a private attorney (instead of an attorney in the public defender office) may or shall be appointed:
 - in a Cook County misdemeanor case involving multiple defendants, the court “may” appoint a private attorney for additional defendants;⁹⁸
 - in all counties and cases (other than in a Cook County misdemeanor⁹⁹), the court “shall” appoint a private attorney “if the defendant requests counsel other than the Public Defender.”¹⁰⁰
- In counties that do not have a public defender office, the court “shall” appoint a private attorney.¹⁰¹

⁹⁵ 55 ILL. COMP. STAT. § 5/3-4006 (2018); 725 ILL. COMP. STAT. § 5/113-3(b) (2018).

⁹⁶ 55 ILL. COMP. STAT. § 5/3-4000 (2018).

⁹⁷ 55 ILL. COMP. STAT. § 5/3-4006 (2018).

⁹⁸ 55 ILL. COMP. STAT. § 5/3-4006 (2018); 725 ILL. COMP. STAT. § 5/113-3(b) (2018).

⁹⁹ In a Cook County misdemeanor case involving only a single defendant, state law requires that the court appoint the public defender – never a private attorney. 55 ILL. COMP. STAT. § 5/3-4006 (2018); 725 ILL. COMP. STAT. § 5/113-3(b) (2018).

¹⁰⁰ 55 ILL. COMP. STAT. § 5/3-4006 (2018); 725 ILL. COMP. STAT. § 5/113-3(b) (2018).

¹⁰¹ 725 ILL. COMP. STAT. § 5/113-3(b) (2018).

Throughout Illinois statutes, the terms used to refer to attorneys appointed to represent indigent defendants in adult criminal court proceedings are “the public defender” or “counsel other than the public defender.”¹⁰² When statutes instead use the term “appointed counsel,” it encompasses both public defender office attorneys and private attorneys.¹⁰³

Public defender office. State law establishes a public defender office in each of the counties that have an official U.S. census population of 35,000 or more – 42 counties as of the 2010 U.S. census.¹⁰⁴ In counties with an official U.S. census population of less than 35,000 – 60 counties as of the 2010 U.S. census – the county board may, if it so chooses, create a public defender office.¹⁰⁵ Adjoining counties within the same circuit may create a shared public defender office if they wish.¹⁰⁶

Each county that has a public defender office is responsible for providing “suitable office quarters” and for paying “necessary office, travel and other expenses incurred in the defense of cases.”¹⁰⁷ In counties other than Cook, DuPage, Kane, Lake, and Will, under state law the county board must “appropriate a sufficient sum” to pay the costs of representation in felony cases and the county’s circuit court must approve all public defender office expenses “as being necessary and proper” before the county pays the expense.¹⁰⁸

At least as of July 1, 2019 (if not earlier), every county in Illinois has (whether required or by choice) a public defender office.¹⁰⁹

The public defender. Once a county has a public defender office, state law requires that “the person appointed to such office shall be known as the Public Defender.”¹¹⁰ The state prescribes minimal requirements for the public defender in each county:

- All counties other than Cook.¹¹¹ The public defender is appointed by majority vote of the circuit judges of the circuit in which the county is located, and the public defender serves and can be removed at the pleasure of those judges. The public defender must be a licensed attorney in Illinois. Each county chooses whether the public defender is full-time, or is a part-time public defender who is permitted to also engage in private practice. A full-time public defender’s compensation must be at least 90% of the state’s attorney’s annual compensation.¹¹²

¹⁰² See, e.g., 55 ILL. COMP. STAT. §§ 5/3-4000, 5/3-4006, 725 ILL. COMP. STAT. § 5/113-3 (2018).

¹⁰³ See, e.g., 55 ILL. COMP. STAT. § 5/3-4011 (2018).

¹⁰⁴ 55 ILL. COMP. STAT. § 5/3-4001 (2018). *QuickFacts*, [each Illinois county], U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045219>.

¹⁰⁵ 55 ILL. COMP. STAT. § 5/3-4002 (2018). *QuickFacts*, [each Illinois county], U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045219>.

¹⁰⁶ 55 ILL. COMP. STAT. § 5/3-4003 (2018).

¹⁰⁷ 55 ILL. COMP. STAT. § 5/3-4009 (2018).

¹⁰⁸ 55 ILL. COMP. STAT. §§ 5/3-4009, 5/3-4011 (2018).

¹⁰⁹ Letter from Illinois Dept. of Revenue to [each Illinois county] (July 9, 2019) (regarding “Salary Reimbursement” by state to county for FY 2020).

¹¹⁰ 55 ILL. COMP. STAT. §§ 5/3-4001, 5/3-4002, 5/3-4003 (2018).

¹¹¹ 55 ILL. COMP. STAT. §§ 5/3-4001, 5/3-4002, 5/3-4003, 5/3-4004, 3-4007(b) (2018).

¹¹² State law is worded oddly regarding the compensation and the full-time/part-time nature of the public defender

- Cook County.¹¹³ The public defender is appointed by the county board president, with advice and consent of the full county board, to a six-year term and removable only for good cause or dereliction of duty. The public defender must be a licensed attorney in Illinois and have been licensed to practice law for at least five years, among other more subjective qualifications.¹¹⁴ The public defender must be full-time and cannot have a private law practice. The public defender's compensation "shall be comparable with that paid to circuit court judges, but in no event shall be more than that of the State's Attorney," and must be at least 90% of the state's attorney's annual compensation.

Each county sets the amount of its public defender's compensation and pays that compensation out of the county treasury.¹¹⁵ The state reimburses each county for 66 2/3 percent of the public defender's compensation, "subject to appropriation" of funding by the legislature.¹¹⁶ Because the state reimburses counties for a portion of the public defender's compensation, the state regularly receives current information about the amount each county pays its public defender each month and whether that public defender is full-time or part-time.¹¹⁷ The following table shows the breakdown of full-time and part-time public defenders in all 102 Illinois counties.

in counties with populations less than 35,000. Once these counties establish a public defender office, there are two different provisions that come into play. One provision says: "If the public defender is employed full-time in that capacity, his or her salary must be at least 90% of that county's State's [A]ttorney's annual compensation." 55 ILL. COMP. STAT. § 5/3-4007(b) (2018). A second provision says: "When a Public Defender in a county of 30,000 or more population is receiving not less than 90% of the compensation of the State's Attorney of such county, that Public Defender shall not engage in the private practice of law." 55 ILL. COMP. STAT. § 5/3-4007(a) (2018). This seems to suggest that a county with a population less than 30,000 can choose to have a part-time public defender and pay that part-time public defender 90% or more of the compensation of the state's attorney. There are 52 counties that have 2010 census populations of less than 30,000. See *QuickFacts, [each Illinois county]*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045219>.

¹¹³ 55 ILL. COMP. STAT. §§ 5/3-4004.1, 5/3-4004.2, 5/3-4007(b) (2018).

¹¹⁴ State law additionally requires that the person appointed as the public defender in Cook County must be "an attorney whose practice of law has clearly demonstrated experience in the representation of persons accused of crime; . . . who has had administrative experience; and who is dedicated to the goals of providing high quality representation for eligible persons and to improving the quality of defense services generally." 55 ILL. COMP. STAT. § 5/3-4004.2(a) (2018).

¹¹⁵ 55 ILL. COMP. STAT. § 5/3-4007(a), (c) (2018).

¹¹⁶ 55 ILL. COMP. STAT. § 5/3-4007(b) (2018).

¹¹⁷ Every county treasurer must submit a PTAX-450 salary report every month to the state's department of revenue, signed by both the county treasurer and the county public defender, which serves as the invoice against which the county is reimbursed by the state that month. If a county changes the amount of its public defender's compensation, the county's board must submit a PTAX-451 form to the state's department of revenue, notifying of the adjustment to the public defender's compensation and providing a copy of the board minutes or resolution adopting the change.

The Public Defender in Each of Illinois' 102 Counties

Public defender office	Public defender		
	Full-time	Part-time	
established by state law ¹¹⁸	42 counties	35 counties	7 counties
established by county board ¹¹⁹	60 counties	10 counties	50 counties

State law requires that the public defender “shall keep a record of the services rendered” by the public defender office and file a written report with the county board (quarterly in Cook County; quarterly or monthly in all other counties).¹²⁰

Assistant public defenders and support staff. Once a county has a public defender office, whether there are any assistant public defenders or support staff in that office is decided within each county, according to minimal state requirements:

- All counties other than Cook.¹²¹ The circuit judges, of the circuit in which the county is located, determine the number of assistant public defenders and support staff that are “necessary for the proper discharge of the duties” of the public defender office. The county board sets the compensation for the assistant public defenders and support staff, and the county pays them out of the county treasury. The public defender appoints the specific people to fill the allocated number of positions, and they serve at the pleasure of and may be removed by the public defender.
- Cook County.¹²² The county board determines the number of assistant public defenders

¹¹⁸ Forty-two counties have a 2010 census population of 35,000 or more. See *QuickFacts, [each Illinois county]*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045219>.

The 35 counties that have a full-time public defender are: Adams, Boone, Champaign, Clinton, Coles, Cook, DeKalb, DuPage, Fulton, Grundy, Henry, Jefferson, Kane, Kendall, Knox, Lake, LaSalle, Livingston, Macon, Macoupin, Madison, Marion, McHenry, McLean, Peoria, Rock Island, Sangamon, Stephenson, Tazewell, Vermilion, Whiteside, Will, Williamson, Winnebago, and Woodford. Letter from Illinois Dept. of Revenue to [each Illinois county] (July 9, 2019) (regarding “Salary Reimbursement” by state to county for FY 2020 and notifying whether public defender is full-time or part-time).

The seven counties that have a part-time public defender are: Franklin, Jackson, Kankakee, Lee, Morgan, Ogle, and St. Clair. Letter from Illinois Dept. of Revenue to [each Illinois county] (July 9, 2019) (regarding “Salary Reimbursement” by state to county for FY 2020 and notifying whether public defender is full-time or part-time).

¹¹⁹ Sixty counties have a 2010 census population of less than 35,000. See *QuickFacts, [each Illinois county]*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045219>.

The 10 counties that have a full-time public defender are: Christian, Clay, DeWitt, Effingham, Fayette, McDonough, Montgomery, Perry, Richland, and Shelby. Letter from Illinois Dept. of Revenue to [each Illinois county] (July 9, 2019) (regarding “Salary Reimbursement” by state to county for FY 2020 and notifying whether public defender is full-time or part-time).

The 50 counties that have a part-time public defender are: Alexander, Bond, Brown, Bureau, Calhoun, Carroll, Cass, Clark, Crawford, Cumberland, Douglas, Edgar, Edwards, Ford, Gallatin, Greene, Hamilton, Hancock, Hardin, Henderson, Iroquois, Jasper, Jersey, Jo Daviess, Johnson, Lawrence, Logan, Marshall, Mason, Massac, Menard, Mercer, Monroe, Moultrie, Piatt, Pike, Pope, Pulaski, Putnam, Randolph, Saline, Schuyler, Scott, Stark, Union, Wabash, Warren, Washington, Wayne, and White. Letter from Illinois Dept. of Revenue to [each Illinois county] (July 9, 2019) (regarding “Salary Reimbursement” by state to county for FY 2020 and notifying whether public defender is full-time or part-time).

¹²⁰ 55 ILL. COMP. STAT. §§ 5/3-4010, 5/3-4010.1 (2018).

¹²¹ 55 ILL. COMP. STAT. §§ 5/3-4004, 5/3-4008 (2018).

¹²² 55 ILL. COMP. STAT. § 5/3-4008.1 (2018).

and support staff, sets their compensation, and pays them out of the county treasury. The public defender appoints the specific people to fill the allocated number of positions, and they serve at the pleasure of and may be removed by the public defender.

Private attorneys. Because the scope of this evaluation is limited to the provision of counsel to indigent adults in trial-level criminal cases, this section does not attempt to discuss Illinois state law requirements for county indigent defense systems to provide the private attorneys who are appointed to represent indigent people in all of the other types of cases for which Illinois guarantees a right to counsel. (See pages 5 to 7, discussing the right to counsel in Illinois.)

Private attorneys appointed in adult criminal trial-level cases. When a private attorney is appointed in an adult criminal trial-level case, state law requires the circuit court judges to appoint an attorney who is licensed to practice law in Illinois.¹²³ State law requires the circuit court judges to determine the amount of the compensation paid to the private attorney appointed in an adult criminal case:¹²⁴

- All counties. The court “shall order” the county to pay a “reasonable fee” for “services rendered,” considering “all relevant circumstances, including” the time spent and expenses reasonably incurred by the attorney.¹²⁵
- Limitations in Cook County. In Cook County only:
 - expenses “may” be reimbursed “not to exceed \$50 for each defendant,”¹²⁶ and
 - payment for the lawyer’s time cannot be more than \$40 per hour in-court and \$30 per hour out-of-court, capped at \$150 per misdemeanor case and \$1,250 per felony case, *except* “in extraordinary circumstances, payment in excess of the limits herein stated may be made if the trial court certifies that such payment is necessary to provide fair compensation for protracted representation.”¹²⁷

Each county is required by state law to pay the amounts ordered by the circuit court judges for cases arising out of that county.¹²⁸ In counties other than Cook, DuPage, Kane, Lake, and Will, the county board must “appropriate a sufficient sum” to pay the costs in felony cases.¹²⁹

Determining when a private attorney must be appointed. As explained previously, in counties that have a public defender office (as do all Illinois counties today), the need to appoint a private attorney arises when a court determines that “the rights of the defendant would be prejudiced by the appointment of the public defender”¹³⁰ – commonly referred to as a conflict of interest.

As recognized by the *Illinois Rules of Professional Conduct*, there are generally three ways in which a lawyer can have a conflict of interest in a defendant’s case:¹³¹

¹²³ 725 ILL. COMP. STAT. § 5/113-3(b) (2018).

¹²⁴ 55 ILL. COMP. STAT. §§ 5/3-4006 (2018); 725 ILL. COMP. STAT. § 5/113-3(c)-(e) (2018).

¹²⁵ 725 ILL. COMP. STAT. § 5/113-3(c) (2018).

¹²⁶ 725 ILL. COMP. STAT. § 5/113-3(e) (2018).

¹²⁷ 725 ILL. COMP. STAT. § 5/113-3(c) (2018).

¹²⁸ 725 ILL. COMP. STAT. § 5/113-3(c) (2018).

¹²⁹ 55 ILL. COMP. STAT. § 5/3-4011 (2018).

¹³⁰ 55 ILL. COMP. STAT. § 5/3-4006 (2018); 725 ILL. COMP. STAT. § 5/113-3(b) (2018).

¹³¹ ILL. R. PROF’L CONDUCT (2010) R. 1.7, 1.9 (eff. Jan. 1, 2010).

- when a lawyer represents, at the same time, two clients who have conflicting interests;
- when a lawyer's current client has interests that conflict with those of the lawyer's former client or a third person with whom the lawyer has a relationship; and
- when the lawyer's own personal interests conflict with those of the lawyer's client.

Generally, unless a client gives "informed consent," a lawyer cannot represent a client if the lawyer has a conflict of interest.¹³²

Each and every defendant has a right to effective representation that is free from conflicts of interest.¹³³ Nearly 80 years ago, the United States Supreme Court stated in *Glasser v. United States*, "'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests."¹³⁴ Likewise, the Illinois Supreme Court has long held that "[e]ffective assistance means assistance by an attorney whose allegiance to his client is not diluted by conflicting interests or inconsistent obligations."¹³⁵

b. The indigent defense systems in the nine sample counties

This evaluation closely studied nine Illinois counties to understand how the county government and the circuit court judges carry out the responsibilities delegated to them by the state to provide, oversee, and fund their county's indigent defense system. With one exception,¹³⁶ in each of these nine counties, the county board and circuit court judges have established a single indigent defense system to represent all indigent people in all of the types of cases for which Illinois law provides a right to counsel, including: criminal cases that carry incarceration as a penalty; juvenile delinquency cases and "minors requiring authoritative intervention" cases; parents and children in abuse & neglect cases; and some other types of civil cases. (See pages 5 to 7, discussing the right to counsel in Illinois.)

The indigent defense systems in the nine representative counties vary greatly and are described individually from least populous to most populous. (See table at page 33, briefly illustrating the indigent defense systems in the nine study counties.) With 102 counties in the state, it is likely that any or all of those counties present even greater variations in their indigent defense systems, yet the State of Illinois has no method of knowing.

¹³² ILL. R. PROF'L CONDUCT (2010) R. 1.7, 1.9 (eff. Jan. 1, 2010).

¹³³ See, e.g., *Wood v. Georgia*, 450 U.S. 261, 271 (1981) ("Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest."); *Cuyler v. Sullivan*, 446 US 335, 346 (1980) ("Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial."); *Glasser v. United States*, 315 U.S. 60, 70 (1942).

¹³⁴ *Glasser v. United States*, 315 U.S. 60, 70 (1942).

¹³⁵ *People v. Spreitzer*, 123 Ill. 2d 1, 13-14, 525 N.E.2d 30 (Ill. 1988) (citing *People v. Washington*, 101 Ill.2d 104, 110 (1984); *People v. Franklin*, 75 Ill.2d 173 (1979); *People v. Kester*, 66 Ill.2d 162 (1977); *People v. Stoval*, 40 Ill.2d 109 (1968)).

¹³⁶ The DuPage County public defender office is not responsible for representing indigent defendants in cases under the sexually violent persons act and the sexually dangerous persons act.

Indigent Defense Systems in the Nine Sample Counties in FY 2019

County	Public Defender Office				Private Attorneys (for conflict of interest cases)
		Public defender	Assistant public defenders	Support staff	
Hardin	optional	part-time, employee	0	0	In the first instance: none (other county public defender, no compensation); otherwise: case-by-case, paid hourly
Gallatin	optional	part-time, contractor	0	0	In the first instance: none (other county public defender, no compensation); otherwise: case-by-case, paid hourly
Schuyler	optional	part-time, employee	0	0	case-by-case, paid hourly
Mercer	optional	part-time, employee	0	0	criminal, delinquency, and delinquency appeal: contract, fixed annual fee; other: case-by-case, paid hourly
Stephenson	required	full-time, employee	3 full-time 2 part-time	2 full-time	none
LaSalle	required	full-time, employee	4 part-time	3 full-time	none other than dependency cases; dependency cases: in the first instance: contract, fixed annual fee; otherwise: list of qualified attorneys, paid hourly
Champaign	required	full-time, employee	13 full-time	4 full-time	none in single party cases; none in criminal & delinquency cases for 1st & 2nd codefendants; criminal & delinquency cases 3rd & 4th codefendants: 2 contracts, fixed annual fee; otherwise: case-by-case, paid hourly
DuPage	required	full-time, employee	29 full-time	14 full-time	none
Cook	required	full-time, employee	505 full-time	179 full-time	none in adult criminal misdemeanor cases; rarely in adult criminal felony cases: case-by-case, paid hourly

Hardin County. Located at the southeastern corner of the state on the border with Kentucky, Hardin County has a 2010 U.S. Census population of 4,320,¹³⁷ making it the smallest county by population in Illinois.

Public defender office. Hardin County has a public defender office voluntarily created by the county board.¹³⁸ The county does not provide office facilities; instead, the business of the public defender office is conducted out of the private law office of the appointed public defender.

The appointed public defender is a salaried employee of Hardin County, who serves part-time and is allowed to maintain a private law practice. Additionally, the public defender provides representation when appointed in conflict cases in neighboring Gallatin County for no additional compensation.

There are no assistant public defenders and no support staff.

Private attorneys. Conflict representation is provided in the first instance by the public defender of neighboring Gallatin County, and Hardin County does not pay anything for this conflict representation.

For any additional conflict representation, private attorneys are appointed on a case-by-case basis and paid an hourly rate.

Gallatin County. Located at the southeastern corner of the state on the borders with Indiana and Kentucky, Gallatin County has a 2010 U.S. Census population of 5,589.¹³⁹

Public defender office. Gallatin County has a public defender office voluntarily created by the county board.¹⁴⁰ The county does not provide office facilities but does provide a \$100 per month overhead stipend; instead, the business of the public defender office is conducted out of the private law office of the appointed public defender.

The appointed public defender works under a fixed-fee contract with Gallatin County,¹⁴¹ serves part-time, and is allowed to maintain a private



¹³⁷ See *Quickfacts: Hardin County, Illinois*, UNITED STATES CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/hardincountyillinois,US/PST045219>.

¹³⁸ “Resolution” by the Board of Commissioners for the County of Hardin (Nov. 7, 1991).

¹³⁹ See *Quickfacts: Gallatin County, Illinois*, UNITED STATES CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/gallatincountyillinois,US/PST045219>.

¹⁴⁰ “Resolution” by the Gallatin County Board (Oct. 10, 2001).

¹⁴¹ “Gallatin County, Illinois Public Defence Contract” between the County of Gallatin and [named attorney] (Oct. 17, 2019). Under the contract, the public defender does not handle appeals. “Gallatin County, Illinois Public Defence Contract” between the County of Gallatin and [named attorney], ¶ 2 (Oct. 17, 2019).

law practice.¹⁴² Additionally, the public defender is required to provide representation when appointed in conflict cases in neighboring Hardin County for no additional compensation.¹⁴³

There are no assistant public defenders and no support staff.

Private attorneys. Conflict representation is provided in the first instance by the public defender of neighboring Hardin County, and Gallatin County does not pay anything for this conflict representation.

For any additional conflict representation, private attorneys (most often those who are appointed public defenders or assistant public defenders in other counties) are appointed on a case-by-case basis and paid an hourly rate.

Schuyler County. Located centrally on the western side of the state, just one county removed from the borders with Iowa and Missouri, Schuyler County has a 2010 U.S. Census population of 7,544.¹⁴⁴

Public defender office. Schuyler County has a public defender office voluntarily created by the county board. The county provides a private room in the courthouse for the business of the public defender office.

The appointed public defender is a salaried employee of Schuyler County,¹⁴⁵ who serves part-time and is allowed to maintain a private law practice.¹⁴⁶

There are no assistant public defenders and no support staff.¹⁴⁷

Private attorneys. Private attorneys are appointed on a case-by-case basis and paid an hourly rate.



¹⁴² “Gallatin County, Illinois Public Defence Contract” between the County of Gallatin and [named attorney], ¶ 5 (Oct. 17, 2019). The public defender is contractually required to appear in court in Gallatin County “every Monday and the second and fourth Thursday of every month.” “Gallatin County, Illinois Public Defence Contract” between the County of Gallatin and [named attorney], ¶ 2 (Oct. 17, 2019).

¹⁴³ “Gallatin County, Illinois Public Defence Contract” between the County of Gallatin and [named attorney], ¶ 2 (Oct. 17, 2019).

¹⁴⁴ See *Quickfacts: Schuyler County, Illinois*, UNITED STATES CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/schuylercountyillinois,US/PST045219>.

¹⁴⁵ “Resolution No. 2014-R-28” by the Schuyler County Board (Oct. 13, 2014). See Order, No. 2014-CA-29 (Ill. 8th Jud. Cir. Schuyler Cty., Oct. 21, 2014).

¹⁴⁶ The Schuyler County public defender’s private law practice is located about 60 miles away in Adams County. The Schuyler County public defender is also the appointed public defender in Brown County under separate compensation.

¹⁴⁷ The Schuyler County public defender has one secretary in his private law office, who devotes approximately 25% of her time to the work of the public defender office.

Mercer County.¹⁴⁸ Located in the northwestern part of the state on the border with Iowa, Mercer County has a 2010 U.S. Census population of 16,434.¹⁴⁹

Public defender office. Mercer County has a public defender office voluntarily created by the county board. The county offered to provide space in the courthouse basement, but the public defender declined, and the business of the public defender office is instead conducted out of the private law office of the appointed public defender which is located about 45 minutes away in a different county.

The appointed public defender is a salaried employee of Mercer County and does not receive any benefits from the county.¹⁵⁰ The public defender serves part-time and is allowed to maintain a private law practice.¹⁵¹

There are no assistant public defenders and no support staff.¹⁵²

Private attorneys. Mercer County contracts with one private attorney¹⁵³ to provide representation whenever appointed by the court, in exchange for a fixed annual fee, for trial-level felonies and misdemeanors and for appeals of juvenile delinquencies.¹⁵⁴

For all other conflict representation, private attorneys are appointed on a case-by-case basis and paid an hourly rate.



¹⁴⁸ The person who was the appointed public defender at the time of the in-person site visit to Mercer County was subsequently appointed to a judgeship in February 2020. As a result, some of the circumstances reported for Mercer County have likely changed.

¹⁴⁹ See *Quickfacts: Mercer County, Illinois*, UNITED STATES CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/mercercountyillinois,US/PST045219>.

¹⁵⁰ “Resolution” by the County Board of Mercer County, Illinois (Dec. 1, 2010); Administrative Order Appointing [named attorney] as Public Defender of Mercer County, No. 10CA-19 (Ill. 14th Jud. Cir. Mercer Cty. Dec. 1, 2010); “Resolution” by the County Board of Mercer County, Illinois (Jan. 4, 2011).

¹⁵¹ The Mercer County public defender’s private law practice is located about 45 minutes away in Rock Island County.

¹⁵² The Mercer County public defender has one secretary in his private law office, who devotes approximately 70% of her time to the work of the public defender office.

¹⁵³ This contract private attorney’s private law practice is located about 45 minutes away in Rock Island County.

¹⁵⁴ “Mercer County Conflict Attorney Agreement” between the County of Mercer and [named attorney] (June 9, 2016).

Stephenson County. Located near the northwest corner of the state on the border with Wisconsin, Stephenson County has a 2010 U.S. Census population of 47,708.¹⁵⁵

Public defender office. Stephenson County has a public defender office created by state law.¹⁵⁶ The county provides office space in the courthouse for the business of the public defender office.

The appointed public defender is a salaried employee of Stephenson County and serves full-time.

There are three full-time assistant public defenders who are salaried employees of the county, and two part-time assistant public defenders under contract with the public defender office.¹⁵⁷ There are two full-time support staff (one receptionist and one office manager) who are employees of the county.

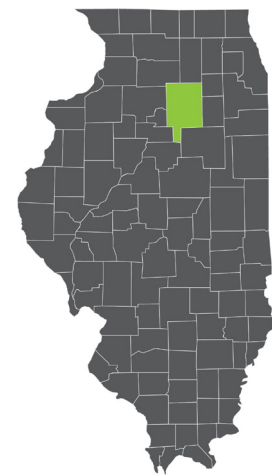
Private attorneys. None – conflict cases are re-assigned to a different assistant public defender.¹⁵⁸



LaSalle County. Located centrally in the northern half of the state, LaSalle County has a 2010 U.S. Census population of 113,924,¹⁵⁹ and it is geographically the second largest county in the state, covering 1,135 square miles.

Public defender office. LaSalle County has a public defender office created by state law.¹⁶⁰ The county provides office space in the government complex for the business of the public defender office.

The appointed public defender is a salaried employee of LaSalle County and serves full-time.¹⁶¹ The public defender is also required to provide representation when appointed in conflict cases in neighboring Bureau County and Grundy County for no additional compensation.



¹⁵⁵ See *Quickfacts: Stephenson County, Illinois*, UNITED STATES CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/stephensoncountyillinois,US/PST045219>.

¹⁵⁶ 55 ILL. COMP. STAT. § 5/3-4001 (2018).

¹⁵⁷ Beginning January 1, 2019, there were two part-time assistant public defenders under oral contract with the public defender office, one to provide juvenile delinquency representation and one to provide dependency representation, who each worked one day per week. Both positions were eliminated effective January 1, 2020: the public defender eliminated one of the contracts due to FY 2020 budget cuts, and the other attorney chose not to renew their contract.

¹⁵⁸ Private attorneys would only be appointed in the unlikely circumstance that all four public defender office attorneys have a conflict in the same case or that there are more than four indigent parties in the same case. In these exceedingly rare circumstances, private attorneys are appointed on a case-by-case basis and paid an hourly rate.

¹⁵⁹ See *Quickfacts: LaSalle County, Illinois*, UNITED STATES CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/lasallecountyillinois,US/PST045219>.

¹⁶⁰ 55 ILL. COMP. STAT. § 5/3-4001 (2018).

¹⁶¹ Until 2016, the LaSalle County public defender served part-time.

There are four part-time assistant public defenders, who are salaried employees of the county and who are allowed to maintain a private law practice.¹⁶² Additionally, the assistant public defenders are required to provide representation when appointed in conflict cases in neighboring Bureau County and Grundy County for no additional compensation. There are three full-time support staff (two investigators¹⁶³ and one office manager) who are employees of the county.

Private attorneys. None in criminal and juvenile delinquency cases – conflict cases are re-assigned to a different assistant public defender.¹⁶⁴

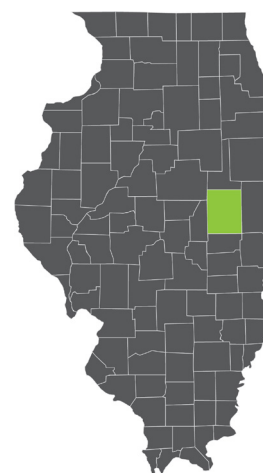
For conflict representation in dependency cases, LaSalle County contracts with one private attorney to represent parents whenever appointed by the court in exchange for a fixed annual fee,¹⁶⁵ and the circuit court maintains a list of qualified private attorneys eligible to be appointed in child custody cases and paid an hourly rate.¹⁶⁶

Champaign County. Located centrally on the eastern side of the state, just one county removed from the border with Indiana, Champaign County has a 2010 U.S. Census population of 201,081.¹⁶⁷

Public defender office. Champaign County has a public defender office created by state law.¹⁶⁸ The county provides office space located in the courthouse for the business of the public defender office.

The appointed public defender is a salaried employee of Champaign County and serves full-time.

There are 13 full-time assistant public defenders who are salaried employees of the county. There are four full-time support staff (one investigator, two legal secretaries, and one executive assistant) who are employees of the county.¹⁶⁹



¹⁶² No two attorneys employed by the LaSalle County public defender’s office can be members of the same legal firm or “connected in the practice of law in any manner” with the appointed LaSalle County public defender or with the other part-time assistant public defenders. General Order No. 92-13 (Ill. 13th Jud. Cir. Jan. 24, 1992).

¹⁶³ The investigators are also responsible for any investigations requested by the public defender office attorney(s) in Bureau County.

¹⁶⁴ In the unlikely circumstance that all five public defender office attorneys have a conflict in the same case or that there are more than six indigent parties in the same case, then the public defender office attorneys from neighboring Bureau County and Grundy County are appointed and LaSalle County does not pay anything for this conflict representation.

¹⁶⁵ LaSalle County Board Resolution No. 18-228 (Nov. 29, 2018).

¹⁶⁶ ILL. 13TH JUD. CIR. LOCAL R. PRAC. R. 8.14 (effective August 1, 1984, including amendments received through March 30, 2017).

¹⁶⁷ See *Quickfacts: Champaign County, Illinois*, UNITED STATES CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/champaigncountyillinois,US/PST045219>.

¹⁶⁸ 55 ILL. COMP. STAT. § 5/3-4001 (2018).

¹⁶⁹ Because of the proximity of the University of Illinois campus, the public defender office has five to ten unpaid interns year-round, including law school interns, social work interns, and undergraduate interns.

Private attorneys. None for single party cases and for the first and second codefendants in multi-defendant criminal and delinquency cases – conflict cases are re-assigned to a different assistant public defender.

In multi-defendant criminal and delinquency cases:

- for the third co-defendant, Champaign County contracts with a private attorney to provide representation whenever appointed by the court in a conflict criminal case in exchange for a fixed annual fee; and
- for the fourth co-defendant, Champaign County contracts with a different private attorney to provide representation whenever appointed by the court in a conflict criminal case in exchange for a fixed annual fee.

For other conflict representation, private attorneys are appointed on a case-by-case basis and paid an hourly rate.

DuPage County. Located in the northeastern part of the state and separated from Lake Michigan by only Cook County, DuPage County has a 2010 U.S. Census population of 916,741,¹⁷⁰ making it the second largest county by population in the state.



Public defender office. DuPage County has a public defender office created by state law.¹⁷¹ The public defender office is not responsible for representing indigent defendants in cases under the sexually violent persons act and the sexually dangerous persons act.¹⁷² The county provides offices located in the courthouse for the business of the public defender office.

The appointed public defender is a salaried employee of DuPage County and serves full-time.

There are 29 full-time assistant public defenders who are salaried employees of the county.¹⁷³ There are 14 full-time support staff who are employees of the county (six investigators, one mental health clinician, two administrative assistants, and five legal secretaries). Because of the size of the public defender office, it is common for one or more assistant public defender and support staff positions to be vacant at any given time.

¹⁷⁰ See *Quickfacts: DuPage County, Illinois*, UNITED STATES CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/dupagecountyillinois,US/PST045219>.

¹⁷¹ 55 ILL. COMP. STAT. § 5/3-4001 (2018).

¹⁷² DuPage County contracts with one private attorney to provide representation whenever appointed by the court to represent indigent defendants in cases under the sexually violent persons act and the sexually dangerous persons act, in exchange for a fixed annual fee. See DuPage County Judicial and Public Safety Committee Final Minutes (Oct. 2, 2018). This contract also provides for the private attorney to provide representation whenever appointed by the court in conflict cases, but this has not occurred in DuPage County since at least 2010.

¹⁷³ The assistant public defenders are assigned to one of three sections: felony, misdemeanor, or juvenile.

Private attorneys. None – conflict cases are re-assigned to a different assistant public defender.¹⁷⁴

Cook County. Located at the northeastern corner of the state bordering Lake Michigan and Indiana, Cook County is home to Chicago and has a 2010 U.S. Census population of 5,194,675,¹⁷⁵ making it by far the most populous of all Illinois counties with over five times the population of the next largest county.



Public defender office. Cook County has a public defender office created by state law,¹⁷⁶ and it is the longest-existing public defender office in the state.¹⁷⁷ The county provides office space in 12 separate physical office locations spread across the county, most often within courthouse facilities, for the business of the public defender office.¹⁷⁸

The appointed public defender is a salaried employee of Cook County and serves full-time.¹⁷⁹

There are 505 full-time assistant public defenders who are salaried employees of the county.¹⁸⁰

¹⁷⁴ The DuPage County public defender office policy is to only seek to withdraw if there is a conflict with respect to the appointed public defender personally, but this has not occurred in DuPage County since at least 2010. The county contracts with one private attorney to provide representation in all appointed cases under the sexually violent persons act and the sexually dangerous persons act and, if needed, to provide representation in conflict cases, in exchange for a fixed annual fee of not to exceed \$47,000. *See* DuPage County Judicial and Public Safety Committee Final Minutes (Oct. 2, 2018).

Effective May 1, 2019, the circuit court contracts with one private attorney to provide representation “to abused, neglected, dependent or delinquent minors or family members in cases, where the DuPage County Public Defender may not represent a party, including appeals in these matters,” in exchange for a fixed annual fee of \$45,000. Agreement, between the Eighteenth Judicial Circuit Court of DuPage County and [named attorney] (Apr. 2019).

¹⁷⁵ *See Quickfacts: Cook County, Illinois*, UNITED STATES CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/cookcountyillinois,US/PST045219>.

¹⁷⁶ 55 ILL. COMP. STAT. § 5/3-4001 (2018).

¹⁷⁷ The Cook County board of commissioners first established the county’s public defender office in 1930, though a state appellate court held that the county board lacked statutory authority to do so at that time. *See Cocot v. Bd. of Comm’rs of Cook Cty.*, 273 Ill. App. 75, 83 (Ill. App. Ct. 1933). In 1933, the state legislature statutorily authorized counties of more than 500,000 – then, only Cook County – to create a public defender office (and therefore to spend public funds to provide counsel to indigent people charged with crimes). 1933 ILL. LAWS, p. 430, § 1 (enacting CAHILL’S ST. ch. 37, ¶ 539 *et seq.*).

¹⁷⁸ *Office Directory*, LAW OFFICE OF THE COOK COUNTY PUBLIC DEFENDER, <https://www.cookcountypublicdefender.org/about/locations>.

¹⁷⁹ As required by state law only for Cook County, the appointed public defender in Cook County is appointed by the county board president with advice and consent of the full county board. 55 ILL. COMP. STAT. § 5/3-4004.1 (2018). Also as required by state law only for Cook County, the public defender is appointed to a six-year term and is removable during that term only for good cause or dereliction of duty. 55 ILL. COMP. STAT. § 5/3-4004.2(c) (2018). The Cook County public defender in place during this evaluation was appointed and sworn into office on April 1, 2015.

¹⁸⁰ The assistant public defenders (and support staff) are assigned to either the administration headquarters or to one of 21 divisions within the public defender office. Each of the 21 divisions are responsible for handling only certain types of cases or stages of cases or specialized aspects of representation (11 divisions for adult criminal proceedings; 3 divisions for juvenile and civil proceedings; and 7 divisions for administrative and litigation support).

There are 179 full-time support staff who are employees of the county (62 investigators, 10 social work & mitigation, 3 interpreters, 2 paralegals, 102 other support positions). Because of the size of the public defender office, there are always many vacant positions among assistant public defenders and support staff at any given time.¹⁸¹

Private attorneys. None in adult criminal misdemeanor cases and rarely in adult criminal felony cases¹⁸² – conflict criminal cases are re-assigned to a different assistant public defender.¹⁸³

D. Unintended consequences of the state’s framework for county criminal justice systems

The state has delegated to each county the responsibility for funding much of the cost of both their state’s attorney office and their indigent defense system,¹⁸⁴ so each county’s board must make decisions about how to allocate limited county resources. The framework established by the state for how counties are to create and implement their criminal justice systems sometimes leaves counties with few choices and little control.

1. Limited county resources to fund the criminal justice system’s needs

Illinois counties are limited in the sources of revenue available to them to fund all of the responsibilities delegated to them by the state. All counties other than Cook are prohibited from issuing bonds and from levying or increasing taxes other than as authorized by state statute.¹⁸⁵

For adult criminal cases, the 11 divisions are: felony trial division, homicide task force, multiple defendant division, police station representation division, problem-solving courts division, first municipal division (Chicago), second municipal division (Skokie), third municipal division (Rolling Meadows), fourth municipal division (Maywood), fifth municipal division (Bridgeview), and sixth municipal division (Markham).

¹⁸¹ For example, in June 2019, the public defender office’s internal strength & operations reports showed approximately 473 attorney positions were filled and approximately 160 support positions were filled.

¹⁸² In rare circumstances in felony cases, private attorneys are appointed on a case-by-case basis and paid an hourly rate.

¹⁸³ This report does not address the use of private attorneys to provide representation in Cook County in other types of cases to which counsel is appointed by the circuit court.

¹⁸⁴ 55 ILL. COMP. STAT. §§ 5/3-4007 to 5/3-4011, 5/4-2001, 5/4-2003, 5/4-2005, 5/4-3001, 5/5-1106 (2018); 725 ILL. COMP. STAT. § 5/113-3(c) (2018). The counties within each judicial circuit are also responsible for funding the courthouses and the rooms and offices for and expenses of the circuit court and circuit court clerk. 55 ILL. COMP. STAT. § 5/5-1106 (2018).

¹⁸⁵ ILL. CONST. art. VII, § 7; 55 ILL. COMP. STAT. §§ 5/5-1012, 5/5-1024 et seq., 5/5-2001 et seq. (2018); 35 ILL. COMP. STAT. §§ 200/1-1 et seq. (2018). Illinois’ counties, like those of many other states, are created by state law and are treated in the first instance as a local “unit” of the state that can only act with the express permission of the state’s Constitution or the state legislature. ILL. CONST. art. VII, § 1. These non-home-rule counties are guaranteed certain limited powers and are otherwise subject to statutory restrictions. *See* ILLINOIS GENERAL ASSEMBLY JOINT COMMITTEE ON LEGISLATIVE SUPPORT SERVICES, LEGISLATIVE RESEARCH UNIT, 1970 ILLINOIS CONSTITUTION ANNOTATED FOR LEGISLATORS 75 (4th ed., updated 2005) (explaining that courts have narrowly interpreted the powers of non-home-rule units to act where restricted by state statute).

Demographic factors that influence property tax revenues and economic vitality in Illinois counties

	For these factors, a higher number is better						For these factors, a lower number is better	
	Owner-occupied housing 2015-2019	Median value of owner-occupied housing 2015-2019	High-school graduation rate July 1, 2019	In civilian labor force 2015-2019	Median household income July 1, 2019	Change in population 2010-2019	Population age 65 and over July 1, 2019	Poverty rate July 1, 2019
National	64.0%	\$217,500	88.0%	63.0%	\$62,843	6.3%	16.5%	10.5%
Illinois	66.1%	\$194,500	89.2%	65.1%	\$65,886	-1.2%	16.1%	11.5%
Champaign	53.0%	\$162,100	95.0%	62.0%	\$52,797	4.3%	13.3%	19.9%
Cook	56.9%	\$246,600	87.1%	66.0%	\$64,660	-0.9%	15.1%	13.0%
DuPage	73.4%	\$308,500	93.0%	69.0%	\$92,809	0.7%	16.1%	6.0%
Gallatin	77.1%	\$73,900	86.9%	53.8%	\$44,076	-13.6%	24.4%	19.0%
Hardin	82.0%	\$80,500	79.6%	45.2%	\$51,250	-11.6%	26.7%	18.0%
LaSalle	71.8%	\$127,200	88.6%	61.9%	\$58,142	-4.6%	19.4%	12.2%
Mercer	79.0%	\$107,600	91.9%	62.3%	\$59,787	-6.1%	21.8%	8.1%
Schuyler	75.7%	\$86,600	89.4%	53.7%	\$52,357	-10.3%	23.4%	11.3%
Stephenson	69.6%	\$97,800	92.5%	61.7%	\$48,805	-6.7%	23.4%	11.5%

Key

State faring worse than the nation

County faring worse than the state

Source: *QuickFacts: United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045219> (in “Enter state, county, city, town, or zip code,” add to your selections “Illinois” and each of the nine counties evaluated: Champaign, Cook, DuPage, Gallatin, Hardin, LaSalle, Mercer, Schuyler, and Stephenson).

Even Cook County, which holds broader powers as a home rule county, is subject to state limitations on its revenue sources.¹⁸⁶

“Overwhelmingly,” Illinois’ county governments rely on property taxes “to fund basic governmental operations and services.”¹⁸⁷ Yet many factors can cause property values to be low and limit a county’s property tax revenue, such as high unemployment, high poverty rates, and limited household incomes. Illinois counties often struggle with many of these factors that may lead to decreasing county property tax revenue and a declining county economy overall, as illustrated by the nine sample counties in this evaluation and shown in the table above.

¹⁸⁶ ILL. CONST. art. VII, § 6; 55 Ill. Comp. Stat. § 5/5-1009 (2018). As a home rule county, Cook County has the power to act with respect to county affairs in areas where the legislature has not acted and so long as they do not conflict with state law. *See* ILLINOIS GENERAL ASSEMBLY JOINT COMMITTEE ON LEGISLATIVE SUPPORT SERVICES, LEGISLATIVE RESEARCH UNIT, 1970 ILLINOIS CONSTITUTION ANNOTATED FOR LEGISLATORS 63 (4th ed., updated 2005) (explaining that Cook County “can, without statutory authorization, levy property taxes above the limits that would otherwise apply (subject to any debt limits in subsection 6(k))” but that “the General Assembly has taken away from home-rule municipalities and counties the powers to tax the sale, purchase, and use of tangible personal property based on price or gross receipts (such as by ‘sales’ and use taxes)”).

¹⁸⁷ ILLINOIS STATE COMPTROLLER, LOCAL GOVERNMENT DIVISION, 2018 FISCAL RESPONSIBILITY REPORT CARD 18 (finding that “[c]ounties . . . rely on property taxes for an average of 32.5% of their combined total revenue”).

The most obvious factor is the property available to be taxed. The percentage of owner-occupied housing in Illinois is higher than that of the nation, and only two of the sample counties have a lower percentage than the state as a whole. But, in seven of the sample counties the median value of that property is substantially lower than that of the state, which is itself significantly lower than that of the nation. When the value of homeowners' property is low, the property taxes that counties can assess and collect is also low.

Even as the nation's population grows, people have been moving away from Illinois as a whole, and six of the sample counties have seen their populations decline at a far greater rate than the state. Fewer people living in a county means fewer people to tax. Meanwhile, the remaining population is aging. The percentage of the population that is age 65 or over is noticeably higher in six of the sample counties than in both the state and the nation. Aging and lessening populations overall tend to cause an economy to decline, as fewer people remain in the workforce.¹⁸⁸ Among the declining and aging number of people who live in Illinois' counties, the percentage of adults who are employed in the civilian labor force is lower in seven of the sample counties than in both the state and the nation. Median household income is lower in eight of the sample counties than in the state as a whole.

All of this leads to increasing poverty within a county. As of July 1, 2019, Illinois' poverty rate is slightly worse than the national poverty rate, but five of the sample counties have a noticeably larger percentage of their people living in poverty. Counties with higher levels of poverty are called on to spend more on social services, such as medical care for the uninsured and housing and food needs for the un- and under-employed, leaving fewer fiscal resources available to spend on the criminal justice system overall.

Whatever the amount of crime that occurs in a county, and whether committed by residents or people passing through, each Illinois county is required to fund the bulk of the cost of both prosecution and defense of the indigent in those cases.¹⁸⁹ As poverty increases, a larger percentage of people accused of crime will be indigent and qualify for indigent defense representation, even as the county's available resources decline. Among the nine sample counties, three (Gallatin, Hardin, and LaSalle) fare worse than the state as a whole on seven of the eight factors shown in the table above, while another four (Champaign, Mercer, Schuyler, and Stephenson) are in worse shape than the state on five of the eight factors. Requiring counties to take on the financial burden of providing indigent defense services is unwise at best given these conditions, particularly because the state legislature and state supreme court establish the laws and procedures that the local governments must pay to prosecute and defend.

¹⁸⁸ See Adam Ozimek, Kenan Fikri, and John Lettieri, *From Managing Decline to Building the Future: Could a Heartland Visa Help Struggling Regions?*, ECONOMIC INNOVATION GROUP, at 3 (2019) ("Population loss itself perpetuates economic decline. Its deleterious effects on housing markets, local government finances, productivity, and dynamism make it harder for communities to bounce back.").

¹⁸⁹ 55 ILL. COMP. STAT. §§ 5/3-4007 to 5/3-4011, 5/4-2001, 5/4-2003, 5/4-2005, 5/4-3001, 5/5-1106 (2018); 725 ILL. COMP. STAT. § 5/113-3(c) (2018).

2. The state's framework limits counties' choices

The details of the state's framework for state's attorneys and for public defenders, and of how the responsibility for payment is divided between the state and the counties, show unintended consequences that limit counties' choices in how to control and distribute criminal justice spending.

First, every county's state's attorney is required by state law to be full-time.¹⁹⁰ When the state began reimbursing counties for a portion of the salary of the state's attorneys, it capped the amount that each county is responsible for paying at 33 2/3 percent of the state's attorney's salary that was in effect on December 31, 1988, with the state paying the remainder.¹⁹¹ Next, the state legislature each year determines whether the compensation of state's attorneys will increase.¹⁹² The state pays 100 percent of the amount by which a state's attorney salary has increased since December 31, 1988,¹⁹³ so no matter how much the state's attorney's compensation increases, the cost to the county remains exactly the same.

For a county that has a public defender (which today is every county in the state), each county other than Cook chooses whether to have a full-time or a part-time public defender. If a county chooses to have a full-time public defender, then that county must pay its public defender at least

¹⁹⁰ ILL. CONST. art. VI, § 19; 55 ILL. COMP. STAT. § 5/4-2001(b) (2018).

¹⁹¹ 55 ILL. COMP. STAT. §§ 5/4-2001(a), 5/4-3001(a) (2018). The salary in effect for a state's attorney on December 31, 1988 was:

• in counties of less than 10,000	\$40,500
• in counties of 10,000 to less than 20,000	\$46,500
• in counties of 20,000 to less than 30,000	\$51,000
• in counties of 30,000 or more other than Cook	\$65,500
• in Cook County	\$75,000.

¹⁹² ILL. CONST. art. VI, § 19; 55 Ill. Comp. Stat. §§ 5/4-2001(a), 5/4-3001(a) (2018). State's attorney salaries, according to statute, are either the amount explicitly set by state law "or as set by the Compensation Review Board, whichever is greater." 55 ILL. COMP. STAT. §§ 5/4-2001(a), 5/4-3001(a) (2018). Effective Oct. 30, 2009, the legislature abolished the Compensation Review Board and left state's attorney compensation at the level it was as of that date, subject to change only for future cost of living adjustments as authorized or prohibited by the legislature. 25 ILL. COMP. STAT. § 120/2.1 (2018).

For FY 2019 and for FY 2020, the state's attorney salary is set at:

	<u>FY 2019</u>	<u>FY 2020</u>
in counties of less than 30,000	\$131,796	\$134,564
in counties of 30,000 or more other than Cook	\$170,171	\$173,745
in Cook County	\$197,030	\$201,168

Letter from Illinois Dept. of Revenue to [each Illinois county] (July 9, 2019) (regarding "Salary Reimbursement" by state to county for FY 2020). At the 2010 census, 52 counties had populations less than 30,000: Alexander, Bond, Brown, Calhoun, Carroll, Cass, Clark, Clay, Crawford, Cumberland, DeWitt, Douglas, Edgar, Edwards, Fayette, Ford, Gallatin, Greene, Hamilton, Hancock, Hardin, Henderson, Iroquois, Jasper, Jersey, Jo Daviess, Johnson, Lawrence, Marshall, Mason, Massac, Menard, Mercer, Moultrie, Perry, Piatt, Pike, Pope, Pulaski, Putnam, Richland, Saline, Schuyler, Scott, Shelby, Stark, Union, Wabash, Warren, Washington, Wayne, and White. *See QuickFacts, [each Illinois county]*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045219>.

¹⁹³ 55 ILL. COMP. STAT. §§ 5/4-2001(a), 5/4-3001(a) (2018).

90 percent of that county’s state’s attorney salary.¹⁹⁴ The state reimburses each county monthly for 66 2/3 percent of the public defender’s compensation, leaving the county responsible for the remainder.¹⁹⁵ Because a full-time public defender’s compensation automatically rises in tandem with that of the state’s attorney, the amount the county must pay also increases.

As shown in the following table, in FY 2019 a county bears a far greater financial burden in paying its full-time public defender than in paying its state’s attorney, even though the public defender is paid only 90 percent of what the state’s attorney is paid. For example, in FY 2019 counties other than Cook with a population of 30,000 or more were required by state law to pay \$21,831 for their full-time state’s attorney and to pay \$51,046 for a full-time public defender.

County & State Fiscal Responsibility for Compensation of State’s Attorney and Full-Time Public Defender in FY 2019

	SA salary at 12/31/88	SA salary FY 2019			PD full-time salary FY 2019		
		Total salary	County pays 33 1/3 % of 12/31/88 salary	State pays 66 2/3 % of 12/31/88 salary + 100 % of increase	Total salary	County pays 33 1/3 % of total	State pays 66 2/3 % of total
County pop <10K	\$40,500	\$131,796	\$13,499	\$118,297	\$118,616	\$39,535	\$79,069
County pop 10K to <20K	\$46,500	\$131,796	\$15,498	\$116,298	\$118,616	\$39,535	\$79,069
County pop 20K to <30K	\$51,000	\$131,796	\$16,998	\$114,798	\$118,616	\$39,535	\$79,069
County pop 30K to ~ (other than Cook)	\$65,500	\$170,171	\$21,831	\$148,340	\$153,154	\$51,046	\$102,092
Cook County	\$75,000	\$197,030	\$24,998	\$172,033	\$177,327	\$59,103	\$118,206

And while the county’s financial responsibility remains level for its state’s attorney, the county’s responsibility increases for the full-time public defender every time the Illinois legislature authorizes a raise, as shown in the same table on page 46 adjusted for FY 2020 state-mandated salary increases. For example, in FY 2020 counties other than Cook with a population of 30,000 or more were required by state law to increase their spending on a full-time public defender salary from \$51,046 to \$52,118, while their spending on their full-time state’s attorney salary remained steady at \$21,831.

¹⁹⁴ 55 ILL. COMP. STAT. § 5/3-4007(b) (2018). See also 55 ILL. COMP. STAT. § 5/3-4007(a) (2018).

For FY 2019 and for FY 2020, the state’s attorney salary is set at:

	FY 2019	FY 2020
in counties of less than 30,000	\$118,616	\$121,107
in counties of 30,000 or more other than Cook	\$153,154	\$156,370
in Cook County	\$177,327	\$181,051

Letter from Illinois Dept. of Revenue to [each Illinois county] (July 9, 2019) (regarding “Salary Reimbursement” by state to county for FY 2020, and notifying whether public defender is full-time or part-time, and if full-time public defender then the amount that position’s salary must be to equal 90% of the state’s attorney’s salary).

¹⁹⁵ 55 ILL. COMP. STAT. § 5/3-4007(b) (2018).

**County & State Fiscal Responsibility for
Compensation of State's Attorney and Full-Time Public Defender in FY 2020**

	SA salary at 12/31/88	SA salary FY 2020			PD full-time salary FY 2020		
		Total salary	County pays 33 1/3 % of 12/31/88 salary	State pays 66 2/3 % of 12/31/88 salary + 100 % of increase	Total salary	County pays 33 1/3 % of total	State pays 66 2/3 % of total
County pop <10K	\$40,500	\$134,564	\$13,499	\$121,065	\$121,107	\$40,365	\$80,730
County pop 10K to <20K	\$46,500	\$134,564	\$15,498	\$119,066	\$121,107	\$40,365	\$80,730
County pop 20K to <30K	\$51,000	\$134,564	\$16,998	\$117,566	\$121,107	\$40,365	\$80,730
County pop 30K to ~ (other than Cook)	\$65,500	\$173,745	\$21,831	\$151,914	\$156,370	\$52,118	\$104,236
Cook County	\$75,000	\$201,168	\$24,998	\$176,171	\$181,051	\$60,344	\$120,689

Because counties do not have any control over the amount of the salary they pay to a full-time public defender, the only option left to a county to reduce the cost of its public defender salary is to make that public defender be part-time, without regard to the number of cases or amount of work that part-time public defender is required to handle. With a part-time public defender, the county board can set the salary at the lowest level at which an attorney will agree to serve in the position, and the state will still reimburse the county for 66 2/3 percent of the total salary. As of FY 2020, 57 of Illinois' 102 counties have a part-time public defender.¹⁹⁶ Although not among the sample counties studied closely for this evaluation, it is notable that Kankakee County and St. Clair County, with 2010 census populations of 113,449 and 270,056 respectively, both have part-time public defenders. Among the nine sample counties, Gallatin, Hardin, Mercer, and Schuyler have part-time public defenders. Meanwhile, every Illinois county has a full-time state's attorney, as required by state law.

One choice that state law appears to allow and that some counties exercise is to deny their public defender the employment benefits that are provided to other county employees. For example, the part-time public defender in Mercer County does not receive any benefits or retirement contribution from the county. Gallatin County's contract with its part-time public defender expressly states that she is "not an employee of the county, and is not entitled to benefits provided to employees, except that the Public Defender may at her election, participate in the Illinois Municipal Retirement Fund retirement plan."¹⁹⁷ In Hardin County, the part-time public

¹⁹⁶ Letter from Illinois Dept. of Revenue Property, to [each Illinois county] (July 9, 2019) (regarding "Salary Reimbursement" by state to county for FY 2020 and notifying whether public defender is full-time or part-time). The counties that have a part-time public defender are: Alexander, Bond, Brown, Bureau, Calhoun, Carroll, Cass, Clark, Crawford, Cumberland, Douglas, Edgar, Edwards, Ford, Franklin, Gallatin, Greene, Hamilton, Hancock, Hardin, Henderson, Iroquois, Jackson, Jasper, Jersey, Jo Daviess, Johnson, Kankakee, Lawrence, Lee, Logan, Marshall, Mason, Massac, Menard, Mercer, Monroe, Morgan, Moultrie, Ogle, Piatt, Pike, Pope, Pulaski, Putnam, Randolph, Saline, Schuyler, Scott, Stark, St. Clair, Union, Wabash, Warren, Washington, Wayne, and White.

¹⁹⁷ "Gallatin County, Illinois Public Defence Contract" between the County of Gallatin and Tammi Jackson, ¶ 5 (Oct. 17, 2019).

defender is a county employee who is eligible to participate in the Illinois Municipal Retirement fund, but who does not receive any other employment benefits from the county. Schuyler County's part-time public defender is a county employee "for purposes of IMRF, FICA, and Medicare" but who is otherwise "responsible for all other expenses associated with his office and duties of Public Defender. No expenses other than salary, IMRF, FICA, and Medicare will be paid by the County . . ." ¹⁹⁸ Meanwhile, every state's attorney receives the full employment benefits provided to other employees within their county, as required by state law.

As another option allowed under state law, some counties decline to provide any or an adequate number of assistant public defenders or support staff in the public defender office, again without regard to the number of cases or amount of work that office is required to handle. Among the nine sample counties, Gallatin, Hardin, Mercer, and Schuyler counties do not provide any assistant public defenders or support staff for the public defender office. This report does not attempt to determine whether the number of assistant prosecutors and support staff in each county's state's attorney office is adequate. Among the nine sample counties, in every county other than Hardin the state's attorney office has a greater number of assistant attorneys and support staff than the public defender office and in four of the nine counties (LaSalle, Champaign, DuPage, and Cook) more than double the number. (*See* table below, page 48.)

Finally, state law allows 60 of the 102 Illinois counties the choice to eliminate their public defender office entirely at any time and instead have the court appoint private attorneys to represent indigent people at whatever rate of pay the court can negotiate. ¹⁹⁹ Meanwhile, every county always has a state's attorney office, as required by state law.

The table on page 48 shows the staffing of the public defender office and the state's attorney office in each of the nine sample counties in FY 2019, as a result of the decisions made by each county's board and the judges of the circuit court for the county, within the framework established by the state.

Prosecutors and defense attorneys have different roles and needs, but a disparity in resources between the two can have deleterious effects on the right to counsel. The U.S. Supreme Court determined that, because governments "quite properly spend vast sums of money to establish machinery to try defendants," a poor person charged with crime cannot get a fair trial unless a lawyer is provided at state expense, ²⁰⁰ and due process requires the appointed attorney to subject the prosecution's case to "the crucible of meaningful adversarial testing." ²⁰¹ As the Supreme Court said in *United States v. Cronin*, "while a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of

¹⁹⁸ "Resolution No. 2014-R-28" by the Schuyler County Board (Oct. 13, 2014).

¹⁹⁹ 55 ILL. COMP. STAT. § 5/3-4002 (2018); 725 ILL. COMP. STAT. §§ 5/113-3(b), 5/113-3(c) (2018).

²⁰⁰ *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

²⁰¹ *United States v. Cronin*, 466 U.S. 648, 656 (1984).

Public Defender Office and State's Attorney Office in the Nine Sample Counties in FY 2019

County	Public Defender Office			State's Attorney Office				
	Public defender	Assistant public defenders	Support staff	State's attorney	Assistant state's attorneys	Support staff		
Hardin	optional	part-time, employee	0	0	required	full-time	0	0
Gallatin	optional	part-time, contractor	0	0	required	full-time	0	1
Schuyler	optional	part-time, employee	0	0	required	full-time	0	1 full-time
Mercer	optional	part-time, employee	0	0	required	full-time	1 full-time	3.5 full-time
Stephenson	required	full-time, employee	3 full-time 2 part-time	2 full-time	required	full-time	5 full-time	4 full-time
LaSalle	required	full-time, employee	4 part-time	3 full-time	required	full-time	12 full-time	12 full-time
Champaign	required	full-time, employee	13 full-time	4 full-time	required	full-time	21 full-time	21 full-time
DuPage	required	full-time, employee	29 full-time	14 full-time	required	full-time	combined* 140 full-time	
Cook	required	full-time, employee	505 full-time	179 full-time	required	full-time	combined 1,125.1 full-time	

* At least 90 of these positions are assistant state's attorneys.

unarmed prisoners to gladiators.”²⁰² For these reasons, national standards, as summarized in the eighth of the American Bar Association’s *Ten Principles*, uniformly call for parity between the prosecution and defense with respect to resources.²⁰³

²⁰² *United States v. Cronin*, 466 U.S. 648, 657 (1984) (citing *United States ex rel. Williams v. Twomey*, 510 F.2d 634, 640 (7th Cir. 1975)).

²⁰³ AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 8 (Feb. 2002).

Chapter III

Providing qualified, trained, and supervised attorneys to represent indigent defendants

In *Powell v. Alabama* – the case the U.S. Supreme Court points to in *United States v. Cronin* as representative of the constructive denial of the right to counsel²⁰⁴ – the judge overseeing the Scottsboro Boys’ Alabama trial appointed as defense counsel a real estate lawyer from Chattanooga, Tennessee, who was not licensed in Alabama and was admittedly unfamiliar with the state’s rules of criminal procedure.²⁰⁵ The *Powell* Court concluded that defendants require the “guiding hand” of counsel,²⁰⁶ that is, the attorneys a government provides to represent indigent people must be qualified and trained to help those people advocate for their stated legal interests.

Although attorneys graduate from law school with a strong understanding of the principles of law and legal theory and generally how to think like a lawyer, no law school graduate enters the legal profession automatically knowing how to be, for example, a criminal defense lawyer.²⁰⁷ Expertise and skill must be developed. Just as one would not go to a dermatologist for heart surgery, a real estate or divorce lawyer cannot be expected to handle a complex criminal case competently. Attorneys must know what legal tasks need to be considered in each and every case they handle, and then how to perform them. (See sidebar at pages 55 to 57, discussing

²⁰⁴ *United States v. Cronin*, 466 U.S. 648, 659-60 (1984) (“[I]f counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. . . . Circumstances of that magnitude may be present on some occasions when, although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. *Powell v. Alabama*, 287 U.S. 45 (1932), was such a case.”)

²⁰⁵ *Powell v. Alabama*, 287 U.S. 45, 53-56 (1932). A retired local Alabama attorney who had not practiced in years was also appointed to assist in the representation of all nine co-defendants.

²⁰⁶ *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) (“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.”).

²⁰⁷ Christopher Sabis and Daniel Webert, *Understanding the Knowledge Requirement of Attorney Competence: A Roadmap for Novice Attorneys*, 15 GEO. J. LEGAL ETHICS 915, 915 (2001-2002) (“[B]ecause legal education has long been criticized as being out of touch with the realities of legal practice and because novice attorneys often lack substantive experience, meeting the knowledge requirements of attorney competence may be particularly difficult for a lawyer who recently graduated from law school or who enters practice as a solo practitioner.”).

the problems posed when the same attorneys are required to provide adult criminal, juvenile delinquency, and civil representation to indigent people.)

For these reasons, national standards require that each attorney must have the qualifications, training, and experience necessary for each specific type of case to which they are appointed.²⁰⁸ As national standards explain, an attorney’s ability to provide effective representation in a criminal case depends on their familiarity with the “substantive criminal law and the law of criminal procedure and its application in the particular jurisdiction.”²⁰⁹ The American Bar Association observed nearly 30 years ago that “[c]riminal law is a complex and difficult legal area, and the skills necessary for provision of a full range of services must be carefully developed. Moreover, the consequences of mistakes in defense representation may be substantial, including wrongful conviction and death or the loss of liberty.”²¹⁰

A. Selecting qualified attorneys to represent indigent defendants

Before any individual attorney can be appointed to represent any individual defendant, the indigent defense system must first select the attorneys who are available to be appointed.

1. Qualifications & selection of a county’s public defender

State law establishes different requirements for the qualifications necessary to be and the process to select the Cook County public defender than for all other counties.

All counties other than Cook. In all counties other than Cook, the *only* qualifications required by state law are: that the public defender must be a licensed attorney;²¹¹ and, in counties with a population greater than 30,000 that pay their public defender at least 90% of the state’s attorney’s salary, the public defender may not engage in a private law practice, i.e., must be full-time.²¹² Counties are free to establish additional qualifications required for their public defender. From among those who have the necessary qualifications, state law requires that the public defender be selected by majority vote of the circuit judges of the circuit in which the county is located.²¹³

Among the sample counties studied closely for this evaluation (other than Cook), only Champaign County appears to require any additional qualifications to be the public defender. The Champaign County website contains a job description stating that its public defender

²⁰⁸ See, e.g., AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 6 & cmt. (2002).

²⁰⁹ NATIONAL LEGAL AID & DEF. ASS’N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, guideline 1.2(a) (1995).

²¹⁰ AMERICAN BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, § 5-1.5 & cmt. (3d ed. 1992).

²¹¹ 55 ILL. COMP. STAT. §§ 5/3-4001 through 4003 (2018).

²¹² 55 ILL. COMP. STAT. § 5/3-4007(a) (2018).

²¹³ 55 ILL. COMP. STAT. § 5/3-4004 (2018).

must additionally have “several years of felony trial experience, and have some professional supervisory experience.”²¹⁴

In all of the sample counties (other than Cook), the circuit judges appoint the public defender through majority vote as state law requires. However, none of the sample counties have any sort of formal application process, and at least among the more rural and mid-sized counties, the judges tend to defer to the preference of the circuit judge(s) who actually sit in the particular county. One chief judge described the full bench vote as “a rubber stamp” of approval for the person chosen by the county’s presiding judge.

The lack of required qualifications and required procedures for selecting the public defender means that counties can appoint attorneys who have little to no prior experience in criminal defense to serve as the public defender. For example, in December 2008, Gallatin County contracted with an attorney who had passed the bar exam only months earlier to serve as its part-time public defender. As the only attorney in the Gallatin County public defender office, this attorney was responsible for representing indigent clients in every type of case (criminal and civil) of all levels of complexity and severity, up to and including homicides.

Cook County. State law requires that the Cook County public defender: must be a licensed attorney for at least five years; “whose practice of law has clearly demonstrated experience in the representation of persons accused of crime;” with administrative experience; and “who is dedicated to the goals of providing high quality representation for eligible persons and to improving the quality of defense services generally.”²¹⁵ While in office, the Cook County public defender must be full-time and is prohibited from the private practice of law.²¹⁶ The county is free to establish additional qualifications required for its public defender. From among those who have the necessary qualifications, state law requires that the public defender be selected by the president of the county board, with advice and consent of the board.²¹⁷

Cook County does not require any additional qualifications to be its public defender and it has not formally established an application or selection process. In selecting the Cook County public defender in March 2015, the board president chose to have a selection committee review and interview all candidates and recommend its top three choices, from among whom the board president presented her final selection to the full county board for its approval. Reportedly, the president of the Cook County board used that same process to appoint the county’s public defender in 2021.²¹⁸ Nothing requires future Cook County board presidents to use this or any other process to select the Cook County public defender.

²¹⁴ See *Champaign County Job Description, Public Defender*, CHAMPAIGN COUNTY PUBLIC DEFENDER, <http://www.co.champaign.il.us/descript/pd/nbu/PublicDefender.pdf> (last visited Aug. 3, 2020).

²¹⁵ 55 ILL. COMP. STAT. § 5/3-4004.2(a) (2018).

²¹⁶ 55 ILL. COMP. STAT. § 5/3-4004.2(b) (2018).

²¹⁷ 55 ILL. COMP. STAT. §§ 5/3-4004.1, 4004.2 (2018). Prior to the 1991 amendment to ILL. REV. STAT. 1989, ch. 34, par. 3-4004, “each public defender in the state,” including the Cook County public defender, “was appointed by a majority vote of the circuit judges in the judicial circuit.” *Burnette v. Terrell*, 905 N.E.2d 816, 825 (Ill. 2009).

²¹⁸ See Megan Crepeau, *Contenders for Cook County public defender appointment include some high-profile names*, CHICAGO TRIBUNE (Feb. 23, 2021).

2. Qualifications & selection of assistant public defenders

Whether there are any assistant public defenders in a county's public defender office is decided individually for each county.²¹⁹ Among the nine representative counties in this evaluation, four counties – Hardin, Gallatin, Schuyler, and Mercer – do not have any assistant public defenders.

If a county's public defender office is authorized to have any assistant public defenders, the *only* qualification required by state law is that each assistant public defender must be a licensed attorney.²²⁰ Counties are free to establish additional qualifications required for their assistant public defenders. From among those who have the necessary qualifications, state law requires that the public defender select the specific people to fill the authorized number of funded positions.²²¹

In the five representative counties that have assistant public defenders – Stephenson, LaSalle,²²² Champaign, DuPage,²²³ and Cook²²⁴ – none of the counties require any additional qualifications

²¹⁹ In counties other than Cook, state law requires that the circuit judges of the circuit in which the county is located determine the number of assistant public defenders that are “necessary for the proper discharge of the duties” of the public defender office, within the funding allocated by the county board. 55 ILL. COMP. STAT. § 5/3-4008 (2018). In Cook County, state law requires that the county board determine the number of assistant public defenders. 55 ILL. COMP. STAT. § 5/3-4008.1 (2018); *see also* Burnette v. Stroger, 905 N.E.2d 939, 951-53 (Ill. 1st Dist. 2009).

²²⁰ 55 ILL. COMP. STAT. §§ 5/3-4008, 5/3-4008.1 (2018).

²²¹ 55 ILL. COMP. STAT. §§ 5/3-4008, 5/3-4008.1 (2018). *See also* Burnette v. Stroger, 905 N.E.2d 939, 951-53 (Ill. 1st Dist. 2009).

²²² In LaSalle County (and the other counties within the Thirteenth Judicial Circuit), assistant public defenders cannot be members of the same legal firm or “connected in the practice of law in any manner” with either the public defender or the other assistant public defenders. General Order No. 92-13 (Ill. 13th Jud. Circ. Jan. 24, 1992).

²²³ The DuPage County public defender employee handbook states: “It is the policy of the Public Defender’s Office to seek the best qualified applicant when offering employment in accordance with the tenets of Equal Employment Opportunity. The Public Defender’s Office considers educational background, previous experience, and proven skills and abilities.” DUPAGE COUNTY ILLINOIS PUBLIC DEFENDER EMPLOYEE HANDBOOK § 1C (rev’d Feb. 11, 2020).

²²⁴ Cook County has a collective bargaining agreement with the assistant public defenders’ union. When a vacant assistant public defender position occurs, the collective bargaining agreement provides that the public defender announces the job posting and states “the grade, assignment, and skills required for the posted position.” *See* Collective Bargaining Agreement Between American Federation of State, County, and Municipal Employees (A.F.S.C.M.E.), Council 31, ALF-CIO, Local 3315 Representing Assistant Public Defenders, and County of Cook (Dec. 1, 2017 - Nov. 30, 2020), § 5.3(e). The collective bargaining agreement defines four levels of assistant public defender positions – assistant public defender I at the lowest level and rising through assistant public defender IV – but these classification levels have more bearing on the attorney’s compensation than on the types or complexity of cases to which the attorney may be assigned. Collective Bargaining Agreement Between American Federation of State, County, and Municipal Employees (A.F.S.C.M.E.), Council 31, ALF-CIO, Local 3315 Representing Assistant Public Defenders, and County of Cook (Dec. 1, 2017 - Nov. 30, 2020), § 5.5 (classification).

The assistant public defender I position is limited to attorneys hired on a 12-month probationary basis (for example, a person hired contingent upon successfully passing the bar exam). *See* COOK COUNTY EMPLOYMENT PLAN (as amended Feb. 27, 2019) § VII(K) (establishing procedures for hiring individuals to fill vacant “Pre-licensed Assistant Public Defender positions”); Collective Bargaining Agreement Between American Federation of State, County, and Municipal Employees (A.F.S.C.M.E.), Council 31, ALF-CIO, Local 3315 Representing Assistant Public Defenders, and County of Cook (Dec. 1, 2017 - Nov. 30, 2020), § 5.3(e) (“Grade One attorneys shall be

for a person to be hired as an assistant public defender and none of the public defenders have formally established any additional required qualifications for all assistant public defenders.

In all of the five representative counties that have assistant public defenders – Stephenson, LaSalle, Champaign, DuPage, and Cook – the public defender selects (or has delegated to someone within the office the authority to select) the assistant public defenders as state law requires. In Cook County, the public defender is somewhat constrained by the county’s “employment plan” that “sets forth the general principles that will govern the County’s hiring and employment policies and procedures” for all county agencies, including establishing certain procedures for filling vacant assistant public defender positions.²²⁵ Beyond that, none of the public defenders have established a formal application or selection process.

The lack of required qualifications and required procedures for selecting assistant public defenders means that assistant public defenders may have little to no prior experience in criminal defense and yet be assigned to represent indigent clients in every type of case (criminal and civil) of all levels of complexity and severity, up to and including homicides (except in Cook County, which has qualifications for the most complex of criminal cases).

3. Qualifications & selection of appointed private attorneys

Each county may provide representation to some indigent defendants through appointed private attorneys. (*See* discussion at pages 32 to 41 regarding counties, case types, and circumstances in which a private attorney may be appointed to represent an indigent defendant in an adult criminal

promoted to Grade Two, Step Two . . . no later than one (1) year after the date of hire.”). The assistant public defender II position is an entry-level attorney position, for which there are no minimum qualification requirements other than being an attorney. The public defender has established additional minimum qualification requirements for the assistant public defender III and assistant public defender IV level positions:

- assistant public defender III
 - minimum of three years of experience as an assistant public defender in Criminal Defense and/or Juvenile Justice matters and/or Civil Litigation matters, at least two years of which are related to legal matters of a progressively difficult and complex nature; AND
 - one of the following:
 - acted as lead counsel in at least four felony jury trials to verdict, OR
 - lead counsel in at least two felony jury trials to verdict AND five misdemeanor jury trials to verdict, OR
 - lead counsel in at least 100 juvenile justice felony trials to finding, OR
 - lead counsel in at least five post-conviction evidentiary hearings to finding, OR
 - lead counsel in at least 10 termination of parental rights trials to finding
- assistant public defender IV
 - minimum of five years of experience as an assistant public defender; AND
 - acted as lead counsel or provided meaningful participation as secondary counsel in at least five first degree murder trials to verdict or finding where the client was tried as an adult; AND
 - acted as lead counsel in at least 10 additional felony jury trials to verdict

See Law Office of the Cook County Public Defender, Assistant Public Defender III Promotional Pre-Interview Questionnaire 2 (2019); Law Office of the Cook County Public Defender, Assistant Public Defender IV Information Sheet 2 (2019).

²²⁵ *See* COOK COUNTY EMPLOYMENT PLAN (as amended Feb. 27, 2019) §§ I (introduction), VII(K) (assistant public defenders).

trial-level case.) The table at page 33 briefly illustrates the extent to which the nine representative counties use private attorneys to represent indigent defendants.

When a private attorney is appointed to represent an indigent person, the *only* qualification required by state law is that the private attorney must be a licensed attorney.²²⁶ Counties and judges are free to establish additional qualifications required for the private attorneys appointed to represent indigent people. From among those who have the necessary qualifications, state law requires that the circuit court judge(s) select the private attorney who is appointed in each case.²²⁷

None of the nine representative counties in this evaluation require any additional qualifications for a private attorney to be eligible for appointment to represent an indigent person, and none of the counties have any sort of formal application or selection process. Mercer, LaSalle, Champaign, and DuPage counties all have contracts with one or more private attorneys who are available to be appointed in certain types of conflict of interest cases in exchange for a fixed annual fee, however it is unclear whether the county board or the circuit court judges selected these private attorneys or the methods by which they did so. In six of the representative counties – Hardin, Gallatin, Schuyler, Mercer, Champaign, and Cook – private attorneys are occasionally appointed, on a case-by-case basis in exchange for an hourly rate, and in these instances the circuit judges simply rely on their familiarity with local attorneys to determine whom to appoint in a given case.

²²⁶ 55 ILL. COMP. STAT. §§ 5/3-4008, 5/3-4008.1 (2018).

²²⁷ 725 ILL. COMP. STAT. § 5/113-3(b) (2018).

Problems posed when the same attorneys are required to provide adult criminal, juvenile delinquency, and civil representation to indigent people

This evaluation is concerned principally with the right to counsel for indigent adults in criminal cases, as mandated by the Sixth and Fourteenth Amendments. Throughout Illinois, however, each county's indigent defense system is responsible for representing all indigent people at the trial level (and in some appellate & post-conviction cases), whenever appointed by a court – both in cases where the right to counsel is guaranteed under the federal constitution and in those cases where, although not mandated by the Sixth Amendment, appointed counsel is required or allowed under Illinois law. This means that attorneys in county public defender offices and appointed private attorneys represent indigent adults and children in a variety of case types and must be competent not only in criminal law but also in juvenile delinquency law and in a broad range of civil law areas. As a result, it is impossible to objectively evaluate the provision of the right to counsel in indigent adult criminal cases without considering the demands placed on the indigent defense systems as a whole, and the indigent defense system attorneys specifically, by their responsibilities to indigent clients in non-criminal cases.

Juvenile delinquency cases and dependency cases are different from adult criminal cases – and from each other – in several significant ways. For example, both delinquency and dependency cases are civil in nature,^a rather than criminal. Each is governed by a separate set of statutes and rules, have a different burden and standard of proof, and require training and experience in a broad range of areas entirely different than that needed in criminal cases.^b To the extent that the same attorneys are appointed in delinquency cases or dependency cases as are appointed in criminal cases, those attorneys must have different qualifications and experience and must receive different training and supervision to effectively represent clients in all of these case types.

^a See generally 705 ILL. COMP. STAT. §§ 405/1-1 *et seq.* (2018) (Juvenile Court Act of 1987).

^b See 705 ILL. COMP. STAT. §§ 405/2-1 *et seq.* (2018) (abuse, neglect, and dependency); 705 ILL. COMP. STAT. §§ 405/5-101 *et seq.* (2018) (delinquency).

Similar concerns arise in the other types of civil cases in which attorneys can be appointed in Illinois to represent indigent people.

Juvenile delinquency cases. The juvenile justice system began to diverge from the adult criminal justice system at the end of the 19th century, in part based on the understanding that children are different from adults.^c More than 50 years ago, the U.S. Supreme Court held that children require the “guiding hand of counsel” at each step in the proceedings against them.^d The U.S. Supreme Court states that a child’s right to zealous advocacy “is not a formality. It is not a grudging gesture to a ritualistic requirement. It is the essence of justice.”^e

Because age is “far more than a chronological fact,” the U.S. Supreme Court has “[t]ime and again” concluded that children “generally are less mature and responsible than adults,” do not have “the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them,” and usually are “more vulnerable or susceptible to . . . outside pressures than adults.”^f The Court has observed that children accused of wrongdoing are unlikely to trust adults and their understanding of the justice system’s formalities and the “roles of the institutional actors within it” are limited, making it likely that children

^c See *In re Gault*, 387 U.S. 1, 14-16 (1967) (recounting the history and theory underpinning the juvenile justice system from its inception in 1899).

^d *In re Gault*, 387 U.S. 1, 36 (1967) (internal citations omitted).

^e *Kent v. United States*, 383 U.S. 541, 561 (1966).

^f *J.D.B. v. North Carolina*, 564 U.S. 261, 272-273 (2011) (internal citations omitted). See *Graham v. Florida*, 560 U.S. 48, 68 (2010) (discussing developments in child psychology and brain science). These differences between children and adults mean there are additional constitutional protections for children, beyond those of adults. See, e.g., *Miller v. Alabama*, 567 U.S. 460, 471 (2012) (forbidding mandatory life without parole sentencing schemes for juvenile offenders); *Graham v. Florida*, 560 U.S. 48, 78 (2010) (requiring special consideration for children in the context of *Miranda* waivers); *Roper v. Simmons*, 543 U.S. 551, 563 (2005) (banning capital punishment for juvenile offenders).

will struggle to “work effectively with their lawyers to aid in their defense.”^g

For these reasons, the National Juvenile Defender Center explains that representing children in juvenile delinquency proceedings “is a specialized practice that requires a unique set of skills and knowledge distinct from what is required to practice adult criminal defense”^h – specialized qualifications, skills, experience, and training are necessary for an attorney to provide effective representation in delinquency matters.ⁱ National standards require that attorneys appointed to represent juveniles “must be skilled in juvenile defense” and “knowledgeable about adolescent development and the special status of youth in the legal system.”^j Attorneys who represent children in juvenile delinquency proceedings must also have skill, experience, and training in the areas of: “collateral consequences of adjudication; child welfare and entitlements; special education; immigration; drug addiction and substance abuse; adolescent psychological development; racial, ethnic and cultural competence; special ethical considerations when working with children; competency and capacity; the role of parents or guardians; sexual orientation and gender identity awareness; transfer to adult court and certification hearings; and school discipline policies and procedures.”^k All of this is necessary because otherwise children “may face unnecessary detention and excessive confinement, . . . decreased educational and/or employment opportunities, restriction of access to public benefits and privileges, and compromised immigration status, as well as placement on lifelong registries.”^l

Neglect, abuse, and dependency cases. A neglect,^m abuse,ⁿ or dependency^o case may involve multiple children from a single family who are all entitled to public counsel.^p Similarly, there may be several parents or guardians who are entitled to have counsel appointed.^q While a single state’s attorney can represent the state’s interests on behalf of multiple children in a single neglect, abuse, or dependency case without a conflict, the children and parents in these cases often have conflicting interests, such that each person must have their own individual attorney appointed to represent them. For example, in a not unusual situation, as many as five unconflicted attorneys may be required. Imagine a home where a mother has two children, who each have different fathers, and a report of alleged abuse or neglect is made concerning either or both of the children. The mother may be entitled to an appointed attorney. Each of the two children may be entitled to separate appointed attorneys. The father of the first child may be entitled to an appointed attorney, and the father of the second child may be entitled to an appointed attorney.

Neglect, abuse, and dependency cases often involve (as children, or parents, or witnesses) some of the same people that the indigent defense system and its attorneys are called upon to represent in criminal cases. Each neglect, abuse, or dependency case can create increasing conflicts with regard to those same attorneys’ representation of defendants in concurrent or future criminal cases. For example, underlying the allegations of abuse and neglect in a dependency case, it is not unusual that an adult parent may be charged with the crime of abuse against his child. In those circumstances, the parent is both a defendant in a criminal case and an interested party in the dependency case. That parent has a right to counsel in both cases, but the legal interests involved might be different or altogether contrary (e.g., by accepting a plea offer in the criminal case, the parent may jeopardize their custodial interests in their child in the dependency case). A single lawyer’s ability to provide effective assistance to the parent in both cases may be compromised by the need to assert and protect

^g *Graham v. Florida*, 560 U.S. 48, 78 (2010) (internal citations omitted).

^h *Specialization in Juvenile Defense*, NATIONAL JUV. DEF. CTR., <http://njdc.info/practice-policy-resources/topical-issues/specialization-in-juvenile-defense/>.

ⁱ See generally NATIONAL JUV. DEF. CTR., NATIONAL JUVENILE DEFENSE STANDARDS (2012).

^j NATIONAL JUV. DEF. CTR., NATIONAL JUVENILE DEFENSE STANDARDS std. 1.1 (2012).

^k Adrienne Winney, *Juvenile Defense Attorneys Badly Need Specialized Training, Higher Fees*, JUV. J. INFORMATION EXCHANGE (Oct. 28, 2015).

^l NATIONAL JUV. DEF. CTR., NATIONAL JUVENILE DEFENSE STANDARDS std. 1.1 cmt. (2012).

^m 705 ILL. COMP. STAT. § 405/2-3(1) (2018).

ⁿ 705 ILL. COMP. STAT. § 405/2-3(2) (2018).

^o 705 ILL. COMP. STAT. § 405/2-4(1) (2018).

^p See 705 ILL. COMP. STAT. §§ 405/2-10(3), 2-15(2) (2018).

^q See 705 ILL. COMP. STAT. §§ 405/2-15(2), 2-25(5) (2018).

different legal interests of the same client in different proceedings.

Where a single incident gives rise to both an abuse and neglect case and a criminal prosecution, the abuse and neglect case can arise before the prosecution files criminal charges. That is, where the child is taken into temporary protective custody, the court must hear the issue of the child's shelter care usually within 48 hours of removal from the home.⁷ But the prosecution may not institute criminal charges against the allegedly abusive or neglective parent for several days, weeks, or even months following the incident. If an indigent defense system attorney is appointed to represent the child in the abuse and neglect case,

then that attorney is likely ethically prohibited from representing any other party in the abuse and neglect case or in the related adult criminal case.

Finally, dependency cases in particular can span more than a decade during which the appointed counsel for the parent, guardian, or child is responsible for their representation. For example, the state could commence a dependency case in the interest of an abused, neglected, or dependent baby and that case can continue in various stages of dependency or termination of parental rights or both simultaneously until that baby reaches adulthood.

⁷ 705 ILL. COMP. STAT. § 405/2-9(1) (2018).

B. Training indigent defense system attorneys

To ensure that attorneys continue to be competent from year to year to handle the cases to which they are appointed, national standards require that the indigent defense system provide attorneys with access to a “systematic and comprehensive” training program,²²⁸ at which attorney attendance is compulsory.²²⁹ Training must be tailored to the types and levels of cases for which the attorney is appointed.²³⁰ For example, an attorney who is appointed in drug-related cases must be trained in the latest forensic sciences and case law related to drugs. Ongoing training, therefore, is an active part of the job of being an indigent defense system attorney.

State law requires all Illinois lawyers to complete 30 hours of mandatory continuing legal education (CLE), including six hours of professional responsibility, within each 24-month period to maintain their licenses to practice law in the state of Illinois.²³¹ The state does not require attorneys to obtain CLE or training in the fields in which they practice, and in particular there are no specific state requirements for the training of indigent defense system attorneys.

Lack of specific training requirements and minimal to no funding for training. None of the nine representative counties in this evaluation have any specific training requirements for their indigent defense system attorneys, except the Cook County public defender office requires all of its newly licensed attorneys to attend an external or internal week-long trial advocacy seminar, requires certain leadership training for attorneys newly assigned to management positions, and requires sexual harassment training for all office employees including attorneys.

- Hardin, Gallatin, Schuyler, Mercer, Stephenson,²³² and LaSalle²³³ counties do not pay any of the costs (registration and or travel expenses) for any indigent defense system attorneys to obtain any training or CLE. All indigent defense system attorneys in these counties must personally pay for obtaining their own training.
- In Champaign County, during most years the public defender office defrays a portion of the cost for some of its public defender office attorneys to obtain training, however, the funding is “sporadic” and insufficient to cover all of the costs.²³⁴

²²⁸ NATIONAL ADVISORY COMM’N ON CRIM. JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, ch. 13 (The Defense), std 13.16 (1973). *See also* AMERICAN BAR ASS’N, CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, std 4-1.12(b) (4th ed. 2017).

²²⁹ AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 9 & cmt. (2002).

²³⁰ AMERICAN BAR ASS’N, CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION std 4-1.12(c) (4th ed. 2017).

²³¹ ILL. SUP. CT. R. 794.

²³² In FY 2020, Stephenson County eliminated a public defender budget line item to pay for the cost of attending training, and public defender office attorneys described the loss as “a really big deal.”

²³³ The LaSalle County public defender office’s FY 2018 budget showed an expenditure of \$666 for “education” – the only instance between FY 2016 and FY 2019 that any amount of county funds was spent on indigent defense system attorney training. *See* LASALLE COUNTY PUBLIC DEFENDER 2019 BUDGET; LASALLE COUNTY ILLINOIS, ANNUAL FINANCIAL REPORT 78 (Nov. 30, 2018); LASALLE COUNTY ILLINOIS, ANNUAL FINANCIAL REPORT 80 (Nov. 30, 2017); LASALLE COUNTY ILLINOIS, ANNUAL FINANCIAL REPORT 80 (Nov. 30, 2016).

²³⁴ Champaign County budgets show the public defender office’s “Conferences & Training” line item was \$934 in FY 2014; \$0 in FY 2015; \$94 in FY 2016; \$651 in FY 2017; and \$1,216 in FY 2018. *See* CHAMPAIGN COUNTY, ILLINOIS FY2020 BUDGET at 211; CHAMPAIGN COUNTY, ILLINOIS FY2019 BUDGET at 203; CHAMPAIGN COUNTY, ILLINOIS FY2018 BUDGET at 191; CHAMPAIGN COUNTY, ILLINOIS FY2017 BUDGET at 183; CHAMPAIGN COUNTY, ILLINOIS FY2016

- In DuPage County, the public defender office budget includes approximately \$20,000 each year for the cost of public defender office attorneys to obtain training.²³⁵ The office often pays for its misdemeanor attorneys who have less than two years of experience to attend the week-long trial advocacy seminar presented by the OSAD. In recent years, one or more DuPage County assistant public defenders have attended, at county expense, the Illinois Public Defender Association seminar, the National Association of Drug Court Professionals' annual conference, and the Trial Practice Institute of the National Criminal Defense College in Macon, Georgia. The office also provides internal training, at no cost to the office attorneys, that meets the state's annual CLE requirements (*see* discussion below of internal training).
- In Cook County, as part of the collective bargaining agreement with the assistant public defenders' union, the public defender office allocates \$40,000 annually "for education purposes," and each public defender office attorney may request up to \$550 per year to defray the cost of attending training.²³⁶ However, some assistant public defenders note that the office "quickly runs out of money" each year. The office provides internal training, at no cost to the public defender office attorneys, that meets the state's annual CLE requirements (*see* discussion below of internal training).

Internal public defender office training. Among the nine sample counties, only DuPage and Cook counties have formal internal training programs for public defender office attorneys.

- In DuPage County, each month the public defender office presents a lunch hour CLE program that it requires all of the public defender office attorneys to attend,²³⁷ meeting the state's annual CLE requirements at no cost to the individual public defender office attorneys.
- The Cook County public defender office has a professional development division that organizes the office's internal training programs.²³⁸ Although its attorneys are not required to attend, each year the office provides a three-day training program, called "Nutshell," that provides six hours of professional responsibility and 12 hours of CLE

BUDGET at 182.

²³⁵ DUPAGE COUNTY, COMPREHENSIVE ANNUAL FINANCIAL REPORT DUPAGE COUNTY, ILLINOIS FOR THE FISCAL YEAR ENDED NOVEMBER 30, 2018 at 123; DUPAGE COUNTY, COMPREHENSIVE ANNUAL FINANCIAL REPORT DUPAGE COUNTY, ILLINOIS FOR THE FISCAL YEAR ENDED NOVEMBER 30, 2017 at 122; DUPAGE COUNTY, COMPREHENSIVE ANNUAL FINANCIAL REPORT DUPAGE COUNTY, ILLINOIS FOR THE FISCAL YEAR ENDED NOVEMBER 30, 2016 at 125; DUPAGE COUNTY, COMPREHENSIVE ANNUAL FINANCIAL REPORT DUPAGE COUNTY, ILLINOIS FOR THE FISCAL YEAR ENDED NOVEMBER 30, 2015 at 125.

²³⁶ Collective Bargaining Agreement Between American Federation of State, County, and Municipal Employees (A.F.S.C.M.E.), Council 31, ALF-CIO, Local 3315 Representing Assistant Public Defenders, and County of Cook (Dec. 1, 2017 - Nov. 30, 2020), § 16.1.

²³⁷ DUPAGE COUNTY ILLINOIS PUBLIC DEFENDER EMPLOYEE HANDBOOK § 7F (rev. Feb. 11, 2020).

²³⁸ The division manages an annual training budget of approximately \$150,000, out of which the public defender office pays for the cost of internal and external training programs. *See* COOK COUNTY, ILLINOIS, FISCAL YEAR 2019: ANNUAL APPROPRIATION BILL VOLUME II, N-6 (1260 Public Defender) (showing a 2018 Adjusted Appropriation of \$161,020 under "501765-Professional Develop/Fees," and for that same category an approved & adopted appropriation for 2019 of \$196,000); COOK COUNTY, ILLINOIS, FISCAL YEAR 2018: ANNUAL APPROPRIATION BILL VOLUME II, X-7 (1260 Public Defender) (showing a 2017 Adjusted Appropriation of \$161,020 under "501765-Professional Develop/Fees").

sessions focused on criminal law and procedure,²³⁹ meeting the state’s annual CLE requirements at no cost to the individual public defender office attorneys. Some assistant public defenders think “Nutshell is great,” while others say the training is “boring and repetitious and unimaginative” and is “really useless for experienced lawyers.” Whenever the public defender office has a sufficient number of new attorneys, it provides a four-day trial advocacy program for those attorneys that they are required to attend. Some chiefs of individual public defender office divisions organize their own training programs for attorneys assigned to their divisions.

Insufficient access to optional state-funded training provided through the Office of the State Appellate Defender. The Office of the State Appellate Defender (OSAD) is statutorily authorized to “provide training to county public defenders.”²⁴⁰ Since FY 2012, the state has made a general fund appropriation each year for OSAD to provide this training and to partially defray the cost of attendance by indigent defense system attorneys.²⁴¹

The state does not require any indigent defense system attorney to attend any OSAD training.

OSAD presents five programs each year, all provided only in Chicago or Springfield, of three types:

- *Trial advocacy program.* A week-long workshop with presentations and demonstrations on voir dire, opening statements, cross-examinations, closing arguments, and other trial skills. Provided always in Chicago in partnership with the Cook County public defender office, the program is limited to 35 participants; a maximum of 10 attendee slots are reserved for Cook County assistant public defenders, 15 slots are reserved for attendees from downstate, and assistant public defenders from any county are given priority over appointed private attorneys. The cost of registration is free, and OSAD provides hotel accommodations for downstate attorneys traveling to Chicago, as well as mileage and per diem.
- *Seminars.* One-day training programs held twice annually, in Chicago in June and again in Springfield in July or August, with specific training topics varying from seminar to

²³⁹ For example, the August 2019 Nutshell training included sessions on suppression issues, mental health and other forensic issues, implicit bias, body camera evidence, and immigration consequences.

²⁴⁰ 725 ILL. COMP. STAT. § 105/10(c)(5.5) (2018).

²⁴¹ For example, from FY 2012 through FY 2018, the state made general fund appropriations to the state appellate defender’s office for “statewide training to public defenders” of:

FY 2012	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017	FY 2018
\$67,000	\$63,000	\$63,000	\$61,600	\$63,000	\$63,000	\$63,000

See ILLINOIS STATE COMPTROLLER, DETAILED ANNUAL REPORT OF REVENUES AND EXPENDITURES: ILLINOIS FISCAL YEAR 2012, at 139-40; ILLINOIS STATE COMPTROLLER, DETAILED ANNUAL REPORT OF REVENUES AND EXPENDITURES: ILLINOIS FISCAL YEAR 2013, at 147; ILLINOIS STATE COMPTROLLER, DETAILED ANNUAL REPORT OF REVENUES AND EXPENDITURES: ILLINOIS FISCAL YEAR 2014, at 169; ILLINOIS STATE COMPTROLLER, DETAILED ANNUAL REPORT OF REVENUES AND EXPENDITURES: ILLINOIS FISCAL YEAR 2015, at 147; ILLINOIS STATE COMPTROLLER, DETAILED ANNUAL REPORT OF REVENUES AND EXPENDITURES: ILLINOIS FISCAL YEAR 2016, at 149; ILLINOIS STATE COMPTROLLER, DETAILED ANNUAL REPORT OF REVENUES AND EXPENDITURES: ILLINOIS FISCAL YEAR 2017, at 169; ILLINOIS STATE COMPTROLLER, DETAILED ANNUAL REPORT OF REVENUES AND EXPENDITURES: ILLINOIS FISCAL YEAR 2018, at 179.

seminar.²⁴² Attendance is limited to between 24 and 35 attorneys: between 7 and 10 attendee slots are reserved for Cook County assistant public defenders, 15 slots are reserved for attendees from downstate, and assistant public defenders from any county are given priority over appointed private attorneys. The cost of registration is free, and OSAD provides hotel accommodations for attorneys with long travel distances to the seminar location, as well as mileage and per diem.

- *Illinois Public Defender Association (IPDA) seminars.*²⁴³ Two-day training programs held each spring and fall in Springfield, providing 7 to 8 CLE hours on a variety of topics.²⁴⁴ Each seminar can accommodate up to 185 participants, but the average registration is approximately 120 attorneys. Registration is \$145 for all attorneys,²⁴⁵ and attendees must pay for their own hotel accommodations, mileage, and meals.

Registration data for the 13 OSAD training programs presented sequentially from 2017 through 2019 shows²⁴⁶ that 25 of the state's 102 counties did not have a single indigent defense system attorney in attendance at any program, and another 10 counties had only one indigent defense system attorney attend any of those 13 events.²⁴⁷

OSAD is aware of several reasons that indigent defense system attorneys from many counties do not attend its training programs. All of the programs are offered only in Springfield and Chicago, so attorneys traveling from further away sometimes find it challenging to clear their calendars for the travel time in addition to the training time – it is not unusual for lawyers who have registered for the programs to have to cancel just a day in advance when their work prevents them from attending. Attendance at the three free programs is severely limited, with no more than 25 slots available for each program to attorneys outside of Cook County. The two IPDA seminars carry a registration cost, and for out-of-town lawyers also the cost of travel and lodging, which the indigent defense system attorneys from many counties must personally pay without reimbursement from the counties. Finally, appointed private attorneys suffer loss of income while attending training, unlike public defender office attorneys who continue to receive their salary while attending CLE.

²⁴² Recent one-day seminar topics include: arguing motions in limine and contemporaneous objections; preparing clients to testify in self-defense cases; and working with investigators.

²⁴³ These seminars are hosted by the Illinois Public Defender Association, with administrative and logistics support from the Office of the State Appellate Defender.

²⁴⁴ Recent conference training topics include: U.S. Supreme Court and Illinois Supreme Court update; legislative update; affirmative defenses; litigating forensic digital evidence; forensic pathology; and police body cameras.

²⁴⁵ The \$145 registration fee covers the rental cost of the venue and hotel accommodations for faculty and OSAD staff.

²⁴⁶ OSAD has maintained an electronic registration system since 2017; registration data prior to 2017 is not available.

²⁴⁷ The 25 counties with no attendees are Bond, Brown, Clinton, Douglas, Edwards, Franklin, Greene, Hardin, Henderson, Iroquois, Jo Daviess, LaSalle, Mason, McHenry, Mercer, Monroe, Piatt, Pope, Richland, Schuyler, Stark, Wabash, Washington, Wayne, and White. The 10 counties with only one attendee at a single event are Alexander, Carroll, Clay, Crawford, Ford, Fulton, Gallatin, Lawrence, Putnam, and Saline.

C. Supervising indigent defense system attorneys

Attorneys who were once well-qualified and well-trained can, for any number of reasons, lose their competency to handle cases over time, and indigent people do not get to choose which attorney is appointed to represent them. For these reasons, national standards require that all attorneys who are appointed to represent indigent people must be “supervised and systematically reviewed” to ensure that they continue to provide effective assistance of counsel to each and every indigent client.²⁴⁸ Implicit within supervision is that the supervisor has authority to ensure an attorney is no longer appointed if they are no longer competent.

1. Supervision of a county’s public defender

All counties other than Cook. In all counties other than Cook, the only state law provision touching on supervision states that the appointed public defender holds office at the pleasure of the appointing judges, and so can be removed at any time by those judges with or without a reason.²⁴⁹ As one county public defender explained: “The people who could fire me are the people that I practice before every day.” And as a judge in a different county reportedly said: “The public defender works for the judges.”

The judges in the representative counties of this evaluation have not established any standards or procedures by which to measure or review the work of the public defender in their county. In practice, the circuit judges provide little to no supervision of the public defenders they appoint. Some judges say they avoid any conduct that might be seen as interfering with the public defender’s operations because the public defender office should be kept “completely independent” of the courts, and thus they see their oversight responsibilities as limited to “advising” the public defender on ethical considerations.

Cook County. The only state law provision regarding supervision of the Cook County public defender provides that, during the six-year term of office, the appointed public defender can be “removed by the President [of the county board] only for good cause or dereliction of duty after notice and a hearing before the [county] Board.”²⁵⁰ The coronavirus pandemic prevented learning more during this evaluation about whether and how the Cook County board president supervises the work of the public defender.

²⁴⁸ See AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 10 (2002).

²⁴⁹ 55 ILL. COMP. STAT. § 5/3-4004 (2019).

²⁵⁰ 55 ILL. COMP. STAT. §§ 5/3-4004.1, 4004.2 (2018).

Among the duties required of the public defender in Cook County, all county agencies are required to submit monthly expenditures and services reports to the county, as part of the county’s “Set Targets, Achieve Results (STAR) program” for performance management. See *Performance Management*, COOK COUNTY GOVERNMENT, <https://www.cookcountyil.gov/agency/performance-management>; *STAR Reports*, COOK COUNTY GOVERNMENT, <https://www.cookcountyil.gov/service/star-reports>. The county annually measures each county agency, including the public defender office, against broad county goals and publishes the results in performance reports. See, e.g., COOK COUNTY, ILLINOIS, COOK COUNTY ANNUAL PERFORMANCE REPORT FOR FISCAL YEAR 2019 at 16-17.

2. Supervision of assistant public defenders

The only state law provisions touching on supervision of assistant public defenders state that they “serve at the pleasure of the Public Defender,” and so they can be removed at any time by the county’s public defender with or without a reason.²⁵¹

Among the nine representative counties in this evaluation, four do not have any assistant public defenders, and the county public defenders in the other five counties vary in their approaches to supervising the assistant public defenders in their offices.

The public defenders in Stephenson and LaSalle counties have not established any standards or procedures by which to measure or review the work of the assistant public defenders in their offices. No formal supervision occurs, because the public defenders in both counties believe they have hired competent assistant public defenders and trust them to perform effectively on their own. In LaSalle County additionally, because the assistant public defenders are assigned to handle each other’s conflict of interest cases, the public defender believes any direct oversight of attorney performance (for example, through case file reviews or court observations) would be inappropriate.

The Champaign County public defender has not established any standards or procedures by which to measure or review the work of the assistant public defenders. Whatever supervision that occurs of the 13 assistant public defenders is the responsibility of the appointed public defender.²⁵² Until approximately 2017, assistant public defenders received annual performance reviews, but the public defender acknowledges having “fallen short” on these and other supervisory responsibilities due to the lack of available time. Assistant public defenders report that there is “not very much supervision” provided, with no proactive review of case files and no regular court observations.

The DuPage County public defender office’s *Employee Handbook* provides information about expectations and performance assessments, as well as about procedures for disciplining and terminating an assistant public defender due to inadequate performance.²⁵³ In addition to the public defender, one deputy chief public defender oversees the assistant public defenders in the misdemeanor division and another deputy chief public defender oversees the assistant public defenders in the felony division. Both deputy chiefs carry reduced caseloads. Supervision in the misdemeanor division is reported to be much more intensive than in the felony division where attorneys tend to have more experience. Both deputy chiefs engage in some amount of case file review and court observations, in addition to seeking feedback from other criminal justice

²⁵¹ 55 ILL. COMP. STAT. §§ 5/3-4008, 5/3-4008.1 (2019).

²⁵² The first assistant public defender has no supervisory responsibility over other attorneys within the office, despite a published job description that says the position “has some authority in supervising the staff, . . . Carries out supervisory responsibilities in planning, assigning, and directing work; appraising performance; . . .” See *Champaign County Job Description, First Assistant Public Defender*, CHAMPAIGN COUNTY PUBLIC DEFENDER, <http://www.co.champaign.il.us/descript/pd/nbu/FirstAssistantPublicDefender.pdf> (last visited Mar. 31, 2020).

²⁵³ DUPAGE COUNTY ILLINOIS PUBLIC DEFENDER EMPLOYEE HANDBOOK §§ 2A, 2B, 2C, 5B, 7A, 7B, 7E (rev’d Feb. 11, 2020).

stakeholders about and having regular conversations with assistant public defenders to monitor their caseloads and address their needs. The deputy chiefs conduct formal annual performance reviews that guide decisions about the assistant public defenders' job progress, professional development, and potential pay increases.

The Cook County public defender office's *Employee Manual* and *Division Chiefs and Supervisor Manual* provide information about expectations and performance assessments, and the collective bargaining agreement with the assistant public defender union explains the procedures for disciplining and terminating an assistant public defender.²⁵⁴ With over 500 FTE assistant public defender positions allocated to 12 separate physical office locations spread across the county, the Cook County public defender has the most extensive supervisory structure of the nine counties studied closely in this evaluation.

Assistant public defenders are assigned to either the administration headquarters or to one of 21 divisions within the public defender office. Each division has a chief who is responsible for all of that division's attorneys and some number of supervisors who assist in supervising the division's assistant public defenders. The division chiefs and supervisors do not carry a caseload and are dedicated full-time to their managerial and supervisory responsibilities. Cook County division chiefs and supervisors actively monitor assistant public defenders' work according to prescribed performance metrics (e.g., visiting clients at jail, bringing cases to trial, time & attendance, etc.) that are part of the standardized performance review process.

Beyond these standardized performance metrics, though, there is wide variation in the amount of supervision and the manner in which it is provided from division to division. There are many reasons for this disparity, including: inequitable ratios of supervisors to trial attorneys; personalities; experience levels; ingrained culture of each division; and number and location of courts served by each division. As of June 2019, there was a combined total of 25 chiefs and supervisors overseeing the 315 assistant public defender trial attorneys across the 11 divisions that provide direct representation to indigent defendants in adult criminal cases (or an average ratio of 1 supervising attorney to every 13 trial attorneys), distributed as follows:

- felony trial division, 1:18 (one chief and four supervisors, to 89 trial lawyers);
- homicide task force, 1:13 (one chief and one supervisor, to 26 trial lawyers);
- multiple defendant division, 1:9 (one chief and one supervisor, to 18 trial lawyers);
- police station representation division, 0:9 (no dedicated chief or supervising attorney);
- problem-solving courts division, 0:0 (all chiefs, supervisors, and trial lawyers are accounted for in the other 10 divisions);
- first municipal division (Chicago), 1:11 (one chief and three supervisors, to 43 trial lawyers);
- second municipal division (Skokie), 1:13 (one chief and one supervisor, to 27 trial lawyers);

²⁵⁴ LAW OFFICE OF THE COOK COUNTY PUBLIC DEFENDER, EMPLOYEE MANUAL, §§ 4-2, 6-1, 9-2, 9-6, 10-2 (rev'd Apr. 1, 2016); LAW OFFICE OF THE COOK COUNTY PUBLIC DEFENDER, DIVISION CHIEFS AND SUPERVISOR MANUAL, §§ 2, 5, 13, 14 (rev'd Apr. 16, 2019); Collective Bargaining Agreement Between American Federation of State, County, and Municipal Employees (A.F.S.C.M.E.), Council 31, ALF-CIO, Local 3315 Representing Assistant Public Defenders, and County of Cook (Dec. 1, 2017 - Nov. 30, 2020), art. XI.

- third municipal division (Rolling Meadows), 1:9 (one chief and one supervisor, to 18 trial lawyers);
- fourth municipal division (Maywood), 1:9 (one chief and one supervisor, to 19 trial lawyers);
- fifth municipal division (Bridgeview), 1:14 (one chief and one supervisor, to 28 trial lawyers); and
- sixth municipal division (Markham), 1:9 (one chief and three supervisors, to 38 trial lawyers).

The public defender identified implementing a consistent management theory and style across divisions as one of the most significant challenges facing the office as a whole. One division chief put it less delicately: “We’re constantly fighting the county, our clients, and each other.”

3. Supervision of appointed private attorneys

State law does not make any provision for the supervision of appointed private attorneys.

Among the nine representative counties in this evaluation, four rarely if ever appoint private attorneys to represent indigent adults in trial-level criminal cases (Stephenson, LaSalle, DuPage, and Cook). In the other five sample counties, the judges have not established any standards or procedures by which to measure or review the work of the private attorneys whom they appoint, even in Mercer and Champaign counties where private attorneys are under contract to be appointed in criminal conflict of interest cases. In Hardin, Gallatin, Schuyler, and Mercer counties, there is no supervision of appointed private attorneys. The coronavirus pandemic prevented learning more during this evaluation about whether and how the judges in Champaign County supervise the work of appointed private attorneys.

Chapter IV

Sufficient resources & compensation

The U.S. Supreme Court explained in *Cronic* that “[t]he right to the effective assistance of counsel” means that the defense must put the prosecution’s case through the “crucible of meaningful adversarial testing.”²⁵⁵ For this to occur, an indigent person must be represented by an attorney who has the resources necessary to challenge the prosecution’s case. If the attorney lacks the necessary resources to challenge the state’s case – “if the process loses its character as a confrontation between adversaries”²⁵⁶ – this is a structural impediment that results in the constructive denial of the right to counsel.

The U.S. Constitution holds the State of Illinois responsible for ensuring adequate funding for the right to counsel under the Sixth and Fourteenth Amendments.²⁵⁷ The State of Illinois provides limited funding for the right to counsel in two ways: (1) through the Office of the State Appellate Defender to provide certain services to the county indigent defense systems, and (2) by reimbursing counties that have a public defender office for a portion of the public defender’s compensation. (See discussion at pages 26 to 29.) Illinois has delegated to its counties all of the other responsibility for funding the right to counsel of indigent people.²⁵⁸ When a state chooses to delegate this responsibility to its counties, the state must guarantee not only that those local governments are capable of providing effective representation but also that they are in fact doing so.²⁵⁹

²⁵⁵ *United States v. Cronic*, 466 U.S. 648, 656-57 (1984) (“The right to the effective assistance of counsel is thus the right of the accused to require the prosecution’s case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted – even if defense counsel may have made demonstrable errors – the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.”).

²⁵⁶ *United States v. Cronic*, 466 U.S. 648, 656-57 (1984).

²⁵⁷ *Gideon v. Wainwright*, 372 U.S. 335, 341-45 (1963) (“[T]hose guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment. . . . [A] provision of the Bill of Rights which is ‘fundamental and essential to a fair trial’ is made obligatory upon the States by the Fourteenth Amendment. . . . [R]eason 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. . . . The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”).

²⁵⁸ 55 ILL. COMP. STAT. §§ 5/3-4007 to 5/3-4011 (2018); 725 ILL. COMP. STAT. § 5/113-3(c) (2018).

²⁵⁹ *Cf. Robertson v. Jackson*, 972 F.2d 529, 533 (4th Cir. 1992) (although administration of a food stamp program was turned over to local authorities, “ultimate responsibility” . . . remains at the state level.”); *Osmunson v. State*, 17 P.3d 236, 241 (Idaho 2000) (where a duty has been delegated to a local agency, the state maintains “ultimate responsibility” and must step in if the local agency cannot provide the necessary services); *Claremont School Dist. v. Governor*, 794 A.2d 744 (N.H. 2002) (“While the State may delegate [to local school districts] its duty to provide a constitutionally adequate education, the State may not abdicate its duty in the process.”); Letter and white paper from American Civil Liberties Union Foundation et al to the Nevada Supreme Court, regarding Obligation of States

A. The fiscal resources necessary for effective representation

The American Bar Association's *Standards for Criminal Justice* explain that attorneys must have adequate resources and support (including secretarial, investigative, and expert services) and adequate facilities and equipment (such as computers, telephones, photocopying equipment, and office space to meet with clients) in order to render effective assistance of counsel.²⁶⁰ All national standards require that: "Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses."²⁶¹ Therefore, an attorney needs three types of resources to effectively represent each client:

- *Law office overhead.* For an attorney to be available to represent clients each day, certain expenses must be funded. These include office rent, furniture and equipment, computers and cellphones, telephone and internet and other utilities, office supplies including stationery, malpractice insurance, state licensing and bar dues, and legal research materials, plus the cost of staff such as a secretary or legal assistant. All of these expenses, commonly referred to as "overhead," must be incurred before a lawyer represents a single client.²⁶²
- *Case-related expenses.* Once an attorney is designated to represent a specific client in a specific case, there are additional expenses that must be paid. These are expenses that the attorney would not incur but for representing that client, and they include, for example, postage to communicate with the client and witnesses and the court system, long-distance and collect telephone charges, mileage and other travel costs to and from court and to conduct investigations, preparation of copies and exhibits, costs incurred in obtaining discovery, and the costs of hiring necessary investigators and experts in the case. These costs vary from case to case; some cases requiring very little in the way of expense, other cases costing quite a lot. The individual expenses that are necessary, though, must be paid for in every client's case.
- *Fair lawyer compensation.* This is the attorney's pay.

in Providing Constitutionally-Mandated Right to Counsel Services (Sept. 2, 2008) ("While a state may delegate obligations imposed by the constitution, 'it must do so in a manner that does not abdicate the constitutional duty it owes to the people.'"), http://www.nlada.net/sites/default/files/nv_delegationwhitepaper09022008.pdf.

²⁶⁰ AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE – PROVIDING DEFENSE SERVICES, std. 5-1.4 cmt. (3d ed. 1992).

²⁶¹ AMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 8 cmt. (2002).

²⁶² "The 2012 Survey of Law Firm Economics by ALM Legal Intelligence estimates that over 50 percent of revenue generated by attorneys goes to pay overhead expenses," NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, RATIONING JUSTICE: THE UNDERFUNDING OF ASSIGNED COUNSEL SYSTEMS 8 (Mar. 2013), and overhead tends to be a higher percentage of gross receipts as a law office gets smaller. See ALM LEGAL INTELLIGENCE, 2012 SURVEY OF LAW FIRM ECONOMICS, Executive Summary at 4 (showing overhead ranging from 38.9 percent of receipts in the largest law firms to 47.2 percent in smaller law offices).

The government is responsible for providing the resources needed in each indigent person's case. It can do so by providing a government paid-for building stocked with all the necessary supplies and equipment and a budget for investigation, experts, and support staff. Or it can do so by paying or repaying the appointed attorneys for these expenses. What government *cannot do*, as has been held by state supreme courts all across the country, is place the burden of paying for the indigent defense system onto the appointed attorneys.²⁶³ In 1981, the Illinois Supreme Court similarly observed that “[a] fee award which is insufficient to cover reasonable office overhead and expenses of trial is clearly unreasonable.”²⁶⁴

B. The state's framework for county funding of indigent representation systems

As previously explained, other than the limited financial assistance that the state provides to counties (*see* discussion at pages 26 to 29 and 41 to 48), Illinois has delegated to its counties all of the other responsibility for funding the right to counsel of indigent people.²⁶⁵ Although this evaluation is concerned principally with the right to counsel for indigent adults in criminal cases at the trial level, as mandated by the Sixth and Fourteenth Amendments, the indigent defense system in each Illinois county is responsible for representing all indigent people at the trial level (and in some appellate & post-conviction cases), whenever appointed by a court – both in cases where the right to counsel is guaranteed under the federal constitution and in those that, although not mandated by the Sixth Amendment, are required or allowed under Illinois law. This means that only a portion of the funding a county provides for its indigent defense system goes toward adult criminal cases and the rest goes toward the representation of children in juvenile

²⁶³ *See, e.g.*, *Wright v. Childree*, 972 So. 2d 771, 780-81 (Ala. 2006) (determining assigned counsel are entitled to a reasonable fee in addition to overhead expenses); *DeLisio v. Alaska Superior Court*, 740 P.2d 437, 443 (Alaska 1987) (concluding that “requiring an attorney to represent an indigent criminal defendant for only nominal compensation unfairly burdens the attorney by disproportionately placing the cost of a program intended to benefit the public upon the attorney rather than upon the citizenry as a whole;” and that Alaska’s constitution “does not permit the state to deny reasonable compensation to an attorney who is appointed to assist the state in discharging its constitutional burden,” because doing so would be taking “private property for a public purpose without just compensation”); *Kansas ex rel Stephan v. Smith*, 747 P.2d 816, 242 Kan. 336, 383 (Kan. 1987) (the state “has an obligation to pay appointed counsel such sums as will fairly compensate the attorney, not at the top rate an attorney might charge, but at a rate which is not confiscatory, considering overhead and expenses”); *Louisiana v. Wigley*, 624 So.2d 425, 429 (La. 1993) (finding that “in order to be reasonable and not oppressive, any assignment of counsel to defend an indigent defendant must provide for reimbursement to the assigned attorney of properly incurred and reasonable out-of-pocket expenses and overhead costs”); *Wilson v. Mississippi*, 574 So.2d 1338, 1340 (Miss. 1990) (holding indigent defense attorneys are entitled to “reimbursement of actual expenses” including “all actual costs to the lawyer for the purpose of keeping his or her door open to handle this case,” in addition to a reasonable sum); *Oklahoma v. Lynch*, 796 P.2d 1150, 1161 (Okla. 1990) (finding that the state government “has an obligation to pay appointed lawyers sums which will fairly compensate the lawyer, not at the top rate which a lawyer might charge, but at a rate which is not confiscatory, after considering overhead and expenses”); *Jewell v. Maynard*, 383 S.E.2d 536, 540 (W. Va. 1989) (finding that, because compensation rates did not cover attorney overhead, court appointed attorneys were forced to “involuntarily subsidize the State with out-of-pocket cash;” “[p]erhaps the most serious defect of the present system is that the low hourly fee may prompt an appointed lawyer to advise a client to plead guilty, although the same lawyer would advise a paying client in a similar case to demand a jury trial”).

²⁶⁴ *People v. Johnson*, 429 N.E.2d 497, 87 Ill. 2d 98, 105 (Ill. 1981).

²⁶⁵ 55 ILL. COMP. STAT. §§ 5/3-4007 to 5/3-4011 (2018); 725 ILL. COMP. STAT. § 5/113-3(c) (2018).

delinquency proceedings and toward the representation of adults and children in a variety of civil case types. Because counties rarely designate the specific case type for which funding is provided, this chapter looks at the entirety of the indigent representation system funding whenever greater specificity is impossible.

Public defender office. In all counties that have a public defender office – today, all 102 counties – state law requires the county to provide “suitable office quarters” and to pay for “necessary office, travel and other expenses incurred in the defense of cases.”²⁶⁶ In counties other than Cook, DuPage, Kane, Lake, and Will, under state law the county board must “appropriate a sufficient sum” to pay the costs of representation in felony cases and the county’s circuit court must approve all public defender office expenses “as being necessary and proper” before the county pays the expense.²⁶⁷

In all counties, state law requires that the county board set the amount of its public defender’s compensation and pays that compensation out of the county treasury.²⁶⁸ However, in counties other than Cook:

- if a county elects to have a full-time public defender, state law requires that the public defender’s compensation must be at least 90% of the state’s attorney’s annual compensation;²⁶⁹
- if a county elects to have a part-time public defender, state law does not impose any requirements about the amount of the public defender’s compensation, so a county board is free to set the compensation at the lowest amount at which an attorney will agree to serve in the position.

In Cook County, the public defender must be full-time, and the public defender’s compensation “shall be comparable with that paid to circuit court judges, but in no event shall be more than that of the State’s Attorney” and must be at least 90% of the state’s attorney’s annual compensation.²⁷⁰

²⁶⁶ 55 ILL. COMP. STAT. § 5/3-4009 (2018).

²⁶⁷ 55 ILL. COMP. STAT. §§ 5/3-4009, 5/3-4011 (2018).

²⁶⁸ 55 ILL. COMP. STAT. § 5/3-4007(a), (c) (2018).

²⁶⁹ State law is worded oddly regarding the compensation and the full-time/part-time nature of the public defender in counties with populations less than 35,000. Once these counties establish a public defender office, there are two different provisions that come into play. One provision says: “If the public defender is employed full-time in that capacity, his or her salary must be at least 90% of that county’s State’s [A]ttorney’s annual compensation.” 55 ILL. COMP. STAT. § 5/3-4007(b) (2018). A second provision says: “When a Public Defender in a county of 30,000 or more population is receiving not less than 90% of the compensation of the State’s Attorney of such county, that Public Defender shall not engage in the private practice of law.” 55 ILL. COMP. STAT. § 5/3-4007(a) (2018). This seems to suggest that a county with a population less than 30,000 can choose to have a part-time public defender and pay that part-time public defender 90% or more of the compensation of the state’s attorney. There are 52 counties that have 2010 census populations of less than 30,000. See *QuickFacts, [each Illinois county]*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045219>.

²⁷⁰ 55 ILL. COMP. STAT. § 5/3-4004.2(b), (d) (2018).

Counties are not required by state law to have any assistant public defenders or support staff in the public defender office. In counties that do have assistant public defenders and/or support staff, state law requires that the county board sets the amount of their compensation and pay that compensation out of the county treasury.²⁷¹

Appointed private attorneys. Each county may provide representation to some indigent defendants through appointed private attorneys. (*See* discussion at pages 32 to 41 regarding counties, case types, and circumstances in which a private attorney may be appointed to represent an indigent defendant in an adult criminal trial-level case.) When a private attorney is appointed to represent an indigent defendant in an adult criminal case, state law requires the circuit court judges to determine the amount of the compensation paid to the private attorney:²⁷²

- All counties. The court “shall order” the county to pay a “reasonable fee” for “services rendered,” considering “all relevant circumstances, including” the time spent and expenses reasonably incurred by the attorney.²⁷³
- Limitations in Cook County. In Cook County only:
 - expenses “may” be reimbursed “not to exceed \$50 for each defendant;”²⁷⁴ and
 - payment for the lawyer’s time cannot be more than \$40 per hour in-court and \$30 per hour out-of-court, capped at \$150 per misdemeanor case and \$1,250 per felony case, *except* “in extraordinary circumstances, payment in excess of the limits herein stated may be made if the trial court certifies that such payment is necessary to provide fair compensation for protracted representation.”²⁷⁵

Each county is required by state law to pay the amounts ordered by the circuit court judges for cases arising out of that county.²⁷⁶ In counties other than Cook, DuPage, Kane, Lake, and Will, the county board must “appropriate a sufficient sum” to pay the costs in felony cases.²⁷⁷

In its court rules, the Illinois Supreme Court gives each judicial circuit the authority to adopt rules governing criminal cases,²⁷⁸ and the chief judge of each circuit has the authority to enter general administrative orders for the performance of judicial duties within the circuit.²⁷⁹ As a result, each judicial circuit can handle private attorney compensation differently from the next, and in some cases the judges within each judicial circuit may adopt their own practices.

²⁷¹ 55 ILL. COMP. STAT. §§ 5/3-4008, 5/3-4008.1 (2018).

²⁷² 55 ILL. COMP. STAT. § 5/3-4006 (2018); 725 ILL. COMP. STAT. § 5/113-3(c)-(e) (2018).

²⁷³ 725 ILL. COMP. STAT. § 5/113-3(c) (2018).

²⁷⁴ 725 ILL. COMP. STAT. § 5/113-3(e) (2018).

²⁷⁵ 725 ILL. COMP. STAT. § 5/113-3(c) (2018).

²⁷⁶ 725 ILL. COMP. STAT. § 5/113-3(c) (2018).

²⁷⁷ 55 ILL. COMP. STAT. § 5/3-4011 (2018).

²⁷⁸ ILL. S. CT. R. 21(a).

²⁷⁹ ILL. S. CT. R. 21(b)-(c).

C. Understanding county funding of indigent representation systems

In theory, it should be easy to know what each Illinois county spends on indigent representation services each year, because every county is required to provide fiscal documentation to the state comptroller for publication on the comptroller's website.²⁸⁰ In reality though, there are several factors that make it difficult, if possible at all, to determine what fiscal resources each county provides for its indigent representation system.

Different fiscal years. Fiscal years differ among the various counties and the state. The state's fiscal year ends on June 30.²⁸¹ Some county governments follow the state's fiscal year; some counties adopt the calendar year, ending on December 31; and some counties adopt a different fiscal year. As a result, the timing varies as to when counties are required to provide their financial information to the state comptroller, because the reports are due to the comptroller within 180 days of the close of a county's fiscal year.²⁸²

Failure to timely report fiscal information. Some counties fail to timely provide their required fiscal documentation to the state comptroller. In counties that have not provided their financial documents to the state comptroller, the county auditor or the county treasurer is the only source of this information.²⁸³

Inconsistent locations of funding within budgets and fiscal documents. While each county provides funding for indigent representation services each year, the specific budgetary category and/or line item in which that funding is located varies from county to county. In some counties, indigent representation services (by whatever name it is given in the county) is its own budgetary category. In other counties, indigent representation funding falls within the court's budget. In still other counties, indigent representation funding is within some other county budgetary category, such as "corrections." Not uncommonly, a county's funding of its indigent representation system is spread throughout multiple budgetary categories, and any given line item within each of those budgetary categories may provide funding for both the indigent representation system and for other justice system expenses.

Inconsistent terminology for components of indigent representation system. Additionally, there is no consistency among counties in the terms they use to designate the various parts of their indigent defense systems. Any two counties may, for example, use the term "public defender" but mean entirely different things.

²⁸⁰ See ILL. CONST. art. VIII, § 4; 15 ILL. COMP. STAT. §§ 405/16.1 (2018) (state comptroller to maintain, for availability to the public, online repository of reports required to be filed by local government units); 15 ILL. COMP. STAT. §§ 425/0.01 through 2 (2018) (Local Government Accounting Systems Act); 50 ILL. COMP. STAT. §§ 310/0.01 through 11 (2018) (Governmental Account Audit Act); 55 ILL. COMP. STAT. §§ 5/6-31001 through 31012 (2018) (County Auditing Law).

²⁸¹ 30 ILL. COMP. STAT. § 105/1 (2018).

²⁸² 50 ILL. COMP. STAT. § 310/2 (2018); 55 ILL. COMP. STAT. §§ 5/6-31003, 5/6-31004 (2018).

²⁸³ See 55 Ill. Comp. Stat. §§ 5/3-1001 through 1008 (2018).

D. Indigent representation system funding in the sample counties

The nine representative counties in this evaluation vary greatly in how they budget and report fiscal information and how they provide funding for their indigent representation systems. This section explains how it is done in each of the nine sample counties from least populous to most populous. With 102 counties in the state, it is likely that any or all of those counties present even greater variations in the funding of their indigent representation systems, yet the State of Illinois has no method of knowing.

To evaluate the extent to which the State of Illinois ensures adequate funding for the right to counsel, as required under the Sixth and Fourteenth Amendments, funding in the nine representative counties is analyzed regarding:

- the methods and amounts of compensation paid by counties to indigent representation system attorneys in exchange for the work required;
- whether counties provide necessary case-related expenses and reasonable overhead in addition to attorney compensation or whether counties require attorneys to pay for those expenses and overhead out of their own compensation; and
- the extent to which counties comply with Illinois state law regarding funding.

Throughout the sample counties, whenever a county provides office facilities for the use of its public defender office, the funding for those facilities is part of the county’s overall cost for courthouse facilities, so it is not possible to determine what portion of the funding is attributable to the indigent representation system.

Throughout the sample counties, whenever private attorneys are paid an hourly rate, the private attorney must pay the cost of overhead out of that compensation and whatever remains is the attorney’s pay.²⁸⁴

At the time of this report, FY 2018 is the last fiscal year for which financial data is available for the state and for all nine sample counties. For that reason, FY 2018 data is used throughout this section to provide a basis for comparison across counties. FY 2018 ends:

June 30, 2018 –	for the state
November 30, 2018 –	for the counties of Cook, DuPage, Gallatin, Hardin, LaSalle, Mercer, and Schuyler
December 31, 2018 –	for the counties of Champaign and Stephenson

Where significant changes in a county’s indigent defense system funding have occurred since FY 2018, information is also provided about those changes.

²⁸⁴ For example, informal guidance in the criminal division in the Cook County circuit court advises that judges should not consider “[l]aw firm overhead expenses . . . as part of counsel’s hourly rate” and that judges should not reimburse appointed counsel for “travel to and from the courthouse, fee petition preparation, excessive staffing, and law firm overhead costs including but not limited to rent, phone, office supplies, and administrative support staff services.”

Hardin County. Hardin County’s fiscal year ends on November 30, so its FY 2018 covers the period of December 1, 2017 through November 30, 2018. The state comptroller shows that Hardin County did not timely submit its FY 2019 annual audit and annual report, both of which were due on July 27, 2020.²⁸⁵

Funding for the public defender’s compensation is in the “corrections” departmental budget under a line item for “public defender: salary.”²⁸⁶ The circuit court advises that funding for all case-related expenses and for appointed private attorneys paid hourly comes from the “court expense” budget.²⁸⁷

Public defender office. The county does not provide office facilities. Instead, the business of the public defender office is conducted out of the private law office of the public defender and all overhead costs are paid personally by the public defender.

The public defender is a part-time employee of the county. In exchange for providing representation in an unlimited number of cases whenever appointed in Hardin County and in conflict cases when appointed in Gallatin County, the public defender is paid an annual salary of \$67,500 and does not receive county benefits other than voluntary participation in the Illinois Municipal Retirement Fund.²⁸⁸

There are no assistant public defenders and no support staff.

Case-related expenses for investigators or experts, if requested, are paid out of the court’s budget. The circuit court reports approving case-related expenses in only two cases (both for the cost of experts conducting “sanity exams”) totaling \$4,730.

Appointed private attorneys. Conflict representation is provided in the first instance by the public defender of Gallatin County, and Hardin County does not pay anything for this conflict representation. Case-related expenses for investigators or experts, if requested, are paid out of the court’s budget.

When other private attorneys are appointed, they are paid \$70/hour. Anecdotally, private attorneys paid hourly were appointed counsel in only three cases, for which the county paid a combined total of \$3,836.50 out of the circuit court’s budget for all private attorney time and case-related expenses.

²⁸⁵ As of November 24, 2020, Hardin County had not submitted its fiscal year 2019 annual audit and its fiscal year 2019 annual report, both of which were due on July 27, 2020. *Landing Page: Hardin - A County in Illinois*, ILLINOIS STATE COMPTROLLER, <https://illinoiscomptroller.gov/financial-data/local-government-division/local-government-data/landingpage/?code=035/000/00&searchtype=AFRSearch&originalSearchString=Hardin%20County%20%20-%20%20035/000/00>.

²⁸⁶ See Hardin County, Illinois, Annual Financial Statements for the Year Ended November 30, 2018, at 41.

²⁸⁷ See Hardin County, Illinois, Annual Financial Statements for the Year Ended November 30, 2018, at 42.

²⁸⁸ See Hardin County, Illinois, Annual Financial Statements for the Year Ended November 30, 2018, at 41.

Gallatin County. Gallatin County’s fiscal year ends on November 30, so its FY 2018 covers the period of December 1, 2017 through November 30, 2018.

Funding for the public defender is in the “circuit court” departmental budget, under a line item for “defense council – contractual” (the county’s share of funding) and another line item for “defense council – state” (the portion provided from state reimbursement dollars).²⁸⁹ Funding for the overhead stipend to the public defender²⁹⁰ is in the “circuit court” departmental budget, but it is unclear as to which line item it is attributable. The circuit court advises that funding for all case-related expenses and for appointed private attorneys paid hourly is in the “circuit court” departmental budget under “defense council.”²⁹¹

Public defender office. The county does not provide office facilities but pays \$100 per month to the public defender as an overhead stipend.²⁹² The business of the public defender office is conducted out of the private law office of the public defender and all overhead costs are paid personally by the public defender.²⁹³

The public defender²⁹⁴ is a part-time contractor and receives no county benefits.²⁹⁵ In exchange for providing representation in an unlimited number of cases whenever appointed in Gallatin County and in conflict cases when appointed in Hardin County, the public defender is paid a fixed annual fee of \$47,250.²⁹⁶

There are no assistant public defenders and no support staff.

Case-related expenses for investigators or experts, if requested, are paid out of the court’s budget. Gallatin County was unable to provide any information about case-related expenses in cases handled by the public defender office during FY 2018.

²⁸⁹ See, e.g., Gallatin County, Illinois, Annual Financial Report & Independent Auditors’ Report for the Fiscal Year Ended November 30, 2018, at 58.

²⁹⁰ See, e.g., Contract, between the County of Gallatin and [named attorney], Attorney at Law, § 5 (Dec. 15, 2016).

²⁹¹ See, Gallatin County, Illinois, Annual Financial Report & Independent Auditors’ Report for the Fiscal Year Ended November 30, 2018, p. 58 (showing “defense council” expenditures).

²⁹² See, e.g., Contract, between the County of Gallatin and [named attorney], Attorney at Law, § 5 (Dec. 15, 2016). The contract provides that this overhead stipend is to cover the cost of “all supplies, office staff, other equipment and office needs and in other full discharge of all other obligations of the County to the Public Defender.” *Id.*

²⁹³ See, e.g., Contract, between the County of Gallatin and [named attorney], Attorney at Law, § 5 (Dec. 15, 2016).

²⁹⁴ The person who served as the Gallatin County public defender during FY 2018 held that position from Dec. 1, 2016 through Apr. 28, 2019. A different public defender held the position from May 1, 2019 through Oct. 15, 2019. A new public defender began on Oct. 16, 2019.

²⁹⁵ The contract expressly provides that “Public Defender agrees he is not an employee of the County, and is not entitled to benefits provided to employees.” Contract, between the County of Gallatin and [named attorney], Attorney at Law, § 4 (Dec. 15, 2016).

²⁹⁶ Contract, between the County of Gallatin and [named attorney], Attorney at Law (Dec. 15, 2016). See Gallatin County, Illinois, Annual Financial Report & Independent Auditors’ Report for the Fiscal Year Ended November 30, 2018, p. 58 (combining actual expenses under “defense council – state” in the amount of \$24,292 and “defense council – contractual” in the amount of \$20,750).

Appointed private attorneys. Conflict representation is provided in the first instance by the public defender of Hardin County, and Gallatin County does not pay anything for this conflict representation. Case-related expenses for investigators or experts, if requested, are paid out of the court's budget.

When other private attorneys are appointed, they are paid \$75/hour. The county paid a combined total of \$12,982 for all private attorney time and case-related expenses.²⁹⁷

Schuyler County. Schuyler County's fiscal year ends on November 30, so its FY 2018 covers the period of December 1, 2017 through November 30, 2018.

Funding for the public defender's compensation and for appointed private attorneys who are paid hourly is in the "judiciary and courts" budget.²⁹⁸

Public defender office. The county provides a private room in the courthouse, on the second floor near the courtroom and the judge's lobby, for the business of the public defender office, but all other overhead costs are paid personally by the public defender.²⁹⁹

The public defender is a part-time employee of the county. In exchange for providing representation in an unlimited number of cases whenever appointed in Schuyler County, the public defender is paid an annual salary of \$33,625 and does not receive county benefits other than voluntary participation in the Illinois Municipal Retirement Fund.³⁰⁰

There are no assistant public defenders and no support staff. The public defender personally pays for the administrative staff in his private office to devote approximately 25% of their time to Schuyler County indigent representation system cases, estimated to cost approximately 15% of the salary the county pays to the public defender.

²⁹⁷ See, Gallatin County, Illinois, Annual Financial Report & Independent Auditors' Report for the Fiscal Year Ended November 30, 2018, p. 58 (showing "defense council" expenditures).

²⁹⁸ Beginning with FY 2017, Schuyler County ceased detailing certain governmental spending accounts, including indigent defense spending, in its annual financial reports submitted to the Illinois State Comptroller. Compare County of Schuyler, Illinois, Annual Financial Report, November 30, 2016, at 37 (providing a line item for "Attorney fees for indigent defendants") with Schuyler County, Illinois, Financial Report, Year Ended November 30, 2017, at 5 (providing only a general "Statement of Activities" for departmental budgets, including "Judiciary and court related," without showing individual line-item expenditures).

²⁹⁹ Schuyler County, Resolution No 2014-R-28 regarding the appointment of the Schuyler County Public Defender (Oct. 13, 2014); and Order, No. 2014-CA-29 (Ill. 8th Jud. Cir. Schuyler County, Oct. 21, 2014). The resolution expressly provides that the public defender is responsible "for all other expenses associated with his office and the duties of Public Defender." *Id.*

³⁰⁰ Schuyler County, Resolution No 2014-R-28 regarding the appointment of the Schuyler County Public Defender (Oct. 13, 2014); and Order, No. 2014-CA-29 (Ill. 8th Jud. Cir. Schuyler County, Oct. 21, 2014).

The county does not fund any case-related expenses in cases handled by the public defender.³⁰¹ The public defender is required to personally pay for all necessary case-related expenses incurred in Schuyler County indigent representation system cases, including investigation.³⁰²

Appointed private attorneys. When private attorneys are appointed, they are reportedly paid \$60 or \$65/hour. The amount spent by Schuyler County for private attorney time and case-related expenses is unknown, because it is included in a line item that also pays for other county expenses.³⁰³ To be paid, private attorneys must submit their bills first to the state's attorney to review them "for reasonableness." If approved, the state's attorney submits the appointed lawyer's bill to the judge for the judge's approval. Alternatively, the state's attorney can negotiate with the private attorney to change the bill. The court estimates that it approves 95% of private attorney bills submitted by the state's attorney without further change.

Mercer County. Mercer County's fiscal year ends on November 30, so its FY 2018 covers the period of December 1, 2017 through November 30, 2018.

Funding for the compensation of the public defender and of the appointed private attorney under contract with the county are in the "judiciary and court related" budget under the line item of "public defender services."³⁰⁴ Funding for appointed private attorneys who are paid hourly is in the "judiciary and court related" budget under the line item of "office administrative judge" and further designated as "court-appointed attorney fees."³⁰⁵

Public defender office. The county offered to provide office facilities in the courthouse basement, but the public defender declined,³⁰⁶ and the business of the public defender office is instead conducted out of the private law office of the public defender which is located about 45 minutes away in a different county. All overhead costs are paid personally by the public defender.

The public defender³⁰⁷ is a part-time employee of the county. In exchange for providing representation in an unlimited number of cases whenever appointed in Mercer County, the public defender is paid an annual salary of \$91,751 and does not receive county benefits.³⁰⁸

³⁰¹ Schuyler County, Resolution No 2014-R-28 regarding the appointment of the Schuyler County Public Defender (Oct. 13, 2014) (providing that the public defender is responsible "for all other expenses associated with his office and the duties of Public Defender").

³⁰² See Schuyler County, Resolution No 2014-R-28 regarding the appointment of the Schuyler County Public Defender (Oct. 13, 2014) (providing that the public defender is responsible "for all other expenses associated with his office and the duties of Public Defender").

³⁰³ See County of Schuyler, Illinois, Financial Report, Year Ended November 30, 2018, at 4 (providing only a general statement of activities for departmental budgets, including "judiciary and courts," without showing individual line-item expenditures – the total expenditure was \$658,486).

³⁰⁴ See Mercer County, Illinois, Financial Report for the Fiscal Year Ended November 30, 2018, at 63.

³⁰⁵ See Mercer County, Illinois, Financial Report for the Fiscal Year Ended November 30, 2018, at 63.

³⁰⁶ The public defender found the space was inadequate for his needs and felt the optics of having his office space in the same building as the circuit court and the state's attorney were inappropriate.

³⁰⁷ The person who was the public defender during FY 2018 was subsequently appointed to a judgeship in February 2020. As a result, some of the circumstances reported for Mercer County have likely changed.

³⁰⁸ Mercer County, Illinois, Budget Appropriations and Tax Levy, Year Ending November 30, 2019, at 22 (separately showing "1-600-210 public defender salary" and "1-601-210 conflict public defender salary" as

There are no assistant public defenders and no support staff. The public defender personally pays for the one secretary in his private law office to devote approximately 70% of her time to Mercer County indigent representation system cases.

The county does not appear to provide any funding for case-related expenses for investigators or experts, and the public defender reports rarely if ever using investigators.

Appointed private attorneys. The county contracts with one private attorney – referred to in the county as the “conflict public defender” – to provide representation in an unlimited number of cases whenever appointed by the court in Mercer County in trial-level felonies and misdemeanors and for appeals of juvenile delinquencies, in exchange for a fixed annual fee of \$22,060.³⁰⁹ The contract private attorney works out of his private law office which is located about 45 minutes away in a different county, and all overhead costs are paid personally by the contract private attorney. The county does not appear to provide any funding for case-related expenses for investigators or experts, and the contract private attorney reports rarely if ever using investigators.

When other private attorneys are appointed, they are paid \$65/hour. The county paid a combined total of \$16,410 for all private attorney time and case-related expenses (including non-criminal representation).³¹⁰ To be paid, private attorneys submit a motion for payment to the court, almost always at the conclusion of a case, along with an itemized hour sheet. The state’s attorney reviews the bill and can object to the motion for payment, in which circumstance the court holds a hearing. Attorneys report that this process not infrequently results in the court cutting the number of hours for which it approves payment.

Stephenson County. Stephenson County’s fiscal year ends on December 31,³¹¹ so its FY 2018 covers the period of January 1, 2018 through December 31, 2018.

All funding for the public defender office is in the “public defender” departmental budget.³¹²

individual spending accounts within the “public defender” budget category).

³⁰⁹ “Mercer County Conflict Attorney Agreement” between the County of Mercer and [named attorney] (June 9, 2016). *See* Mercer County, Illinois, Budget Appropriations and Tax Levy, Year Ending November 30, 2019, 22 (separately showing “1-600-210 public defender salary” and “1-601-210 conflict public defender salary” as individual spending accounts within the “public defender” budget category).

³¹⁰ Mercer County, Illinois, Financial Report for the Fiscal Year Ended November 30, 2019, Part 2, at 62.

³¹¹ Beginning with the 2017 fiscal year, Stephenson County adopted a fiscal year ending December 31 (i.e., following the calendar year), whereas prior to 2017 the fiscal year ended November 30.

³¹² *See* Stephenson County, Illinois, Annual Financial Report for the Fiscal Year Ended December 31, 2018, at 49; Stephenson County, Illinois, Budgetary Status Report, Period Ending Date: December 31, 2019, at 16. The annual financial reports filed by Stephenson County with the state comptroller list the public defender as its own departmental budget and provide total annual expenditures for the public defender department but do not provide line item detail of the expenditures. *See* Stephenson County, Illinois, Annual Financial Report for the Fiscal Year Ended December 31, 2018, at 4 (providing only a general statement of activities for departmental budgets, including “judiciary and courts,” without showing individual line-item expenditures) and at 49 (listing “public defender” within the “judiciary and court related” funding categories).

Private attorneys are rarely if ever appointed to represent indigent people in any type of case, but were it to occur, the funding would come from the “judiciary and courts” budget.³¹³

Public defender office. The county provides office space, on the first floor of the courthouse, for the business of the public defender office, including a large reception area, a kitchen, a conference room, separate offices for each attorney, and additional storage space for closed files.

The public defender is a full-time employee of the county, who is paid a salary and receives county benefits. The public defender’s salary was \$149,857 for the first six months of 2018, increasing to \$153,154 beginning July 2018.³¹⁴

There are three full-time assistant public defenders employed by the county, who are paid a salary and receive county benefits. The annual salaries of the full-time county-employed assistant public defenders were between \$43,350 and \$61,224.³¹⁵ There is one part-time assistant public defender under oral contract with the public defender office³¹⁶ to provide juvenile delinquency and dependency representation two days each week, in exchange for \$49.31/hour (budgeted to total \$35,894/year).³¹⁷

Collectively, the four full-time and one part-time (two days per week) public defender office attorneys provide representation in an unlimited number of cases whenever appointed in Stephenson County.

There are two full-time support staff (one receptionist and one office manager) employed by the county, who are paid a salary and receive county benefits. The collective annual salaries of the support staff total \$58,904.³¹⁸

³¹³ See Stephenson County, Illinois, Annual Financial Report for the year ended December 31, 2018, at 4 (providing only a general statement of activities for departmental budgets, including “judiciary and courts,” without showing individual line-item expenditures).

³¹⁴ Stephenson County Board, Resolution No. ____, Resolution Establishing the Salary for the Office of Public Defender (Nov. 14, 2018). See Stephenson County, Illinois, Budgetary Status Report, Period Ending Date: December 31, 2018, at 16 (showing approved “802-401.00 REGULAR SALARY - DEPT. HEAD” expenses for FY 2018); Stephenson County, Illinois, Budgetary Status Report, Period Ending Date: December 31, 2019, at 16 (showing actual “802-401.00 REGULAR SALARY - DEPT. HEAD” expenses for FY 2018).

³¹⁵ Stephenson County, Illinois, Budgetary Status Report, Period Ending Date: December 31, 2019, at 16 (showing “Fund 001 GENERAL CORPORATE” expenses for the “Department 802 PUBLIC DEFENDER” budget, and line item “802-402.00 REGULAR SALARY - ASSISTANTS” in the amount of \$137,981.03).

³¹⁶ Beginning January 1, 2019, there were two part-time assistant public defenders under oral contract with the public defender office, one to provide juvenile delinquency representation and one to provide dependency representation, who each worked one day per week in exchange for \$50.30/hour (expected to total \$18,309/year each). Both positions were eliminated effective January 1, 2020: the public defender eliminated one of the contracts due to FY 2020 budget cuts, and the other attorney chose not to renew their contract.

³¹⁷ See Stephenson County, Illinois, Budgetary Status Report, Period Ending Date: December 31, 2019, 16 (showing “Fund 001 GENERAL CORPORATE” expenses for the “Department 802 PUBLIC DEFENDER” budget, and line item “802-403.00 REGULAR SALARY - JUVENILE G.A.L.” in the amount of \$31,738.89).

³¹⁸ See Stephenson County, Illinois, Budgetary Status Report, Period Ending Date: December 31, 2019, at 16 (showing actual expenses for FY 2018).

The public defender office budget provides additional overhead needs of the office, including desk-top computers, printers, and phones for all full-time employees of the office.³¹⁹ The county board must review and approve in advance any public defender office expenditures greater than \$2,000 (if \$10,000 or less, by the court services committee; if greater than \$10,000, by the full county board).

Case-related expenses for investigators or experts, if requested, are paid out of the public defender budget. The public defender office attorneys estimate that they collectively make only one request for investigators every three to four months and “almost not at all” for experts, noting that the court is “pretty liberal” in granting the petitions actually submitted.

Appointed private attorneys. Private attorneys are rarely if ever appointed to represent indigent people in any type of case, because conflict cases are re-assigned to a different public defender office attorney, so a private attorney would only be appointed in the unlikely circumstance that all of the public defender office attorneys have a conflict in the same case or that there are more indigent parties in the same case than attorneys in the public defender office.³²⁰

LaSalle County. LaSalle County’s fiscal year ends on November 30, so its FY 2018 covers the period of December 1, 2017 through November 30, 2018.

Funding for the public defender office, including for most case-related expenses in cases handled by office attorneys, is in the “public defender” departmental budget.³²¹ Additional funding for case-related expenses, in cases handled by public defender office attorneys when the public defender budget for this purpose is exhausted, is in the “circuit court and jury” budget under the line item for “trial expense.”³²² LaSalle County rarely if ever appoints private attorneys to represent indigent people (other than in dependency cases³²³) and does not budget funds for that purpose.

³¹⁹ In FY 2018, Stephenson County expended a total of \$62,527.02 on public defender office overhead expenses, including support staff compensation. See Stephenson County, Illinois, Budgetary Status Report, Period Ending Date: December 31, 2019, at 16 (showing actual expenses for FY 2018 for the following line items: “regular salary - office manager;” “full time – receptionist;” “excess sick days;” “office equipment (under \$500);” “books, periodicals & manuals;” “phone / internet;” “photocopies;” “office expense;” “meetings & seminars;” and “ARDC dues”).

³²⁰ The circuit court has not adopted any formal procedures or policies for appointing private attorneys. Anecdotally, the attorneys would inform the court of their regular private practice rate but ask the court to pay a lesser amount of typically \$150 to \$200/hour.

³²¹ See LaSalle County, Illinois, Annual Financial Report, November 30, 2018, at 78.

³²² See LaSalle County, Illinois, Annual Financial Report, November 30, 2018, at 78.

³²³ For conflict representation in dependency cases, LaSalle County contracts with one private attorney to represent parents whenever appointed by the court in exchange for a fixed annual fee. LaSalle County Board Resolution No. 18-228 (Nov. 29, 2018). The circuit court also maintains a list of qualified private attorneys eligible to be appointed in child custody cases and paid an hourly rate. ILL. 13TH JUD. CIR. LOCAL R. PRAC. R. 8.14 (eff. August 1, 1984, including amendments received through March 30, 2017).

Public defender office. The county provides two rooms (one for the public defender and storage, one containing four desks shared by the four assistant public defenders and the three support staff) in the government complex, located behind a door accessed through the sheriff's office, for the business of the public defender office.

The public defender is a full-time employee of the county, who is paid a salary and receives county benefits. The public defender's salary was \$149,857 for December 2017 through June 2018, increasing to \$153,154 for July 2018 through November 2018.³²⁴

There are four part-time assistant public defenders employed by the county, who are paid a salary and receive county benefits. The salaries of the part-time assistant public defenders in FY 2018 were not provided, but during FY 2019 were reported to be between \$44,460 and \$54,155.³²⁵ The assistant public defenders uniformly report that the only meaningful, or best, part of the compensation is the benefits package.

Collectively, the one full-time public defender and four part-time assistant public defenders provide representation in an unlimited number of cases whenever appointed in LaSalle County and in any conflict cases when appointed in Bureau or Grundy counties.

There are three full-time support staff (two investigators and one office manager) employed by the county, who are paid a salary and receive county benefits. The salaries of the support staff in FY 2018 were not provided, but during FY 2019 were reported to be between \$35,474 and \$48,587.³²⁶

The public defender office budget provides for some additional overhead needs of the office, including a laptop computer for the public defender, a single computer shared by the four part-time assistant public defenders, one computer for the office manager, and one computer shared by the two investigators.³²⁷

³²⁴ LaSalle County Board, Resolution #18-225, Salary for LaSalle County Public Defender (Nov. 29, 2018). See LaSalle County, Illinois, Annual Financial Report, November 30, 2018, at 78 (showing "public defender" expenditures within LaSalle County's "judiciary and legal" programs, and a line item for "public defender").

³²⁵ The county's annual financial reports submitted to the state comptroller show only the combined salaries and wages of the assistant public defenders and support staff – a total of \$337,544 in FY 2018 – but does not separately show the assistant public defenders' compensation. See LaSalle County, Illinois, Annual Financial Report, November 30, 2018, at 78 (showing "public defender" expenditures within LaSalle County's "judiciary and legal" programs, and a line item for "salaries and wages").

³²⁶ The county's annual financial reports submitted to the state comptroller show only the combined salaries and wages of the assistant public defenders and support staff – a total of \$337,544 in FY 2018 – but does not separately show the assistant public defenders' compensation. See LaSalle County, Illinois, Annual Financial Report, November 30, 2018, at 78 (showing "public defender" expenditures within LaSalle County's "judiciary and legal" programs, and a line item for "salaries and wages").

³²⁷ See LaSalle County, Illinois, Annual Financial Report, November 30, 2018, at 78 (showing a total overhead expenditure (other than for personnel) of \$9,783: \$46 in "mileage;" \$666 in "education;" \$6,486 in "library;" and \$2,585 in "office supplies").

Case-related expenses are paid first out of the public defender budget. All investigation is conducted by the two public defender office investigators.³²⁸ The cost of experts and other case-related expenses are paid out of the public defender budget, but if those funds are exhausted then the court authorizes additional necessary expenses out of the circuit court budget.³²⁹

Appointed private attorneys. Private attorneys are rarely if ever appointed to represent indigent people in criminal and juvenile delinquency cases,³³⁰ because conflict cases are re-assigned to a different public defender office attorney. In the unlikely circumstance that all five public defender office attorneys have a conflict in the same case or that there are more indigent parties in the same case than attorneys in the public defender office, then the public defender office attorneys from Bureau County and Grundy County are appointed and LaSalle County does not pay anything for this conflict representation.

Champaign County. Champaign County's fiscal year ends on December 31, so its FY 2018 covers the period of January 1, 2018 through December 31, 2018. The state comptroller shows that Champaign County did not timely submit its FY 2019 annual audit and annual report, both of which were due on August 27, 2020.³³¹

The annual financial reports that Champaign County files with the state comptroller group together all county "justice & public safety" functions, including the indigent representation system, rather than breaking down the funding of each county department or function.³³² Funding for the public defender office, including for most case-related expenses in cases handled by office attorneys, is in the "public defender" departmental budget.³³³ Additional funding for case-related expenses (in cases handled by public defender office attorneys when the public defender budget for this purpose is exhausted or by appointed private attorneys) is in the "circuit court" departmental budget under the line item for "professional services."³³⁴ Funding for the public

³²⁸ The investigators are also responsible for any investigations requested by the public defender office attorney(s) in Bureau County.

³²⁹ For example, in FY 2018, the public defender office budget for "trial expense" was \$30,000, but the public defender office actually expended \$36,692, which was reallocated from the circuit court's budget for "trial expense." See LaSalle County, Illinois, Annual Financial Report, November 30, 2018, at 78 (showing budgeted and actual expenditures for the public defender's "trial expense" line item and for the circuit court's "trial expense" line item).

³³⁰ For conflict representation in dependency cases, LaSalle County contracts with one private attorney to represent parents whenever appointed by the court in exchange for a fixed annual fee. LaSalle County Board Resolution No. 18-228 (Nov. 29, 2018). The circuit court also maintains a list of qualified private attorneys eligible to be appointed in child custody cases and paid an hourly rate. ILL. 13TH JUD. CIR. LOCAL R. PRAC. R. 8.14 (effective August 1, 1984, including amendments received through March 30, 2017).

³³¹ As of November 24, 2020, Champaign County had not submitted its fiscal year 2019 annual audit and its fiscal year 2019 annual report, both of which were due on August 27, 2020. *Landing Page: Champaign - A County in Illinois*, ILLINOIS STATE COMPTROLLER, <https://illinoiscomptroller.gov/financial-data/local-government-division/local-government-data/landingpage/?code=010/000/00&searchtype=AFRSearch&originalSearchString=Champaign%20County%20%20-%20%20010/000/00>.

³³² See County of Champaign, Illinois, Comprehensive Annual Financial Report Fiscal Year December 31, 2018, at 291 (showing the combined annual expenditures of "justice & public safety" functions) and at 315 (listing "public defender" within the county's "justice & public safety" functions).

³³³ See, e.g., Champaign County, Illinois, FY2018 Budget, at 189-92.

³³⁴ See Champaign County, Illinois, FY 2018 Budget, at 177-80.

defender office's legal research costs is in the "law library" budget.³³⁵ Funding for appointed private attorneys under contract with the county is in the "circuit court" departmental budget under the line item for "contract attorneys."³³⁶ Funding for appointed private attorneys who are paid hourly is in the "circuit court" departmental budget under the line item for "attorney/legal services."³³⁷

Public defender office. The county provides office space in the county courthouse for the business of the public defender office.

The public defender is a full-time employee of the county, who is paid a salary and receives county benefits. The public defender's salary was \$149,858 for the first six months of 2018, increasing to \$153,155 beginning July 2018.³³⁸

There are 13 full-time assistant public defenders employed by the county, who are paid a salary and receive county benefits. The salaries of the full-time county-employed assistant public defenders were authorized to range between \$49,101 and \$99,507.³³⁹

Collectively, the one full-time public defender and 13 full-time assistant public defenders provide representation in an unlimited number of cases whenever appointed in Champaign County.

There are four full-time support staff (one investigator, two legal secretaries, and one executive assistant) employed by the county, who are paid a salary and receive county benefits.³⁴⁰ The cost of support staff salaries is not provided as a specific sum.³⁴¹

³³⁵ See, e.g., Champaign County, Illinois, FY2018 Budget, at 181-83 ("The cost of Circuit Court and Public Defender Westlaw legal database subscriptions increased 3% in June 2016, pursuant to the agreement in place between the Circuit Court and Thomson Reuters. . . . As part of the contract renewal with Thomson Reuters, several print title subscriptions have been discontinued. The Law Library will maintain a small catalog of print materials to provide the minimum legal reference materials to the public, judges, and attorneys of Champaign County.").

³³⁶ See Champaign County, Illinois, FY 2018 Budget, at 177-80 ("Contract attorney fees . . . are paid to attorneys who contract with the court on an annual basis to provide services in juvenile abuse and neglect cases and when the Public Defender's office cannot be appointed due to conflicts.").

³³⁷ See Champaign County, Illinois, FY 2018 Budget, at 177-80 (explaining that "attorney/legal services" expenditures are payments made to attorneys serving as special prosecutors, GAL, or additional conflict attorneys in cases where the "contract attorneys" are unavailable); Champaign County, Illinois, FY 2020 Budget, at 199 (showing fiscal year 2018 actual expenditures for "attorney/legal services").

³³⁸ See Champaign County, Illinois, FY 2018 Budget, at 190; Champaign County, Illinois, FY 2019 Budget, at 203; County of Champaign, Illinois, Comprehensive Annual Financial Report Fiscal Year December 31, 2018, at 313 (showing Table XVIII, "Salaries of Principal County Officials, December 31, 2018").

³³⁹ See Champaign County, Illinois, FY2018 Budget, at 629 (showing authorized positions by department) and at 636 (showing the FY 2018 salary schedule of non-bargaining positions, and listing the "first asst. public defender" position under the "L 856-932" salary grade) and at 637 (showing authorized salary range for assistant public defenders).

³⁴⁰ See Champaign County, Illinois, FY2018 Budget, at 629 (showing authorized positions by department). Because of the proximity of the University of Illinois campus, the public defender office also has five to ten unpaid interns year-round, including law school interns, social work interns, and undergraduate interns.

³⁴¹ See Champaign County, Illinois, FY2018 Budget, at 190 (showing total budget authorized of \$966,633 for the 17 attorney and non-attorney positions, excluding the appointed public defender).

The public defender office budget provides additional overhead needs of the office, including a landline phone, desktop computer, and two monitors for each employee in the office.³⁴² The county also provides legal research tools for the public defender office.³⁴³

For case-related expenses, some are paid out of the public defender budget, while others are authorized out of the circuit court budget. All investigation is conducted by the one public defender office investigator, and the county provides the investigator with office space, an office phone, computer, and vehicle to use during work. However, the investigator also personally supplies some of his own personal equipment in performance of work obligations, such as a distance-measuring wheel, cell phone, and camera. Interpreters and minimal expert assistance (typically, a request below \$1,000) are paid out of the public defender budget.³⁴⁴ For more extensive expert assistance, public defender office attorneys must ask the court to authorize funding out of the circuit court budget.

Appointed private attorneys. Private attorneys are not appointed in single party cases of any case type, nor for the first and second codefendants in multi-defendant criminal and delinquency cases, because conflict cases are re-assigned to a different public defender office attorney.

In multi-defendant criminal and delinquency cases:

- For the third co-defendant, the county contracts with a private attorney to provide representation in an unlimited number of cases whenever appointed by the court in Champaign County in a conflict criminal case, in exchange for a fixed annual fee.
- For the fourth co-defendant, the county contracts with a different private attorney to provide representation in an unlimited number of cases whenever appointed by the court in Champaign County in a conflict criminal case, in exchange for a fixed annual fee.

The coronavirus pandemic prevented learning more during this evaluation about the circumstances of these attorneys or their contracts.

³⁴² In FY 2018, in addition to support staff compensation, the public defender office expended \$17,767 on overhead expenses. See Champaign County, Illinois, FY2020 Budget, at 211 (showing public defender actual expenditures in fiscal year 2018 for the following line items: “stationery & printing;” “office supplies;” “books, periodicals & man.,” “postage, ups, fed express;” “gasoline & oil;” “uniforms;” “equipment less than \$5000;” “operational supplies;” “job-required travel exp;” “non-employee training, sem.,” “telephone service;” “automobile maintenance;” “equipment maintenance;” “equipment rentals;” “dues and licenses;” “conferences & training;” and “finance charges, bank fees”).

³⁴³ See, e.g., Champaign County, Illinois, FY2018 Budget, at 181-83 (“The cost of Circuit Court and Public Defender Westlaw legal database subscriptions increased 3% in June 2016, pursuant to the agreement in place between the Circuit Court and Thomson Reuters. . . . As part of the contract renewal with Thomson Reuters, several print title subscriptions have been discontinued. The Law Library will maintain a small catalog of print materials to provide the minimum legal reference materials to the public, judges, and attorneys of Champaign County.”).

³⁴⁴ See Champaign County, Illinois, FY 2018 Budget, at 189 (explaining that the “professional services” line item within the public defender’s departmental budget “covers interpreters routinely needed and used by our office as well as expert witness expenses . . . [but] we have effectively no budget for any type of expert witness expense”). In FY 2018, the public defender expended \$4,300 for case-related expenses. Champaign County, Illinois, FY 2020 Budget, at 209.

For other conflict representation, private attorneys are paid an hourly rate determined at the judge's discretion.³⁴⁵ The coronavirus pandemic prevented learning more during this evaluation about the amount spent by the county for the time and case-related expenses of these private attorneys.³⁴⁶

DuPage County. DuPage County's fiscal year ends on November 30, so its FY 2018 covers the period of December 1, 2017 through November 30, 2018.

All funding for the public defender office, including for case-related expenses in cases handled by office attorneys, is in the "public defender" departmental budget.³⁴⁷ Funding for the appointed private attorney under contract with the county is in the "circuit court" budget under the line item for "legal services."³⁴⁸ Otherwise, private attorneys are rarely if ever appointed to represent indigent people in any type of case.

Public defender office. The county provides office space located in the courthouse for the business of the public defender office, including separate offices for each felony attorney and cubicles for all other employees.

The public defender is a full-time employee of the county, who is paid a salary and receives county benefits. Anecdotally, the public defender's salary was \$149,857 for December 2017 through June 2018, increasing to \$153,154 for July 2018 through November 2018.³⁴⁹

There are 29 full-time assistant public defenders employed by the county (although it is common for one or more positions to be vacant at any given time, due to the size of the office), who are paid a salary and receive county benefits. The salaries of the full-time county-employed assistant

³⁴⁵ See Sixth Judicial Circuit Court, Administrative Order No. 2013-4 (Aug. 2, 2013) (vacating Administrative Order No. 2006-02); Sixth Judicial Circuit Court, Administrative Order No. 2006-2 (Amended) (Sept. 13, 2010) (establishing an hourly fee of \$110/hour for private attorneys appointed in criminal, juvenile, and traffic matters "for all reasonable and necessary time spent in and out of court"). Local court rules provide that private attorneys appointed on an hourly basis must submit bills for services rendered within 90 days of the service provided, even if the case is still ongoing, and also submit all bills for a fiscal year by December 31 of that year. See Memorandum from Presiding Judge RE: Billing Practices – Revised (Sept. 2018).

³⁴⁶ A single line item is used to pay for special prosecutors, GAL, or additional conflict attorneys in cases where the "contract attorneys" are unavailable. Champaign County, Illinois, FY 2018 Budget, at 177. See Champaign County, Illinois, FY 2020 Budget, 199 (showing fiscal year 2018 actual expenditures for "attorney/legal services" of \$49,157).

³⁴⁷ See DuPage County, Illinois, Comprehensive Annual Financial Report for Fiscal Year Ended November 30, 2018, at 123; DuPage County, Illinois, 1000 - General Fund Revenue and Expenditures For Period Ending 11/30/18, at 48.

³⁴⁸ See DuPage County, Illinois, Comprehensive Annual Financial Report for Fiscal Year Ended November 30, 2018, at 123 (grouping "legal services" into the broader category of "professional services"); DuPage County, Illinois, FY 2018 Departmental Budgets, at 197.

³⁴⁹ The county financial documents do not show the public defender's salary as a specific sum. See DuPage County, Illinois, FY2019 Financial Plan, at 208 (showing actual FY 2018 expenditures of \$2,704,671 for "regular salaries" of all public defender office employees); DuPage County, Illinois, FY 2018 Departmental Budgets, at 208-10 (showing 44 budgeted public defender office positions for FY 2018 and approved FY 2018 budget of \$2,805,997 for "regular salaries" of all public defender office employees).

public defenders were between approximately \$54,150 and \$113,655.³⁵⁰ Within the total number of positions and total employee compensation allocated by the county board, the public defender sets the compensation for each position.

Collectively, the one full-time public defender and 29 full-time assistant public defenders provide representation in an unlimited number of cases, excluding cases under the sexually violent persons act and the sexually dangerous persons act, whenever appointed in DuPage County.

There are 14 full-time support staff employed by the county (six investigators, one mental health clinician, one administrative assistant, and six legal secretaries; although it is common for one or more positions to be vacant at any given time, due to the size of the office). The salaries of the support staff were between approximately \$31,212 and \$95,795.³⁵¹ Within the total number of positions and total employee compensation allocated by the county board, the public defender sets the compensation for each position.

The public defender office budget provides additional overhead needs of the office, including a computer and phone for every employee and also a printer and scanner for each secretary.³⁵² The county board's judicial & public safety committee must approve in advance any public defender office expenditure greater than \$5,000 and any multi-year contract with a vendor.

Case-related expenses are primarily paid out of the public defender budget.³⁵³ All investigation is conducted by the six public defender office investigators, and the county provides each investigator with tools necessary to perform their duties (including a computer, cell phone, printers, scanners, business cards, information databases, measuring wheels, digital cameras, voice recording devices, and if needed bulletproof vests), and provides access to four county vehicles that the investigators share. Experts are provided out of the public defender budget, but if those funds are exhausted then the county board's justice & public safety committee has always authorized additional necessary funds. The public defender advises that "I've definitely

³⁵⁰ The county financial documents do not show the cost of assistant public defender positions as a specific sum. *See* DuPage County, Illinois, FY2019 Financial Plan, at 208 (showing actual FY 2018 expenditures of \$2,704,671 for "regular salaries" of all public defender office employees); DuPage County, Illinois, FY 2018 Departmental Budgets, at 208-10 (showing 44 budgeted public defender office positions for FY 2018 and approved FY 2018 budget of \$2,805,997 for "regular salaries" of all public defender office employees).

³⁵¹ The county financial documents do not show the cost of support staff positions as a specific sum. *See* DuPage County, Illinois, FY2019 Financial Plan, at 208 (showing actual FY 2018 expenditures of \$2,704,671 for "regular salaries" of all public defender office employees); DuPage County, Illinois, FY 2018 Departmental Budgets, at 208-10 (showing 44 budgeted public defender office positions for FY 2018 and approved FY 2018 budget of \$2,805,997 for "regular salaries" of all public defender office employees).

³⁵² *See* DuPage County, Illinois, FY2019 Financial Plan, at 208 (showing public defender actual FY 2018 expenditures for: "furn/mach/equip small value;" "operating supplies & materials;" "repair & mtce other equipment;" "dues & memberships;" "instruction & schooling;" "printing;" "postage & postal charges;" "statutory & fiscal charges;" and "custodial services").

³⁵³ *See* DuPage County, Illinois, FY2019 Financial Plan, at 208 (showing public defender actual FY 2018 expenditures totaling \$23,391 for: "furn/mach/equip small value;" "operating supplies & materials;" "repair & mtce other equipment;" "dues & memberships;" "instruction & schooling;" "printing;" "postage & postal charges;" "statutory & fiscal charges;" and "custodial services").

blown my expert budget, by a lot” but “never felt we had to cheat a client because we couldn’t afford it.”

*Appointed private attorneys.*³⁵⁴ The county contracts with one private attorney to provide representation in all appointed cases under the sexually violent persons act and the sexually dangerous persons act and, if needed, to provide representation in conflict cases, in exchange for a fixed annual fee not to exceed \$47,000.³⁵⁵ The coronavirus pandemic prevented learning more during this evaluation about the circumstances of this attorney or their contract.

Private attorneys are rarely if ever appointed to represent indigent people in any type of case, because conflict cases are re-assigned to a different public defender office attorney, so a private attorney would only be appointed in the unlikely circumstance that all of the public defender office attorneys have a conflict in the same case or that there are more indigent parties in the same case than attorneys in the public defender office.

Cook County. Cook County’s fiscal year ends on November 30, so its FY 2018 covers the period of December 1, 2017 through November 30, 2018.

All funding for the public defender office, including for case-related expenses in cases handled by office attorneys, is in the “public defender” departmental budget.³⁵⁶ Cook County rarely appoints private attorneys to represent indigent people in adult criminal cases, but funding for compensation and expenses in all cases of any type that are handled by appointed private attorneys is in the “judiciary” budget under “contingency and special purposes” and further itemized as “legal defense for the indigent – Cook County.”³⁵⁷

³⁵⁴ Effective May 1, 2019, the circuit court contracts with one private attorney to provide representation “to abused, neglected, dependent or delinquent minors or family members in cases, where the DuPage County Public Defender may not represent a party, including appeals in these matters,” in exchange for a fixed annual fee of \$45,000. Agreement, between the Eighteenth Judicial Circuit Court of DuPage County and [named attorney] (Apr. 2019); DuPage County, Illinois, FY2019 Financial Plan, at 194.

³⁵⁵ DuPage County Judicial and Public Safety Committee Final Minutes (Oct. 3, 2017); DuPage County, Illinois, FY 2018 Departmental Budgets, at 197. *See* DuPage County, Illinois, Comprehensive Annual Financial Report for Fiscal Year Ended November 30, 2018, at 121 (grouping “legal services” into the broader category of “professional services”).

³⁵⁶ *See* Cook County, Illinois, Comprehensive Annual Financial Report For the Year Ended November 30, 2018, at 134; Cook County, Illinois, Annual Appropriation Bill Fiscal Year 2019, Vol. 2, N-6 (showing 2018 Adjusted Appropriation).

³⁵⁷ *See* Cook County, Illinois, Fiscal Year 2018 Annual Appropriation Bill Volume 2, U-30 (explaining that the “Legal Defense for the Indigent – Cook County” cost center found within the “contingency and special purposes” line item of the judiciary’s budget “compensates counsel and experts on behalf of the indigent who are appointed by court order when Public Defenders are not available or are not able to represent litigants due to a conflict of interest” and that only 34% of expenditures originate from criminal cases) and U-32 (showing in fiscal year 2018 the county approved & adopted “Fees Of Counsel For Indigent” in the amount of \$3,100,000); Cook County, Illinois, Comprehensive Annual Financial Report For the Year Ended November 30, 2018, at 132.

Public defender office. The county provides office space in 12 separate physical office locations spread across the county, most often within courthouse facilities, for the business of the public defender office.³⁵⁸

The public defender is a full-time employee of the county, who is paid a salary and receives county benefits. The public defender's salary was \$190,759.³⁵⁹

There are 504.2 full-time assistant public defenders employed by the county (although it is common for one or more positions to be vacant at any given time, due to the size of the office), who are paid a salary and receive county benefits.³⁶⁰ The salaries of the assistant public defenders were:³⁶¹

Assistant public defender compensation

Job Code/Title	Grade	2018 Approved & Adopted	
		FTE Pos.	Salaries
0679-Asst Public Defender Superv	D05	20.0	\$ 2,432,435
0681-Asst Public Defender Superv	D07	4.0	\$ 510,357
0682-Asst Public Defender Superv	D08	12.0	\$ 1,566,390
0683-Asst Public Defender Superv	D09	3.0	\$ 419,652
0685-Asst Public Defender Superv	D11	6.0	\$ 919,826
0686-Asst Public Defender Superv	D12	2.0	\$ 330,949
0604-Assistant Public Defender I	L1	39.1	\$ 2,497,121
0605-Assistant Public Defender II	L2	192.0	\$ 17,304,352
0606-Assistant Public Defender III	L3	178.0	\$ 20,052,236
0607-Assistant Public Defender IV	L4	48.1	\$ 6,037,776
Total assistant public defenders		504.2	\$ 52,071,094

Collectively, the one full-time public defender and 504.2 full-time assistant public defenders provide representation in an unlimited number of cases whenever appointed in Cook County.

There are 171.2 full-time support staff employed by the county (60.1 investigators, 7 social work & mitigation, 2 interpreters, 102.1 other support positions; although it is common for one or more positions to be vacant at any given time, due to the size of the office), who are paid a

³⁵⁸ *Office Directory*, LAW OFFICE OF THE COOK COUNTY PUBLIC DEFENDER, <https://www.cookcountypublicdefender.org/about/locations>.

³⁵⁹ Cook County, Illinois, Cook County Annual Appropriation Bill Fiscal Year 2018, Vol. 2, X-8.

³⁶⁰ See Cook County, Illinois, Cook County Annual Appropriation Bill Fiscal Year 2018, Vol. 2, X-14 (“personal services - summary of positions by grade”).

³⁶¹ See Cook County, Illinois, Cook County Annual Appropriation Bill Fiscal Year 2018, Vol. 2, X-14 (“personal services - summary of positions by grade”). The compensation of assistant public defenders is governed to some extent by the county's collective bargaining agreement with the assistant public defender union. See *generally* Collective Bargaining Agreement Between American Federation of State, County, and Municipal Employees (A.F.S.C.M.E.), Council 31, ALF-CIO, Local 3315 Representing Assistant Public Defenders, and County of Cook (Dec. 1, 2017 - Nov. 30, 2020).

salary and receive county benefits.³⁶² The collective annual salaries of the support staff were \$11,278,352.³⁶³

The public defender office budget provides additional overhead needs of the office, including a laptop computer for every attorney, access to LexisNexis for legal research, and a case management system.³⁶⁴

Case-related expenses (including investigation, interpreters, and experts) are paid out of the public defender budget.³⁶⁵ All investigation is conducted by the 60.1 public defender office investigators.

Appointed private attorneys. Private attorneys are rarely appointed in adult criminal cases,³⁶⁶ because conflict cases are re-assigned to a different public defender office attorney.³⁶⁷

³⁶² See Cook County, Illinois, Cook County Annual Appropriation Bill Fiscal Year 2018, Vol. 2, X-8 through X-13 (“personal services - summary of positions by program and job code”).

³⁶³ See Cook County, Illinois, Cook County Annual Appropriation Bill Fiscal Year 2018, Vol. 2, X-8 through X-13 (showing total budget authorized of \$63,540,205 for the 676.4 attorney and non-attorney position, including the appointed public defender; “personal services - summary of positions by program and job code”).

³⁶⁴ See Cook County, Illinois, Comprehensive Annual Financial Report For the Year Ended November 30, 2018, at 134.

³⁶⁵ See Cook County, Illinois, Comprehensive Annual Financial Report For the Year Ended November 30, 2018, at 134.

³⁶⁶ This report does not address the use of private attorneys to provide representation in Cook County in other types of cases to which counsel is appointed by the circuit court.

³⁶⁷ In exceedingly rare circumstances in felony cases, private attorneys are appointed on a case-by-case basis and paid an hourly rate. In the few adult criminal indigent defense cases handled by private appointed counsel in Cook County, the circuit court judges routinely exercise their discretion in approving payment of hourly rates in excess of the statutory rates and per-case maximums, considering the lawyer’s level of experience, the nature of the offense, and the complexity of issues involved as factors in determining a “reasonable fee.” In the end, each circuit court judge has discretion to pay whatever compensation the judge thinks is reasonable. Compensation for all private attorney time and case-related expenses in all case types is provided out of the circuit court budget under the “contingency and special purposes” line item further designated as “legal defense for the indigent – Cook County. See Cook County, Illinois, Fiscal Year 2018 Annual Appropriation Bill Volume 2, U-30 (explaining that the “Legal Defense for the Indigent – Cook County” cost center found within the “contingency and special purposes” line item of the judiciary’s budget “compensates counsel and experts on behalf of the indigent who are appointed by court order when Public Defenders are not available or are not able to represent litigants due to a conflict of interest” and that only 34% of expenditures originate from criminal cases).

Chapter V

Early appointment of counsel & continuous representation

“Most obvious[ly],” as the U.S. Supreme Court said in *Cronic*, each state is responsible for ensuring that every indigent defendant who does not choose to self-represent and who faces possible loss of liberty in a criminal case is actually represented by an attorney at every critical stage of the proceeding.³⁶⁸ All offenses in Illinois, whether enacted by state statute or by county/municipal ordinance, are either a felony, a misdemeanor, or a petty offense.³⁶⁹ All felonies and all misdemeanors are punishable by loss of liberty in Illinois,³⁷⁰ so every person charged with either a felony or a misdemeanor who cannot afford to hire their own attorney is entitled under the Sixth and Fourteenth Amendments to have an attorney provided at public expense to

³⁶⁸ United States v. *Cronic*, 466 U.S. 648, 659 (1984). See also *In re Gault*, 387 U.S. 1, 36 (1967) (“The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child ‘requires the guiding hand of counsel at every step in the proceedings against him.’”) (quoting *Powell v. Alabama*, 287 U. S. 45, 69 (1932)).

³⁶⁹ 720 ILL. COMP. STAT. § 5/2-12 (2018); 725 ILL. COMP. STAT. § 5/102-15 (2018); 730 ILL. COMP. STAT. § 5/5-1-15 (2018).

³⁷⁰ A “felony” is any offense that is punishable by one year or more “in a penitentiary” (i.e., in state prison). 720 ILL. COMP. STAT. § 5/2-7 (2018); 730 ILL. COMP. STAT. § 5/5-1-9 (2018). There are six classifications of felonies, based on the possible sentence of incarceration. 730 ILL. COMP. STAT. §§ 5/5-4.5-10(a), 5-4.5-85(a) (2018). First degree murder = 20 to 60 years, or 60 to 100 years for extended term. (The death penalty was abolished effective July 1, 2011.)

- Class X = 6 to 30 years, or 30 to 60 years for extended term.
- Class 1 = 4 to 20 years, or 15 to 30 years for extended term.
- Class 2 = 3 to 7 years, or 7 to 14 years for extended term.
- Class 3 = 2 to 5 years, or 5 to 10 years for extended term.
- Class 4 = 1 to 3 years, or 3 to 6 years for extended term; and any felony not classified in its definition.

725 ILL. COMP. STAT. § 5/119-1(a) (2018) (eff. July 1, 2011); 730 ILL. COMP. STAT. §§ 5/5-4.5-20(a), 5/5-4.5-25(a), 5/5-4.5-30(a), 5/5-4.5-35(a), 5/5-4.5-40(a), 5/5-4.5-45(a), 5/5-4.5-85(a) (2018).

A “misdemeanor” is any offense that is punishable by less than one year in “other than a penitentiary” (i.e., in jail). 720 ILL. COMP. STAT. § 5/2-11 (2018); 730 ILL. COMP. STAT. § 5/5-1-14 (2018). There are three classifications of misdemeanors, based on the possible sentence of incarceration. 730 ILL. COMP. STAT. §§ 5/5-4.5-10(b), 5/5-4.5-85(b) (2018).

- Class A = less than 1 year; and any offense not classified in its definition that carries more than 6 months to less than 1 year.
- Class B = up to 6 months; and any offense not classified in its definition that carries more than 30 days up to 6 months.
- Class C = up to 30 days; and any offense not classified in its definition that carries up to 30 days.

730 ILL. COMP. STAT. §§ 5/5-4.5-55(a), 5/5-4.5-60(a), 5/5-4.5-65(a), 5/5-4.5-85(b)(1), 5/5-4.5-85(b)(2), 5/5-4.5-85(b)(3) (2018).

represent them.³⁷¹ Petty offenses are the only offenses in Illinois that do not carry the possibility of incarceration,³⁷² so Illinois law expressly does not provide appointed counsel to indigent defendants accused of a petty offense.³⁷³

In 2008, the U.S. Supreme Court reaffirmed in *Rothgery v. Gillespie County* that the right to counsel attaches when “formal judicial proceedings have begun.”³⁷⁴ For a person who is arrested, the beginning of formal judicial proceedings is at “a criminal defendant’s initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction,”³⁷⁵ without regard to whether a prosecutor is aware of the arrest.³⁷⁶ For all defendants, both in- and out-of-custody, the beginning of formal judicial proceedings is signaled when prosecution is commenced, “whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.”³⁷⁷

The Court in *Rothgery* carefully explains that the question of whether the right to counsel has attached is distinct from the question of whether a particular proceeding is a “critical stage” at which counsel must be present as a participant.³⁷⁸ In other words, according to the Court, the Constitution does not necessarily require that defense counsel be present at the moment the right to counsel attaches, but from that moment forward, no critical stage in a criminal or juvenile delinquency case can occur unless the defendant is represented by counsel or has made an informed and intelligent waiver of counsel.³⁷⁹ When an indigent defendant is actually deprived of counsel at a critical stage, the U.S. Supreme Court says that is unfair and so likely to prejudice the accused that “no amount of showing of want of prejudice would cure it.”³⁸⁰

³⁷¹ *Halbert v. Michigan*, 545 U.S. 605 (2005); *Alabama v. Shelton*, 505 U.S. 654 (2002); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *In re Gault*, 387 U.S. 1 (1967); *Douglas v. California*, 372 U.S. 353 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963); 725 ILL. COMP. STAT. § 5/113-3(b) (2018) (counsel “shall” be appointed “if the court determines that the defendant is indigent and desires counsel” in every case that carries a penalty other than “fine only”).

³⁷² A “petty offense” is any offense that is punishable by a fine and not by incarceration. 730 ILL. COMP. STAT. §§ 5/5-1-17, 5-4.5-85(c) (2018). There are two kinds of petty offenses, based on the possible sentence of fine. 730 ILL. COMP. STAT. § 5/5-4.5-10(c) (2018).

- Business offense = fine in excess of \$1,000.
- Petty offense = fine of \$1,000 or less.

730 ILL. COMP. STAT. §§ 5/5-1-2, 5/5-4.5-75(a), 5/5-4.5-80 (2018).

³⁷³ 725 ILL. COMP. STAT. § 5/113-3(b) (2018) (counsel “shall” be appointed “if the court determines that the defendant is indigent and desires counsel” in every case that carries a penalty other than “fine only”); ILL. S. CT. R. 576 (explaining for petty offense ordinance violations: “A defendant has a right to be represented by an attorney; however, there shall be no right to appointment of counsel in suits for violation of ordinances for which the penalty does not include the possibility of a jail term.”). The rules of court apply the Code of Civil Procedure, rather than criminal procedures, to petty offense ordinance violations. ILL. S. CT. R. 571; *see* ILL. S. CT. R. 570 through 579.

³⁷⁴ *Rothgery v. Gillespie County*, 554 U.S. 191, 211 (2008). *See also* *Michigan v. Jackson*, 475 U.S. 625, 629 n.3 (1986); *Brewer v. Williams*, 430 U.S. 387, 388-89 (1977).

³⁷⁵ *Rothgery v. Gillespie County*, 554 U.S. 191, 213 (2008).

³⁷⁶ *Rothgery v. Gillespie County*, 554 U.S. 191, 194 (2008).

³⁷⁷ *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)). *See also* *Michigan v. Jackson*, 475 U.S. 625, 629 n.3 (1986).

³⁷⁸ *Rothgery v. Gillespie County*, 554 U.S. 191, 211 (2008).

³⁷⁹ *Rothgery v. Gillespie County*, 554 U.S. 191, 212 (2008).

³⁸⁰ *United States v. Cronin*, 466 U.S. 648, 658-59 (1984) (quoting *Davis v. Alaska*, 415 U.S. 308, 318 (1974)).

Further, each state is responsible for ensuring that, where an attorney is appointed to represent an indigent defendant, that appointed attorney is able to provide effective representation.³⁸¹ Attorneys provide representation to indigent people within the structures of the system a state creates. In *United States v. Cronin*, the U.S. Supreme Court explains that deficiencies in indigent defense systems can make any lawyer – even the best attorney – perform in a non-adversarial way that results in a constructive denial of the right to counsel.³⁸²

All information in this chapter is based on the law and procedures in effect at the time of this evaluation. On February 22, 2021, Illinois omnibus criminal justice legislation was signed into law making many revisions to criminal justice law and procedures,³⁸³ including some aspects of the process of a criminal case discussed in this chapter. These changes will certainly affect the provision of the right to counsel to indigent adults in criminal trial courts, although until the changes are implemented it is impossible to anticipate the effects for indigent defendants and the attorneys appointed to represent them. Relevant changes take effect on either

³⁸¹ See, e.g., *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (“It has long been recognized that the right to counsel is the right to the effective assistance of counsel.”).

³⁸² *United States v. Cronin*, 466 U.S. 648, 659-60 (1984) (“[I]f counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. . . . Circumstances of that magnitude may be present on some occasions when, although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. *Powell v. Alabama*, 287 U.S. 45 (1932), was such a case.”); *Strickland v. Washington*, 466 U.S. 668, 683 (1984) (citing *United States v. Cronin*, 466 U.S. 648 (1984): “The Court has considered Sixth Amendment claims based on actual or constructive denial of the assistance of counsel altogether, as well as claims based on state interference with the ability of counsel to render effective assistance to the accused.”).

³⁸³ SAFE-T Act, Ill. P.A. 101-0652 (H.B. 3653) (eff. various dates).

Limitations of this chapter due to the coronavirus pandemic

The coronavirus pandemic struck the United States during the course of this evaluation. A follow-up visit to Cook County and the site visits to Champaign and DuPage counties were scheduled to take place between March and July of 2020 but had to be cancelled due to the pandemic. As a result, this evaluation was not able to include direct observation of court proceedings in Champaign and DuPage counties nor the full number of court locations originally intended in Cook County. All information about how procedures are carried out in Champaign County and in DuPage County was gleaned through interviews of criminal justice system stakeholders rather than through a combination of direct observations and interviews, as is also the case for a portion of the information about Cook County.

July 1, 2021 or January 1, 2023, and they are noted in the sections of this chapter to which they relate.

A. How a person enters into the criminal justice system

When an adult is alleged to have committed any offense in Illinois, they can be arrested (with or without a warrant) or they can be given a notice to appear before a court at a stated time and place. Absent a warrant, the decision whether to arrest or issue a notice to appear is largely within the discretion of law enforcement.

1. Notice to appear

It is fairly common among the nine sample counties for a person accused of a misdemeanor (other than in a domestic violence case and sometimes in driving under the influence cases) to receive a notice to appear. The exception is DuPage County, where the only defendants who typically receive a notice to appear are in misdemeanor traffic cases that do not involve driving under the influence. In Champaign County, a person accused of a non-violent felony theft is likely to receive a notice to appear.

When a person is given a notice to appear, that notice directs them to appear in court to answer the allegation on a particular date at a particular court location. The defendant is out-of-custody at this court proceeding where they appear for the first time before a judge, and it is their initial appearance (regardless of the name used in the county to refer to the hearing). (*See* discussion of initial appearance at pages 94 to 116.)

2. Arrest

When a person is arrested, they are taken to a county jail (although they may be processed first at a local police station³⁸⁴). Among the nine sample counties:

SAFE-T Act Change

Effective January 1, 2023, law enforcement may no longer arrest persons “accused of traffic and Class B and C criminal misdemeanor offenses, or of petty and business offenses, who pose no obvious threat to the community or any person, or who have no obvious medical or mental health issues that pose a risk to their own safety” and instead “shall issue a citation” requiring the individual to appear in court within 21 days.

SAFE-T Act, Ill. P.A. 101-0652 (H.B. 3653) §§ 10-255 (amending 725 ILL. COMP. STAT. § 5/109-1(a-1)), 99-999 (making § 10-255 effective Jan. 1, 2023).

³⁸⁴ Among the sample counties, for example, those arrested by the Rantoul Police Department in Champaign County are processed first at the police station before being taken to the county

- only Gallatin County does not operate its own jail and instead contracts with neighboring Saline County to house Gallatin County detainees;
- only in Cook County does a person who is arrested have nearly immediate access to a public attorney; and
- in Mercer, Stephenson, and Cook counties, the arrested defendant may be interviewed by the probation department so that it can prepare a pretrial risk assessment.

Release from jail without appearing in court. It is possible for a person who is arrested to be released from jail quickly and without appearing before a judge. If the defendant was arrested on a warrant where the judge has already set the terms and conditions of bail, the sheriff or other peace officer can accept that bail and release the defendant according to those conditions.³⁸⁵ For certain misdemeanors and petty offenses, the Illinois Supreme Court has established a uniform schedule of amounts of bail and the ways in which that bail can be satisfied,³⁸⁶ pursuant to which a defendant who has been arrested can be released before appearing in court. Among the nine sample counties, for example, misdemeanor defendants (other than those arrested for domestic violence) almost always bond out of jail without appearing before a judge in Gallatin, Hardin, and Stephenson counties.

Any defendant who is released from jail before going to court signs a written agreement that directs them to appear in court to answer the allegation on a particular date at a particular court location. The defendant is out-of-custody at this court proceeding where they appear for the first time before a judge, and it is their initial

jail.

³⁸⁵ 725 ILL. COMP. STAT. § 5/110-9 (2018).

³⁸⁶ 725 ILL. COMP. STAT. § 5/110-15 (2018); 725 ILL. COMP. STAT. § 195/1 (2018); ILL. S. CT. R. 526, 527, 528, 553, 554. Generally, the amount of the bail required to be posted will cover the fines & fees that must be imposed if the defendant is convicted of the offense. *See* 705 ILL. COMP. STAT. §§ 135/15-52, 15-55, 15-60, 15-65 (2018).

SAFE-T Act Change

Effective January 1, 2023, the use of cash bail is abolished. Unless an individual is accused of an offense for which a court may deny pretrial release, law enforcement may release a person arrested with a summons to appear in court within 21 days, and there is a “presumption in favor of pretrial release.”

SAFE-T Act, Ill. P.A. 101-0652 (H.B. 3653) §§ 10-255 (adding 725 ILL. COMP. STAT. § 5/110-1.5 and amending 725 ILL. COMP. STAT. §§ 5/102-6, 5/109-1(a-3)), 99-999 (making § 10-255 effective Jan. 1, 2023).

appearance (regardless of the name used in the county to refer to the hearing). (See discussion of initial appearance at pages 94 to 116.)

Detention in jail until appearing in court. If not released from jail (for example, because they cannot afford the amount of bail required or they are arrested on an offense that is not bailable without a hearing³⁸⁷), a person who is arrested must be taken “without unnecessary delay” before a judge for the “initial appearance.”³⁸⁸ The defendant is in-custody at this court proceeding where they appear for the first time before a judge, and it is their initial appearance (regardless of the name used in the county to refer to the hearing). (See discussion of initial appearance at pages 94 to 116.)

Probable cause determination following warrantless arrest. For a person arrested without a warrant, the United States Supreme Court held in *County of Riverside v. McLaughlin* that a judge must make a probable cause determination within 48 clock hours of a warrantless arrest or the government risks being held responsible for an illegal detention.³⁸⁹ This is referred to in many places in Illinois as a “*Gerstein* hearing.”³⁹⁰ It is not necessary for there to be an actual hearing, and a judge can make this determination without ever seeing the defendant. Instead, the judge can review the paperwork or oral information provided by the officer. If the judge finds that there was not probable cause for the arrest, the person is released from jail. If the judge finds, based on the officer’s declaration, that there was probable cause for the arrest, the person remains in jail. In all nine of the sample counties, judges make this probable cause determination on a warrantless arrest either prior to or during the in-custody defendant’s initial appearance (or bail hearing in those counties that first hold a hearing solely for the purpose of setting bail), based on either an oral or written proffer by the state’s attorney or the arresting officer.

B. Initial appearance and the right to counsel

The next step in Illinois after a person is either arrested or given a notice to appear is for that defendant to appear in court before a judge. At this initial appearance before a judge, some defendants are in-custody, while other defendants are out-of-custody. In Illinois, this initial appearance before a judge is called by various names depending on the county and court in which it occurs, sometimes depending on whether the defendant is in- or out-of-custody, and sometimes depending on the type of case. Regardless of the name used in the county to refer to the hearing, for all defendants both in- and out-of-custody this is the proceeding in Illinois that triggers the attachment of the right to counsel under *Rothgery v. Gillespie County*.³⁹¹ From

³⁸⁷ See, e.g., 725 ILL. COMP. STAT. § 5/110-5.1 (2018) (violent crime when alleged victim is family or household member, i.e., a domestic violence charge).

³⁸⁸ 725 ILL. COMP. STAT. § 5/109-1(a) (2018). For petty offenses and certain misdemeanors, the initial appearance is to be “not less than 14 days but within 60 days after the date of the arrest, whenever practicable.” ILL. S. CT. R. 504.

³⁸⁹ *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

³⁹⁰ This is a reference to the U.S. Supreme Court case of *Gerstein v. Pugh*, in which the Court held that the Fourth Amendment requires a judge to determine within a reasonable time whether there is probable cause for the warrantless arrest of a detained defendant. *Gerstein v. Pugh*, 420 U.S. 103 (1975).

³⁹¹ See *Rothgery v. Gillespie County*, 554 U.S. 191, 211 (2008). See also *Michigan v. Jackson*, 475 U.S. 625, 629 n.3 (1986); *Brewer v. Williams*, 430 U.S. 387, 388-89 (1977).

that moment forward, every indigent defendant has the right to be effectively represented by appointed counsel during every critical stage of their case, unless they make an informed and intelligent waiver of their right to counsel.³⁹²

This evaluation closely studied nine Illinois counties to understand the procedures used by the courts in those counties to conduct the initial appearance and provide counsel to indigent adults in criminal cases. The procedures in those nine counties vary greatly and are briefly illustrated in the table on page 96. With 102 counties in the state, it is likely that any or all of those counties have an even greater variety of procedures for providing the right to counsel, yet the State of Illinois has no method of knowing.

Timing of the initial appearance. The timing of the initial appearance varies from county to county, due largely to differences in the number of judges and the number of offenses that occur in the county. Some counties have separate initial appearances for in-custody and out-of-custody defendants.³⁹³ For in-custody defendants some counties first hold a hearing solely to consider bail followed by the full initial appearance at a later date.³⁹⁴ The names used for the initial appearance proceeding vary from county to county.

Hardin County. All defendants, both in- and out-of-custody, have their initial appearance on Tuesday during the one day each week that the court conducts all of its criminal court proceedings. For an in-custody defendant, the initial appearance is on the first Tuesday following the arrest. For an out-of-custody defendant, the initial appearance is on a Tuesday about 14 to 21 days after the arrest/notice.

Gallatin County. All defendants, both in- and out-of-custody, have their initial appearance on Monday during the one day each week that the court conducts all of its criminal court proceedings. For an in-custody defendant, the initial appearance is on the first Monday following the arrest. For an out-of-custody defendant, the initial appearance is on a Monday about 14 to 21 days after the arrest/notice.

Schuyler County. An in-custody defendant has a hearing within 48 hours of the arrest that is solely for the purpose of considering bail, followed within a week but always on Wednesday by what the county refers to as “first appearance” where the full initial appearance proceeding occurs. An out-of-custody defendant’s initial appearance is at the “first appearance” on a Wednesday during the one day each week that the court conducts all of its criminal court proceedings.

Mercer County. An in-custody defendant’s initial appearance is within 48 hours of the arrest, referred to in the county as the “bail hearing,” followed on Monday or Wednesday of the following week by what the county refers to as “first appearance” where the full initial

³⁹² Rothgery v. Gillespie County, 554 U.S. 191, 212 (2008).

³⁹³ Among the nine sample counties: Mercer, Stephenson, LaSalle, and DuPage.

³⁹⁴ Among the nine sample counties: Schuyler, LaSalle for some in-custody defendants, Champaign for some in-custody defendants, and Cook.

Initial appearance in the nine sample counties

County	Bail hearing only, for in-custody defendants	Full initial appearance		Defendant required to enter a plea at initial appearance	In-custody defendants appear in person or by video	Public attorney present or absent
		In-custody defendants	Out-of-custody defendants			
Hardin		criminal court on Tuesdays		no	in person	in person
Gallatin		criminal court on Mondays		no	in person	in person
Schuyler	hearing within 48 hours of arrest	"first appearance"		no	in person	in person on Wednesdays; by phone on other days
Mercer		hearing within 48 hours of arrest; repeated at "first appearance"	"first appearance"	yes - misdemeanor; no - felony	by video	in person on Mondays, Tuesdays, and Saturdays; by phone on other days
Stephenson		"bond hearing" within 48 hours of arrest, but bail determination may be delayed	"first appearance"	no - "bond hearing"; yes - "first appearance"	by video	no public attorney at "bond hearing"; in person at "first appearance"
LaSalle	"bail hearing" conducted on Sundays	"appearance with counsel" if defendant had a Sunday "bail hearing"; otherwise "bail hearing" conducted on weekdays	"appearance with counsel"	yes	in person	in person
Champaign	"bond hearing" conducted on weekends or holidays	"arraignment court" every weekday (except "must appear date" on only Mondays & Fridays for out-of-custody traffic cases)		yes	by video	in person
DuPage		"bond hearing" within 48 hours of arrest	arraignment (referred to as: "arraignment on the complaint" in traffic cases and misdemeanors; "status hearing" in felonies)	yes	by video	in person
Cook	"bond court" within 24 hours of arrest	proceedings for misdemeanors (referred to as: "key date" in suburbs; "first time up" or "state to notify" or "status on discovery" in Chicago)		no	in person	in person
		proceedings for felonies (referred to as: "next court date preliminary hearing" in suburbs; "first time up" or "prelim first time up" in Chicago)				

appearance occurs again. An out-of-custody defendant's initial appearance is at the "first appearance," on a Monday for all non-traffic cases or on a Wednesday for traffic cases; the same days each week that the court conducts all of its criminal court proceedings.

Stephenson County. An in-custody defendant's initial appearance is within 48 hours of the arrest, referred to in the county as the "bond hearing," but the bail determination portion of the proceeding may be continued to a later date. An out-of-custody defendant's initial appearance is at the "first appearance," which is usually about 30 days after the arrest/notice and held on Wednesday or Thursday.

LaSalle County. An in-custody defendant has a hearing within 24 to 48 hours of the arrest, referred to in the county as the "bail hearing." The bail hearings conducted on Sundays are solely for the purpose of considering bail and are followed on the next Thursday or Friday by a full initial appearance referred to as "appearance with counsel;" the bail hearings conducted Monday through Friday are a full initial appearance. An out-of-custody defendant's initial appearance is at the "appearance with counsel," most often on a Thursday or Friday.

Champaign County. An in-custody defendant has a hearing within 48 hours of the arrest. The hearings conducted on weekends or holidays for in-custody defendants are referred to as a "bond hearing" that is solely for the purpose of considering bail and are followed on the next business day by a full initial appearance referred to as "arraignment court;" the hearings conducted Monday through Friday for in-custody defendants are a full initial appearance, referred to in the county as "arraignment court." An out-of-custody defendant's initial appearance is: in a traffic case, at the "must appear date" held on a Monday or Friday typically three to six weeks after the arrest/notice; and in all non-traffic and DUI cases, at "arraignment court" held every weekday.

DuPage County. An in-custody defendant's initial appearance is within 48 hours of the arrest, referred to in the county as the "bond hearing." An out-of-custody defendant's initial appearance is at the arraignment, usually about 30 days after the arrest/notice, referred to in the county as: the "arraignment on the complaint" in a traffic or misdemeanor case; and the "status hearing" in a felony.

Cook County. An in-custody defendant has a hearing in "bond court"³⁹⁵ typically within 24 hours of the arrest that is solely for the purpose of considering bail, followed by a full initial appearance within one to 30 days later and referred to in the county by various names (depending on the type of case and location of the alleged offense³⁹⁶). An out-of-custody defendant's initial

³⁹⁵ More specifically, depending on the day and location of the arrest, the proceeding is referred to in the county as:

- weekends & holidays arrests for all case types everywhere in the county – "holiday bond court;"
- weekdays arrests for:
 - suburban felonies and misdemeanors – suburban "bond court;"
 - Chicago domestic violence – domestic violence "bond court;"
 - Chicago non-domestic violence, both felony and misdemeanor – "central bond court."

³⁹⁶ More specifically:

- Suburban misdemeanor – for example in the fifth municipal district (Bridgeview), in one to three weeks and referred to as the "key date."

appearance is within two to six weeks after the arrest/notice and referred to in the county by various names (depending on the type of case and location of the alleged offense³⁹⁷).

In-custody defendant’s appearance in person or by video conference. An in-custody defendant’s initial appearance can be conducted by video conference if the chief judge of the circuit has adopted a rule so allowing.³⁹⁸ Among the nine sample counties, five counties – Cook, Gallatin, Hardin, LaSalle, and Schuyler – do not use video-conferencing and conduct all criminal case proceedings with the defendant physically present in the courtroom. In the other four sample counties – Champaign, DuPage, Mercer, and Stephenson – the initial appearance for an in-custody defendant is conducted by video conference,³⁹⁹ with the defendant physically located in the jail while all of the other participants in the proceedings are in the courtroom.

Participants in the initial appearance. For all initial appearances in all nine sample counties, the judge and one or more prosecutors are physically present in the courtroom during the proceedings, but whether a public defense attorney is present varies from county to county. Among the nine sample counties, a public defender office attorney is physically present in the courtroom during all initial appearances for both in-custody and out-of-custody defendants in

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- Chicago domestic violence misdemeanor – in two weeks and referred to as either “status on discovery” or “state to notify.”
 - Chicago misdemeanor (non-domestic violence) – in one to two business days and referred to as “first time up.”
 - Suburban felony – for example in the fifth municipal district (Bridgeview), in two weeks and referred to as “next court date – preliminary hearing.”
 - Chicago domestic violence felony – within 30 days and referred to as “prelim first time up.”
 - Chicago felony (non-domestic violence) – in seven days and referred to as “first time up.”

³⁹⁷ More specifically:

- Suburban misdemeanor – for example in the fifth municipal district (Bridgeview), at the “key date” in three to six weeks after the arrest/notice.
- Chicago domestic violence misdemeanor – at either “status on discovery” or “state to notify” about 30 days after the arrest/notice.
- Chicago misdemeanor (non-domestic violence) – at the “state to notify” proceeding approximately one month after the arrest/notice.
- Suburban felony – for example in the fifth municipal district (Bridgeview), at the “next court date – preliminary hearing” about two weeks after the arrest/notice.
- Chicago domestic violence felony – at the “prelim first time up” proceeding about 30 days after the arrest/notice.
- Chicago felony (non-domestic violence) – at the “prelim first time up” proceeding about two weeks after the arrest/notice.

³⁹⁸ 725 ILL. COMP. STAT. § 5/106D-1 (2018) (chief judge of each circuit may adopt a rule allowing in-custody defendants to appear for hearings through video-conferencing in the following specific proceedings: initial appearance at which bail is set; waiver of preliminary hearing; arraignment at which plea of not guilty will be entered; waiver of right to jury; status hearing; and hearing under Sexually Violent Persons Commitment Act at which no witness testimony is taken); 725 ILL. COMP. STAT. § 5/109-1(a) (2018) (“Whenever a person arrested either with or without a warrant is required to be taken before a judge, a charge may be filed against such person by way of a two-way closed circuit televisions system, except that a hearing to deny bail to the defendant may not be conducted by way of closed circuit television.”).

³⁹⁹ 18th JUD. CIR. CT. R. 30.05 (DuPage County). In Champaign, Mercer, and Stephenson counties, there is no local rule adopted by the chief judge of the circuit allowing an in-custody defendant’s initial appearance to be conducted by video conference.

all counties except Schuyler, Mercer, and Stephenson. In those counties and proceedings where a public defender office attorney is present in the courtroom during the initial appearance, that attorney has not yet been appointed to represent any defendant during the proceeding but is instead merely available to do so if and when appointed by the court (*see* discussion of right to representation during bail determination at pages 108 to 116).

Hardin County. The county's part-time public defender is physically present in the courtroom on Tuesday of each week, during which all criminal case proceedings including initial appearances are heard. The public defender meets individually with each defendant who desires to do so prior to the start of the initial appearance and can consult with the defendant during the proceeding.

Gallatin County. The county's part-time public defender is physically present in the courtroom on Monday of each week, during which all criminal case proceedings including initial appearances are heard. The public defender interviews each defendant who desires to do so before the start of the initial appearance and can consult with the defendant during the proceeding.

Schuyler County. The county's part-time public defender is physically present in court during any initial appearances that occur on Wednesdays, but for initial appearances that occur on any other day of the week the public defender most often calls in by telephone.⁴⁰⁰ On Wednesdays when the public defender is physically present in the courtroom during initial appearances, he can consult with any defendants who arrive sufficiently early enough before the court proceedings begin and with all defendants during the proceedings.⁴⁰¹ On days other than Wednesday, the telephone appearances by the public defender make it difficult for defendants to consult with counsel prior to or during the proceedings.

Mercer County. The county's part-time public defender is physically present in court during any initial appearances that occur on Mondays, Tuesdays, and Saturdays, but for initial appearances that occur on any other day of the week the public defender participates by telephone.⁴⁰² Whether appearing in person or by telephone, the public defender does not meet with any defendants before the start of the initial appearance. On days when the public defender appears in person, out-of-custody defendants are able to consult with the public defender during the initial appearance. On other days, the telephone appearances by the public defender make it difficult for any defendants to consult with counsel during the proceedings, and it is particularly difficult for an in-custody defendant because in-custody defendants in Mercer County appear for their initial

⁴⁰⁰ The Schuyler County public defender is part-time and otherwise maintains a private law practice located about 60 miles away in Adams County, and there are no assistant public defenders for the Schuyler County public defender office.

⁴⁰¹ The Schuyler County public defender has an office next door to the courtroom and arrives in court one hour early on Wednesdays to be available to meet with appointed clients.

⁴⁰² At the time of the site visit to Mercer County during this evaluation, the Mercer County public defender was part-time and otherwise maintained a private law practice, but that public defender was appointed as an associate judge in February 2020, so these circumstances may have changed. There are no assistant public defenders for the Mercer County public defender office.

appearance by video conference from the jail. As one judge observed: “I don’t like the video at all. I wish it was all in court. Defendants should get to come to court; see their attorney.”

Stephenson County. There is no public attorney available in any fashion during the initial appearance for in-custody defendants, referred to in the county as the “bond hearing” and held every weekday and Sundays (*see* further discussion at page 106). By contrast, one or more public defender office attorneys are physically present in the courtroom during the initial appearance for out-of-custody defendants, referred to in the county as “first appearance,” where they can meet with out-of-custody defendants both before and during the proceedings.

LaSalle County. The county’s public defender (or an assistant public defender) is physically present in the courtroom during the initial appearance for all in-custody defendants, referred to in the county as the “bail hearing” and held every weekday and on Sundays. Similarly, one or more public defender office attorneys are physically present in the courtroom during the initial appearance for out-of-custody defendants, referred to in the county as “appearance with counsel.” Whether a defendant is in- or out-of-custody, the public defender office attorneys do not talk to them before the proceedings begin but may consult with them during the proceedings.

Champaign County. An assistant public defender is physically present in the courtroom during all initial appearances, referred to as “arraignment court” on weekdays and as “bond hearing” on weekends & holidays and occurring every day of the year except Christmas. Every day, the Champaign County jail sends to the Champaign County public defender office a list of people who are in-custody and will be appearing in court for their initial appearance. Before court begins, an assistant public defender has a brief 5- to 10-minute conversation by video conference with each arrested defendant to gather information for making a bond argument and if a felony arrest to discuss whether the defendant wants to request or waive a preliminary hearing. The quality of the system provided for the public defender office to video-conference with defendants at the jail, and in particular the audio, is very poor, so that defendants often have a hard time hearing what is said. Because in-custody defendants appear for these proceedings by video, it is difficult for the attorney and the in-custody defendant to consult during the proceedings. For out-of-custody defendants, an assistant public defender is available at least 20 minutes before court to begin collecting contact information from out-of-custody defendants who arrive early and want to speak to a public attorney, but otherwise the assistant public defender is unlikely to consult with out-of-custody defendants during the proceedings.

DuPage County. An assistant public defender is physically present in the courtroom during all initial appearances. Initial appearances for in-custody defendants are referred to as the “bond hearing” and occur seven days a week. In advance of each day’s bond hearings, the court sends a list of in-custody people who will be appearing in that session of court to the DuPage County public defender office. Before court begins, an assistant public defender or public defender office investigator calls the jail and speaks individually over the telephone with each in-custody defendant to learn anything that might help with the pretrial release decision. Because in-custody defendants appear for these proceedings by video, it is difficult for the attorney and the in-custody defendant to consult during the proceedings. Initial appearances for out-of-custody

defendants are at arraignment (but referred to as “arraignment on the complaint” in traffic cases and misdemeanors or as “status hearing” in felonies), held Monday through Friday each week. For out-of-custody defendants, the assistant public defender can but rarely does consult with them during the proceedings.

Cook County. One or more assistant public defenders are physically present in the courtroom during all initial appearances, occurring every day of the year, referred to within the county by various names depending on the type of case and the location of the alleged offense.⁴⁰³ Before court begins, the assigned assistant public defenders (or investigators on their behalf) interview all in-custody defendants and the out-of-custody defendants who arrive early enough for them to do so. The assistant public defenders can consult with all defendants during the proceedings, though they are unlikely to do so with out-of-custody defendants.

⁴⁰³ An in-custody defendant has a two-part initial appearance:

first, a hearing in “bond court” solely for the purpose of considering bail, referred to in the county as:

- weekends & holidays arrests for all case types everywhere in the county – “holiday bond court;”
- weekdays arrests for:
 - suburban felonies and misdemeanors – suburban “bond court;”
 - Chicago domestic violence – domestic violence “bond court;”
 - Chicago non-domestic violence, both felony and misdemeanor – “central bond court.”

followed by a full initial appearance referred to in the county as:

- suburban misdemeanor – for example in the fifth municipal district (Bridgeview), referred to as the “key date.”
- Chicago domestic violence misdemeanor – either “status on discovery” or “state to notify.”
- Chicago misdemeanor (non-DV) – “first time up.”
- suburban felony – for example in the fifth municipal district (Bridgeview), referred to as “next court date – preliminary hearing.”
- Chicago domestic violence felony – “prelim first time up.”
- Chicago felony (non-DV) – “first time up.”

An out-of-custody defendant’s initial appearance is referred to in the county as:

- suburban misdemeanor – for example in the fifth municipal district (Bridgeview), referred to as the “key date.”
- Chicago domestic violence misdemeanor – either “status on discovery” or “state to notify.”
- Chicago misdemeanor (non-DV) – “state to notify.”
- suburban felony – for example in the fifth municipal district (Bridgeview), referred to as “next court date – preliminary hearing.”
- Chicago domestic violence felony – “prelim first time up.”
- Chicago felony (non-DV) – “prelim first time up.”

Proceedings at the initial appearance. At the initial appearance, the judge is required by state law to:⁴⁰⁴

- inform the defendant of the charge against him and give him a copy of the charge;
- for defendants who are in-custody, admit the defendant to bail, as provided by law;
- advise the defendant of his right to counsel and, upon request of a defendant found to be indigent, appoint counsel (either a public defender or a private attorney) (*see* discussion of the right to counsel at pages 108 to 116);
- advise the defendant that a foreign national has the right to communicate with consular officials, and upon request of a defendant continue the proceedings to allow that contact; and
- for felony cases, schedule a preliminary hearing.

Pleading at the initial appearance. State law does not require the defendant to enter a plea at the initial appearance,⁴⁰⁵ but:

- in some counties, the court conducts the formal arraignment at the same time as the initial appearance and *requires* the defendant to plead not guilty or guilty;
- in some counties, the court *allows* the defendant to plead guilty if they so choose;
- in some counties, the court *prohibits* the defendant from entering any plea; and
- in some counties, the entry of a plea at the initial appearance varies by type of case.

The courts that require or allow a defendant to plead at the initial appearance must also be able to provide a public attorney to an indigent defendant before that plea is entered, because Illinois law requires that “[e]very person charged with an offense shall be allowed counsel before pleading to the charge.”⁴⁰⁶

Hardin County. The court allows a defendant to plead guilty at the initial appearance, but this rarely ever occurs.

SAFE-T Act Change

Effective January 1, 2023, at the initial appearance of an in-custody defendant, a defendant must either be released pretrial or, upon a petition filed by the state to detain the defendant pretrial, a detention hearing must be set to occur within not later than 24 to 48 hours depending on the offense charged.

SAFE-T Act, Ill. P.A. 101-0652 (H.B. 3653) §§ 10-255 (amending 725 ILL. COMP. STAT. § 5/109-1(b)(4), and adding 725 ILL. COMP. STAT. § 110-6.1(c)(2)), 99-999 (making § 10-255 effective Jan. 1, 2023).

⁴⁰⁴ 725 ILL. COMP. STAT. §§ 5/106D-1(a), 5/109-1(b),(d) (2018).

⁴⁰⁵ *See* 725 ILL. COMP. STAT. §§ 5/106D-1(a), 5/109-1(b),(d) (2018).

⁴⁰⁶ 725 ILL. COMP. STAT. § 5/113-3(a) (2018).

Gallatin County. The court allows a defendant to plead guilty at the initial appearance, but this rarely ever occurs.

Schuyler County. The court allows a defendant to plead guilty at the initial appearance, but this occurs more frequently in misdemeanor cases than felonies. The court does not prohibit a felony defendant from pleading guilty at the initial appearance if they “insist” on doing so, but it is “very rare.”

Mercer County. The court conducts the formal arraignment of a defendant accused of a misdemeanor at the same time as the initial appearance and requires the defendant to enter a plea.⁴⁰⁷ The court prohibits a felony defendant from pleading guilty at the initial appearance.

Stephenson County. The court allows an in-custody misdemeanor defendant to plead guilty at their initial appearance,⁴⁰⁸ but prohibits an in-custody felony defendant from doing so. For out-of-custody defendants, the court conducts the formal arraignment at the same time as the initial appearance and requires defendants to enter a plea.

LaSalle County. The court conducts the formal arraignment at the same time as the initial appearance and requires defendants to enter a plea, but the court prohibits a felony defendant from pleading guilty (i.e., a felony defendant can only plead not guilty, while a misdemeanor defendant can plead guilty or not guilty).

Champaign County. The court conducts the formal arraignment at the same time as the initial appearance and requires defendants to enter a plea, but the court prohibits a felony defendant and a traffic defendant from pleading guilty (i.e., a felony defendant and a traffic defendant can only plead not guilty, while a misdemeanor defendant can plead guilty or not guilty).

DuPage County. The court conducts the formal arraignment at the same time as the initial appearance and requires defendants to enter a plea.⁴⁰⁹

⁴⁰⁷ If an in-custody misdemeanor defendant indicates his intention to plead guilty at the initial appearance, referred to as the “bond hearing,” the court immediately orders the defendant brought to the courthouse (from the jail where he had been participating in the hearing via video conference) to effectuate the guilty plea. For misdemeanor defendants both in- and out-of-custody, if the misdemeanor defendant requests appointed counsel for entry of a guilty plea, the court immediately determines indigence and appoints counsel on the spot to represent an indigent defendant during the entry of a guilty plea.

⁴⁰⁸ If an in-custody misdemeanor defendant indicates his intention to plead guilty at the initial appearance, referred to as the “bond hearing,” the court immediately orders the defendant brought to the courthouse (from the jail where he had been participating in the hearing via video conference) to effectuate the guilty plea.

⁴⁰⁹ If an in-custody misdemeanor defendant indicates his intention to plead guilty at the initial appearance, referred to as the “bond hearing,” the court immediately orders the defendant brought to the courthouse (from the jail where he had been participating in the hearing via video conference) to effectuate the guilty plea. For misdemeanor defendants both in- and out-of-custody, if the misdemeanor defendant requests appointed counsel for entry of a guilty plea, the court immediately determines indigence and appoints counsel on the spot to represent an indigent defendant during the entry of a guilty plea.

Cook County. The court allows a defendant to plead guilty at the initial appearance, including in-custody defendants at “bond court” (though an in-custody defendant accused in a Chicago domestic violence case, whether misdemeanor or felony, cannot plead guilty in “bond court” and must wait until the full initial appearance to do so).

1. Pretrial release or detention, for in-custody defendants

At the initial appearance, the judge must “[a]dmit the defendant to bail” in the manner and to the extent allowed by law.⁴¹⁰ Effective January 1, 2018, Illinois amended its statutes to require that “[a] person charged with an offense shall be allowed counsel at the hearing at which bail is determined,” and a court “shall” appoint an attorney to represent any defendant (without regard to indigency) *during* that hearing whenever the defendant desires but does not have an attorney.⁴¹¹

This change in Illinois law presented challenges for the courts in how to implement at least two changed requirements.

1. Prior to this statutory amendment, there was no requirement under federal or state law that a public defense attorney be present at or participate during the initial appearance,

⁴¹⁰ 725 ILL. COMP. STAT. § 5/109-1(b)(4) (2018). With a few exceptions, under Illinois law, every person who is arrested is theoretically entitled to be released on bail pre-trial. ILL. CONST. art. I, § 9. The following defendants are not entitled to bail:

- a defendant charged with a capital offense or an offense for which life imprisonment may be imposed, where the proof is evident or the presumption great that the defendant is guilty of the offense;
- a defendant charged with a felony offense for which the sentence of imprisonment cannot be probation, periodic imprisonment, or conditional discharge, where the proof is evident or the presumption great that the defendant is guilty of the offense and a court finds following a hearing that the defendant’s release “would pose a real and present threat to the physical safety of any person;”
- a defendant charged with stalking or aggravated stalking, where the proof is evident or the presumption great that the defendant is guilty of the offense and a court finds following a hearing that the release of the defendant would pose a real and present threat to the physical safety of the alleged victim and denial of bail is necessary to prevent fulfillment of the threat on which the charge is based;
- a defendant charged with unlawful use of weapons in or around a school or school conveyance, where the proof is evident or the presumption great that the defendant is guilty of the offense and a court finds following a hearing that the release of the defendant would pose a real and present threat to the physical safety of any person and denial of bail is necessary to prevent fulfillment of that threat;
- a defendant charged with making or attempting to make a terrorist threat, where the proof is evident or the presumption great that the defendant is guilty of the offense and a court finds following a hearing that the release of the defendant would pose a real and present threat to the physical safety of any person and denial of bail is necessary to prevent fulfillment of that threat.

ILL. CONST. art. I, § 9; 725 ILL. COMP. STAT. §§ 5/110-1(c), 5/110-4, 5/110-6.1, 5/110-6.3(2018).

⁴¹¹ 2017 Ill. P.A. 100-1 (enacting 725 ILL. COMP. STAT. § 5/109-1(a-5)).

including for the bail determination,⁴¹² (unless a defendant was also arraigned⁴¹³ at that appearance, i.e., required to enter a plea). The court in each county was previously free to choose whether to have a public attorney present during the initial appearance; some did, and some did not. Today, every court must have a public attorney present and available to actively participate during at least the bail determination portion of the initial appearance, which typically but not always occurs only for in-custody defendants.

2. Prior to this statutory amendment, there was no requirement under federal or state law that a court appoint a public attorney to represent, at any stage of an adult criminal case, a defendant who is not indigent. Today, every court must appoint a public attorney to represent *during* the bail determination portion of the initial appearance *every* defendant who requests one, whether indigent or capable of hiring their own attorney.

⁴¹² As explained in the introduction to this chapter, the U.S. Supreme Court reaffirmed in *Rothgery v. Gillespie County* that the right to counsel attaches when “formal judicial proceedings have begun,” but that this is distinct from whether that proceeding is a “critical stage” at which counsel must be present as a participant. *Rothgery v. Gillespie County*, 554 U.S. 191, 211-12 (2008).

The U.S. Supreme Court has not addressed whether the decision to release or detain a defendant pre-trial is a critical stage in a criminal case. This is a developing area of the law. The issue has been ruled on by some state courts and lower federal courts. *E.g.*, *Higazy v. Templeton*, 505 F.3d 161, 172, 172 n.11 (2d Cir. 2007) (bail hearing is a critical stage of the federal criminal process); *Booth v. Galveston Cnty.*, 352 F.Supp.3d 718 (S.D. Tex. 2019) (civil action finding that plaintiff has claim for relief because Sixth Amendment requires representation by counsel at pretrial detention hearing and stating that “this court is confident that, based on longstanding precedent, the Supreme Court would undoubtedly conclude that a pretrial detention hearing is a ‘critical stage’ for Sixth Amendment purposes”); *Caliste v. Cantrell*, 329 F. Supp. 3d 296, 314 (E.D. La. 2018) (initial bail hearing is a critical stage given the “vital importance of pretrial liberty”); *DeWolfe v. Richmond*, 76 A.3d 1019, 1031 (Md. 2013) (holding that the due process clause of art. 24 of the state’s constitution requires that “an indigent defendant has a right to state-furnished counsel at an initial appearance” following arrest, at which bail is first set, because the proceeding may result in the defendant’s detention); *Lavallee v. Justices in Hampden Superior Court*, 812 N.E.2d 895, 902–03 (Mass. 2004) (holding that “the principles of procedural due process in . . . the Massachusetts Declaration of Rights” require the presence of appointed counsel at bail hearings); *New Jersey v. Fann*, 571 A.2d 1023, 1030 (N.J. Super. Ct. 1990) (bail setting is a critical stage in a criminal proceeding); *Hurrell-Harring v. New York*, 930 N.E.2d 217, 223 (N.Y. 2010) (pretrial determination of liberty is a critical stage of the state’s criminal process). Like Illinois, some states have created a right to counsel at the pre-trial detention proceeding. *E.g.*, FLA. R. CRIM. P. § 3.111(a), (c) (2020) (“officer who commits a defendant to custody . . . shall [upon defendant’s request] immediately and effectively place the defendant in communication with the (office of) public defender” and, for in-custody defendant who reasonably appears to be indigent, the “public defender shall . . . seek the setting of a reasonable bail, and otherwise represent the defendant pending a formal judicial determination of indigency”); IDAHO CODE § 19-852 (2020) (indigent defendant entitled to be represented “to the same extent as a person having his own counsel is so entitled” and “to be counseled and defended at all stages of the matter beginning with the earliest time when a person providing his own counsel would be entitled to be represented by an attorney”); N.M. STAT. ANN. § 31-16-3 (2020) (indigent defendant entitled to be represented “to the same extent as a person having his own counsel” and to be “counseled and defended at all stages of the matter beginning with the earliest time when a person providing his own counsel would be entitled to be represented by an attorney”).

⁴¹³ The U.S. Supreme Court has held that arraignment, plea negotiation, and the entry of a guilty plea are all critical stages in a criminal case, during which an indigent defendant who has not waived their right to counsel is entitled to be represented by counsel. *Lafler v. Cooper*, 566 U.S. 156, 132 S. Ct. 1376, 1386 (2012); *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010); *McMann v. Richardson*, 397 U.S. 759, 771, 771 n.14 (1970); *Hamilton v. Alabama*, 368 U.S. 52, 53-55 (1961). At the arraignment in Illinois, the defendant is required to enter a plea, and state law requires that “[e]very person charged with an offense shall be allowed counsel before pleading to the charge.” 725 ILL. COMP. STAT. §§ 5/102-4, 5/113-1, 5/113-3(a), 5/113-4(a) (2018).

In-custody defendants must choose between timely bail determination and having representation at the bail determination. As explained, since January 1, 2018, every court must have a public attorney present and available to actively represent every defendant (whether indigent or capable of hiring their own attorney) *during* at least the bail determination portion of the initial appearance.⁴¹⁴

Stephenson County. There is no public attorney available in any fashion during the initial appearance for in-custody defendants, referred to in the county as the “bond hearing” and held within 48 hours of an arrest. Instead, if an in-custody defendant desires to have appointed counsel represent him during the bail determination portion of the initial appearance, the court fulfills all of the statutory requirements of the initial appearance *except* the court continues the bail determination until a later date at which a public attorney represents the defendant during the bail determination. The judge who presides over the majority of the initial appearances for in-custody defendants in Stephenson County does not believe it is necessary to have a public attorney present during the initial appearance, because: “I don’t need to hear from a lawyer just to set someone’s bond.” Although the judge is aware that other members of the judiciary interpret the statute differently, the judge advises that he intends to keep doing it his way until a higher court tells him otherwise. As a result, an in-custody defendant in Stephenson County must choose between the right to have bond set quickly (but without representation) and the right to have a lawyer advocate for him about pretrial release (but waiting for that to happen at a later date); this is particularly onerous for an indigent defendant. Reportedly, in-custody defendants in Stephenson County very rarely request to be represented by counsel during the bail determination.

The role of public counsel during the initial appearance. As explained, there is nothing in federal or state law that necessarily requires a defendant to receive the active representation of an appointed attorney during the initial appearance unless bail is being determined for that defendant or the defendant is also being arraigned. A defendant’s right to counsel for the entirety of the case attaches at the initial appearance in Illinois, but this is distinct from the question of whether any of the things required by Illinois law to occur at the initial appearance are a “critical stage” during which the defendant is entitled to the active representation of counsel.⁴¹⁵

In all nine of the sample counties that have a public attorney present during any initial appearance, whenever the court appoints that public attorney to represent any defendant *during* the initial appearance,⁴¹⁶ that public attorney is appointed *only* for the limited purpose of representing the defendant during the bail determination portion of the initial appearance. This means that only in-custody defendants are typically represented at all during the initial appearance, because there usually is no need for a bail determination for an out-of-custody defendant.

⁴¹⁴ 725 ILL. COMP. STAT. § 5/109-1(a-5) (2018).

⁴¹⁵ See *Rothgery v. Gillespie County*, 554 U.S. 191, 211-12 (2008).

⁴¹⁶ For example, in DuPage County, a written standing order appoints the DuPage County public defender office to represent every defendant (without regard to indigency) during bond court (which is the initial appearance for an in-custody defendant), unless the defendant chooses to have private counsel or self-represent. Order in the Matter of the Appointment of the Public Defender in Bond Court, 18th Jud. Cir. Ct. Admin. Order No. 17-26 (Dec. 28, 2017).

Whether the court will appoint a public attorney to represent a defendant for the entirety of the defendant's case is a wholly separate decision, and any attorney so appointed does not begin actively representing the defendant until after the initial appearance (*see* discussion of the right to counsel at pages 108 to 116). And, the public attorney appointed to represent an indigent defendant for the entirety of their criminal case is often a different attorney than the one who was present at their initial appearance (with whom they may have met, and who may have actively represented them during the bail determination).

Bifurcating the initial appearance for in-custody defendants. Illinois statutes prescribe exactly what must occur at the initial appearance (*see* discussion of proceedings at the initial appearance at page 102),⁴¹⁷ and state law does not contemplate that a portion of the initial appearance be conducted on one day with the remainder conducted at a later date. Nonetheless, four of the nine sample counties – Schuyler, LaSalle, Champaign, and Cook – do not carry out the full statutory requirements of an initial appearance for all in-custody defendants on the first day those defendants appear in court. Instead, the first time that some or all of the in-custody defendants in these counties come to court, the judge only conducts the bail determination, and the defendants are required to return to court at a later date for the remainder of the initial appearance requirements to be met, including appointing counsel for defendants who are indigent. This means that, contrary to the requirements of state law, some or all of the indigent defendants who are in-custody at the time of their initial appearance in these counties do not have an attorney appointed to represent them for the entirety of their case until they are brought back to court a second time, when either the same or a different attorney is appointed to represent them in the case proper. This gap in representation ranges from a few days to as long as a month, depending on the county and the type of case, and defendants are understandably confused at having had an appointed attorney the first time they went to court but then no longer having counsel until after their next court appearance.

Schuyler County. An in-custody defendant has a hearing within 48 hours of the arrest that is solely for the purpose of considering bail. Within a week, the in-custody defendant must again appear in court for what the county refers to as “first appearance,” at which the court advises the defendant of the right to counsel and appoints counsel to an indigent defendant who so requests. During the course of this evaluation, the judge who presides over initial appearances in Schuyler County realized that a gap in representation had existed for in-custody defendants between the bail hearing and the first appearance and resolved to “clarify” to the public defender that, unless told otherwise, the public defender remains as counsel for the entire case of any defendant whom he represented during the bail hearing.

LaSalle County. An in-custody defendant has a hearing within 24 to 48 hours of the arrest, referred to in the county as the “bail hearing.” The bail hearings conducted Monday through Friday are a full initial appearance, but the bail hearings for in-custody defendants that are conducted on Sundays are solely for the purpose of considering bail. An in-custody defendant who has a Sunday bail hearing must again appear in court on the following Thursday for what

⁴¹⁷ 725 ILL. COMP. STAT. §§ 5/106D-1(a), 5/109-1(b),(d) (2018).

the county refers to as “appearance with counsel,” at which the court advises the defendant of the right to counsel and appoints counsel to an indigent defendant who so requests.

Champaign County. An in-custody defendant has a hearing within 48 hours of the arrest. The hearings conducted Monday through Friday for in-custody defendants are a full initial appearance, but the hearings conducted on weekends or holidays for in-custody defendants are referred to in the county as “bond hearing” and are solely for the purpose of considering bail. An in-custody defendant who has a weekend or holiday “bond hearing” must again appear in court on the next business day for what the county refers to as “arraignment court,” at which the court advises the defendant of the right to counsel and appoints counsel to an indigent defendant who so requests.

Cook County. An in-custody defendant has a hearing in “bond court”⁴¹⁸ typically within 24 hours of the arrest that is solely for the purpose of considering bail. Within one to 30 days later, the in-custody defendant must appear in court again for a proceeding that the county refers to by varying names depending on the type of case and location of the arrest,⁴¹⁹ at which the court advises the defendant of the right to counsel and appoints counsel to an indigent defendant who so requests.

2. The right to counsel

At the initial appearance, the court must “[a]dvice the defendant of his right to counsel and if indigent shall appoint a public defender or licensed attorney at law of this State to represent him in accordance with the provisions of Section 113-3 of this Code,”⁴²⁰ which requires that counsel must be appointed, upon the request of an indigent person, “[i]n all cases, except where the penalty is a fine only.”⁴²¹

⁴¹⁸ More specifically, depending on the day and location of the arrest, the proceeding is referred to in the county as:

- weekends & holidays arrests for all case types everywhere in the county – “holiday bond court;”
- weekdays arrests for:
 - suburban felonies and misdemeanors – suburban “bond court;”
 - Chicago domestic violence – domestic violence “bond court;”
 - Chicago non-domestic violence, both felony and misdemeanor – “central bond court.”

⁴¹⁹ More specifically:

- Suburban misdemeanor – for example in the fifth municipal district (Bridgeview), in one to three weeks and referred to as the “key date.”
- Chicago domestic violence misdemeanor – in two weeks and referred to as either “status on discovery” or “state to notify.”
- Chicago misdemeanor (non-DV) – in one to two business days and referred to as “first time up.”
- Suburban felony – for example in the fifth municipal district (Bridgeview), in two weeks and referred to as “next court date – preliminary hearing.”
- Chicago domestic violence felony – within 30 days and referred to as “prelim first time up.”
- Chicago felony (non-DV) – in seven days and referred to as “first time up.”

⁴²⁰ 725 ILL. COMP. STAT. § 5/109-1(b)(2) (2018).

⁴²¹ 725 ILL. COMP. STAT. § 5/113-3(b) (2018).

In all of the sample counties except Champaign County, indigent defendants cannot request appointed counsel until they appear in court before a judge – there is no method by which an indigent defendant can request appointed counsel, following arrest or notice to appear, prior to going to court. As one public defender office staff member explains: many defendants who have been arrested or have a court date want advice from a public defense attorney early on, but no one can help them until an attorney is formally appointed to their case.

Champaign County. Jail staff provide to all in-custody defendants who have not yet had an initial appearance the financial affidavit that is used to request appointed counsel, and the in-custody defendants are *required* to complete the affidavit. Once the affidavit is complete, the jail staff fax it to the court for the court’s consideration during the in-custody defendant’s initial appearance by video. If an in-custody defendant appears at the initial appearance without having completed the affidavit, the court schedules the defendant for a subsequent special proceeding, referred to in the county as “appearance with counsel,” at which the defendant is brought physically into the courtroom and must either: already have an attorney; tell the court their plans for hiring an attorney; waive their right to counsel; or apply for a public attorney by completing the financial affidavit.

a. Notice of the right to counsel

In all of the courts in the sample counties, at some point during the initial appearance the judge advises every defendant who is charged with a jailable offense, either as a group or individually, that they have the right to counsel and to appointed counsel if they are indigent. However, in some of the courts in the sample counties, the judge is not the first person who discusses the right to counsel with the defendant.

In some courts, it is the prosecutor who first speaks to defendants about the right to counsel, for example:

- *Mercer County.* Before court begins at the initial appearance for an out-of-custody defendant, referred to in the county as “first appearance,” the attorney assigned from the state’s attorney’s office approaches each out-of-custody defendant and asks them whether they want to have an appointed attorney. Later, during the proceedings, the judge formally advises the defendants of the right to counsel.
- *LaSalle County.* Before court begins at the initial appearance for an in-custody defendant, referred to either as the “bail hearing” or “appearance with counsel,” the attorney assigned from the state’s attorney’s office introduces himself to each defendant, informs the defendant of the charge against them, and asks the defendant whether they want an appointed attorney. Later, during the proceedings, the judge formally advises the defendants of the right to counsel.

In some courts, it is the bailiffs who first speak to defendants about the right to counsel, for example:

- *Champaign County.* Before court begins at the initial appearance for an out-of-custody defendant, referred to in the county as the “must appear date” in traffic cases and

otherwise as “arraignment court,” the bailiff asks each defendant who is charged with a jailable offense to complete the financial affidavit if they want an appointed attorney and provides that affidavit to them. Later, during the proceedings, the judge formally advises the defendants of the right to counsel.

A defendant who is accused of an offense for which incarceration is a possible punishment has three choices about the right to counsel. The defendant can: notify the judge that they have or intend to obtain their own private attorney; request that the judge appoint counsel to represent them; or waive their right to counsel altogether and choose to self-represent.

b. Waiving the right to counsel

A defendant has a Sixth Amendment right to waive counsel and self-represent, but a judge must determine that the defendant’s choice to waive the right to counsel and represent themselves is made knowingly, voluntarily, and intelligently.⁴²² To effectuate this choice, Illinois court rules require that:

Any waiver of counsel shall be in open court. The court shall not permit a waiver of counsel by a person accused of an offense punishable by imprisonment without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:

- (1) the nature of the charge;
- (2) the minimum and maximum sentence prescribed by law, including, when applicable, the penalty to which the defendant may be subjected because of prior convictions or consecutive sentences; and
- (3) that he has a right to counsel and, if he is indigent, to have counsel appointed for him by the court.⁴²³

Prosecutors negotiating directly with unrepresented defendants. In some of the courts in the sample counties, judges either require or invite defendants to negotiate directly with the prosecutor at the initial appearance. By way of contrast, in DuPage County for example, the assistant state’s attorneys reportedly “never” approach and speak with unrepresented defendants at their initial appearance.

Prosecutors who speak directly with defendants, on their own volition or at the suggestion of the judge, risk violating their ethical duties. As the report of the National Right to Counsel Committee, *Justice Denied*, notes: “Not only are such practices of doubtful ethical propriety, but they also undermine defendants’ right to counsel.”⁴²⁴ The National Right to Counsel Committee report notes further:

⁴²² *Faretta v. California*, 422 U.S. 802 (1975).

⁴²³ ILL. S. Ct. R. 401(a).

⁴²⁴ NATIONAL RIGHT TO COUNSEL COMM., *JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL* 88 (2009).

Beyond the court's role in making certain that a defendant's waiver of counsel is valid, prosecutors have a professional responsibility duty "not [to] give legal advice to an unrepresented person, other than the advice to secure counsel." Similarly, the ABA has recommended that prosecutors should refrain from negotiating with an accused who is unrepresented without a prior valid waiver of counsel. Prosecutors also are reproached by the ABA to ensure that the accused has been advised of the right to counsel, afforded an opportunity to obtain counsel, and not to seek to secure waivers of important pretrial rights from an accused who is unrepresented.⁴²⁵

LaSalle County traffic initial appearance. At the initial appearance in LaSalle County on a traffic offense (some traffic offenses are jailable misdemeanors; some are not jailable), there does not seem to be any scenario in which a defendant who appears without counsel can avoid talking to the state's attorney that day.

The judge begins the proceedings by addressing all of the defendants who are present in the courtroom, saying: "The prosecutors will call your name. They will talk to you about your case. This is an opportunity for you to decide what you want to do." The judge explains that all defendants have constitutional rights, including the right to have a trial, the right to remain silent, and the right to present evidence and to cross-examine witnesses, among others.

The judge discusses the right to counsel: "You can hire an attorney. If you do not have adequate funds to hire your own attorney, on certain cases – these are called 'misdemeanors' – you can fill out a form to see whether you are financially eligible" to receive court appointed counsel at public expense.

Then the judge tells defendants that there are "three things" that can result from the day's hearing on their case:

1. The defendant talks to the prosecutor, accepts the plea offer, waives their constitutional rights and pleads guilty that day, and has a fine imposed as their sentence. "You do not have to come back a second time" the judge says.
2. The defendant talks to the prosecutor, rejects the plea offer, and requests a bench or jury trial. The judge tells defendants they will have to return to court another two, maybe three, times. The judge also warns that defendants who choose to self-represent at trial are held to the same procedural and evidentiary rules as practicing attorneys.
3. The defendant talks to the prosecutor and then obtains a continuance, either to hire counsel, apply for appointed counsel (in which case the prosecutor helps the defendant fill out the indigence form), "or you just want time to think about the [plea] offer the state made to you."

⁴²⁵ NATIONAL RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 88 (2009) (citing AMERICAN BAR ASS'N, MODEL RULES OF PROF. CONDUCT r. 4.3); AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION §§ 3-3.10(a), (c), 3-4.1(b) (3d ed. 1993). *See also* ILL. SUP. CT. R. 3.8(b), (c) (as amended through January 26, 2021).

Once the judge completes the general address to the courtroom, the state's attorney calls up each defendant, one-by-one, to speak with them.

Mercer County traffic initial appearance. Before the traffic court proceedings begin, the state's attorney talks individually to each defendant who is present in court that day without an attorney. There is not a public attorney in the courtroom. Some traffic offenses are jailable misdemeanors; some are not jailable.

Once the judge takes the bench, the judge orally advises everyone present in the courtroom as a group. The judge explains that a defendant can negotiate directly with the state's attorney. The judge says a defendant has a right to counsel, including to an appointed attorney if the defendant is indigent but "this is not a free lawyer, and you may be required to pay" for the costs of defense. The judge advises that if a defendant wants to have a trial, that will happen at a later date because the state is not ready to proceed to trial on this day. Finally, the judge reiterates that each defendant can negotiate with the state's attorney, explaining this is a benefit to defendants in Mercer County because in other counties the prosecutor is not always prepared to negotiate cases at a defendant's first court appearance. After this, each defendant's case is called individually.

Most people at the initial appearance on a traffic case in Mercer County plead guilty pursuant to a plea agreement they have negotiated with the prosecutor. For example, in one case observed during this evaluation, when the defendant's case was called, the judge told the defendant he could speak with the public defender if he wished, but that the judge understood that the defendant had already negotiated a plea agreement with the prosecutor. The defendant pled guilty, without counsel, and was sentenced.

Stephenson County misdemeanor initial appearance. The judge begins the proceedings by announcing to all of those present their "rights and potential penalties." The judge says: "If you are here on a misdemeanor charge, technically you could be facing jail time," and then explains the maximum fines and jail time to which they could potentially be sentenced. Next the judge advises: "If you are indigent, I could appoint counsel to represent you. This morning, I will give you the opportunity to speak with the state's attorney. We have found that if you speak with the state's attorney, and hear what the state is seeking, many of you will be able to resolve the case today. But you do not have to speak to the state's attorney – he is not your ally; he is the attorney prosecuting you. If you would like to hire an attorney, or have one appointed, you can do that. I will call your case and you will basically have three choices. Those choices are to hire an attorney, to apply for a public defender, or to speak with the state's attorney. Your answer makes no difference to me." The judge also explains that if, after talking with the assistant state's attorney, the defendant wishes to request court appointed counsel, the state's attorney will not withdraw the plea offer made that morning (that is, the plea offer made to a defendant is not a take-it-or-leave-it offer). The judge then asks each defendant, one by one: "What would you like to do today? Would you like to hire an attorney, would you like me to appoint the public defender, or do you want to talk to the prosecutor?"

In one case observed during this evaluation, a defendant was charged with one count of driving under the influence and one count of improper lane change while failing to avoid an accident. When the defendant was called to the bench on his case, the following exchange occurred:

- Judge: “What would you like to do today? Would you like to hire an attorney, would you like me to appoint the public defender, or do you want to talk to the prosecutor?”
- Defendant: “Wow. I just don’t know what to do.”
- Judge: “Well, you have three options. You can hire an attorney, you can ask me to appoint the public defender, or you can talk to the prosecutor.”
- Defendant: “I just don’t want to be incarcerated.” [pause] “I’d like you to appoint the public defender.”
- Judge: “Are you sure you don’t want to talk to the prosecutor before we get there?”
- Defendant: “Sure. Why not.”

c. Requesting appointed counsel & indigency determinations

If a defendant advises the court of their desire to have counsel appointed, state law requires that the defendant sign an affidavit “in the form established by the Supreme Court containing sufficient information to ascertain the assets and liabilities of that defendant.”⁴²⁶ Despite this requirement, some judges across the sample counties do not require all defendants to complete the affidavit. For example: the court in Stephenson County does not require any defendant to complete the affidavit; the court in Schuyler County usually presumes all in-custody defendants to be indigent without completing an affidavit; some DuPage County judges presume all in-custody defendants to be indigent without completing an affidavit; and some Cook County judges presume all in-custody defendants to be indigent without completing an affidavit.

With or without the benefit of the defendant completing a financial affidavit, the information that a judge uses to decide whether a defendant is indigent and the standard of indigency the judge employs is different from courtroom to courtroom. As a result, a defendant may be denied appointed counsel by one judge, while a similarly situated defendant may receive appointed counsel in the courtroom next door.

Hardin County. There is no formal indigency screening process, because “everyone knows everyone in the community and who is employed and who is not.”

Gallatin County. There is no formal indigency screening process, because “many defendants have been through the courts before” and everyone in the community knows everyone else.

⁴²⁶ 725 ILL. COMP. STAT. § 5/113-3(b) (2018). Although the statute says the Illinois Supreme Court is to promulgate the financial affidavit to be completed by a defendant in requesting counsel, the court does not appear to have done so.

Schuyler County. Though the court rarely requires a defendant to complete the financial affidavit, when a defendant is required to complete the affidavit it is sent first to the state's attorney for his review. After the state's attorney reviews the defendant's affidavit, he gives it to the judge, who asks questions of the defendant and decides whether the defendant is indigent. Reportedly the court errs on the side of appointing an attorney.

Mercer County. Every defendant who requests appointed counsel must complete the "Affidavit of Assets and Liabilities," but reportedly the judge does not consider that affidavit in deciding whether the defendant is indigent. Instead, the judge asks defendants where they work and how much they make. The judge does not have any formal standard for what constitutes indigence and instead errs on the side of appointing counsel.

Stephenson County. The court asks every defendant three questions: how old are you; are you employed; and how much money do you make. Based on the defendant's answers, and without any formal standard for what constitutes indigence, the judge decides whether to appoint an attorney.

LaSalle County. Every defendant who requests appointed counsel must complete the "Affidavit of Assets and Liabilities." In addition to considering the information in the affidavit, all of the judges also question defendants about their assets. There is no formal standard for what constitutes indigence, so each judge decides whether to appoint an attorney to each defendant according to the judge's own sense of indigency. Although it is rare, the judges occasionally appoint counsel to represent a defendant in a "serious case" even when believing the defendant has sufficient assets to hire an attorney and then order the defendant to repay for their representation at the end of the case.

Champaign County. Every defendant who requests appointed counsel must complete the "Affidavit in Support of Request for Appointed Attorney," and all in-custody defendants are provided the affidavit by jail staff and required to complete it before their initial appearance in "arraignment court." At the bottom of the affidavit is the statement: "All of my statements above are true. If an attorney is appointed to represent me, I understand that now or any time up to 90 days after final judgment is entered in this case, the court may order me to pay all or part of the costs for such an attorney." The judges determine indigency based primarily on the information in the affidavit but may also question a defendant about their answers to the affidavit. There is no formal standard for what constitutes indigency, so each judge decides whether to appoint an attorney to each defendant according to the judge's own sense of indigency.

DuPage County. Every out-of-custody defendant who requests appointed counsel must complete the "Affidavit of Indigency" and turn it in to the assistant public defender staffing the courtroom that day. The court has established a threshold of 125% of the federal poverty level as its starting point for determining indigency,⁴²⁷ and the assistant public defender reviews the affidavit against the court's criteria. If the affidavit indicates that the defendant's financial situation is above this

⁴²⁷ In the Matter of Appointing Legal Counsel for Defendants Who Claim Indigency, Admin. Order No. 20-5 (Ill. 18th Jud. Cir. Ct. Feb. 27, 2020), available at <https://www.dupageco.org/Courts/Docs/62510/>.

level, the assistant public defender writes “does not qualify” on the affidavit, before passing it on to the judge. Some judges choose to question a defendant orally, and a judge may appoint counsel even if the defendant’s affidavit shows greater than 125% of the federal poverty level.

Cook County. When a defendant requests appointed counsel, a written order of the court requires every judge to: have each defendant sign and submit a written affidavit containing information to ascertain the assets and liabilities of the defendant; and consider the information in the affidavit, any further information provided by the defendant, and any information from the state.⁴²⁸ In practice though, some judges presume all in-custody defendants are indigent, some judges only ask defendants a small number of questions orally, and some judges have defendants complete the affidavit and then consider the information it contains. There is no formal standard for what constitutes indigency, so each judge decides whether to appoint an attorney to each defendant according to the judge’s own sense of indigency. Some judges refuse to appoint an attorney to represent a defendant who has posted bond.

d. Appointing an individual attorney to represent each indigent defendant

At the initial appearance, once a defendant requests appointed counsel and the court determines that defendant to be indigent, the court “shall” appoint an attorney “[i]n all cases, except where the penalty is a fine only.”⁴²⁹

Indigent defendants paying for the right to appointed counsel. Under Illinois statutes, a court may order a defendant to pay “a reasonable sum” to reimburse the county/state for the representation provided by appointed counsel, and the court can order that reimbursement by holding a hearing at any time after appointment of counsel and up to 90 days after the final order disposing of the case at the trial level.⁴³⁰ In two of the nine sample counties, before the court appoints an attorney, the court advises indigent defendants that they may have to repay the county for the cost of that appointed attorney.

Mercer County. A court rule requires the judge to advise all defendants who want an appointed attorney that they may be required to reimburse the county for the cost of providing that attorney.⁴³¹ If a defendant indicates he is considering requesting appointed counsel, the judge advises the defendant that the appointed counsel “is not a free attorney” and that the defendant might be required to pay some of the costs of his representation.

Champaign County. Before the court appoints counsel, the court informs the defendant that the defendant may have to contribute to the costs of his defense. In addition, the financial affidavit all defendants must complete to request appointed counsel provides: “If an attorney is appointed to represent me, I understand that now or any time up to 90 days after final judgment is entered in this case, the court may order me to pay all or part of the costs for such an attorney.”

⁴²⁸ Gen. Admin. Order No. 2013-11, Appointment of Public Defender (Ill. Cook County Cir. Ct. Aug. 13, 2013).

⁴²⁹ 725 ILL. COMP. STAT. §§ 5/109-1(b)(2), 5/113-3(b) (2018).

⁴³⁰ 725 ILL. COMP. STAT. § 5/113-3.1 (2018). The amount a defendant may be ordered to repay cannot exceed \$500 in a misdemeanor case, \$5,000 in a felony case, and \$2,500 for an appeal. *Id.*

⁴³¹ ILL. 14TH JUD. CIR. R. PRAC. 18(b) (eff. Apr. 8, 2009).

Designating the attorney who will represent the indigent defendant. Throughout the sample counties, at the initial appearance the judges consistently appoint “the public defender office” or generically “the public defender” to represent indigent defendants, rather than appointing a specific attorney by name. In the four sample counties in which the public defender office is one attorney with no assistants – Hardin, Gallatin, Schuyler, and Mercer counties – it is clear to both the lawyer and the defendant who it is that will represent the defendant in their case (barring a conflict of interest). But in the remaining five sample counties, indigent defendants leave their initial appearance not knowing the identity of the attorney who will defend them.

Stephenson County. The court sends an order of appointment to the public defender office listing the county’s public defender by name as the attorney of record. The public defender office support staff open a file and eventually the office assigns a specific assistant public defender to each case. In the interim, if a defendant calls the office and asks to speak with their appointed attorney, the staff tell that defendant they can meet their attorney at their next court date. Once a specific assistant public defender is assigned to the case of an individual defendant, that attorney will continue to represent the defendant through disposition of the case at the trial level.

LaSalle County. The court provides each defendant with a slip of paper containing the contact information for the public defender office and instructs the defendant that it is the defendant’s responsibility to contact their attorney.

Champaign County. The court appoints “the public defender.” The assistant public defender who is staffing the court gives each defendant a piece of paper with the contact information for the public defender office and tells out-of-custody defendants to “wait three days to contact the office” but tells in-custody defendants to call the office if they bond out of jail. The public defender assigns each case to a specific attorney in the office, and that attorney once assigned will continue to represent the defendant through disposition of the case at the trial level.

DuPage County. The court sends an order of appointment to the public defender office listing the county’s public defender by name as the attorney of record. The office assigns each case to a specific attorney in the office, and once assigned that attorney files a written notice of appearance in the case as required by court rules.

Cook County. The court appoints the public defender office. Because criminal cases move from courtroom to courtroom at various stages of the case, and because assistant public defenders are assigned to particular divisions within the public defender office that have responsibility for different court locations and case types, the specific attorney who represents a defendant will rarely ever represent the defendant through all stages of the case.

C. Effective assistance of counsel

Once an individual attorney is appointed to represent an individual defendant, that attorney has a constitutional duty to provide effective assistance of counsel.⁴³² While the attorney must decide in each case “what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence,”⁴³³ it is the defendant’s decision about “whether to plead guilty, waive the right to a jury trial, testify in one’s own behalf, and forgo an appeal.”⁴³⁴ To aid the defendant in making these decisions and to effectively represent the defendant, the *Illinois Rules of Professional Conduct* require the attorney to:

- provide “the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation;”⁴³⁵
- “act with reasonable diligence and promptness;”⁴³⁶ and
- communicate with the client promptly and “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”⁴³⁷

The greatest difficulty experienced by indigent defendants in the nine sample counties, as expressed by criminal justice stakeholders throughout, is in communicating with their appointed attorneys.

Hardin County. The appointed attorneys do not accept collect calls from their clients who are detained in jail. They do visit their detained clients at the jail. The appointed attorneys most often meet with their clients (both those in-custody and out-of-custody) only at the courthouse immediately before, during, or after court proceedings, where they believe they have ample time to meet with clients. There are not any meeting rooms at the courthouse that are dedicated to attorney-client conferences, but appointed attorneys often meet in a conference room located just off of the judge’s chambers.

Gallatin County. In-custody defendants are housed in the Saline County jail, and appointed attorneys do not visit their clients there and do not accept collect calls from their clients who are detained in jail. The attorneys say they cannot afford to pay for the collect calls, but they also say that “all phone calls from the jail are monitored and recorded.” The appointed attorneys most often meet with their clients (both those in-custody and out-of-custody) only at the courthouse immediately before, during, or after court proceedings, where they believe they have ample time to meet with clients.

⁴³² *E.g.*, *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (“the right to counsel is the right to the effective assistance of counsel”).

⁴³³ *Gonzalez v. United States*, 553 U.S. 242, 248 (2008).

⁴³⁴ *McCoy v. Louisiana*, 584 U.S. ___, 138 S. Ct. 1500, 6 (2018); *Jones v. Barnes*, 463 U.S. 745, 751 (1983). *See* ILL. R. PROF’L CONDUCT (2010) R. 1.2 (eff. Jan. 1, 2016).

⁴³⁵ ILL. R. PROF’L CONDUCT (2010) R. 1.1 (eff. Jan. 1, 2010).

⁴³⁶ ILL. R. PROF’L CONDUCT (2010) R. 1.3 (eff. Jan. 1, 2010).

⁴³⁷ ILL. R. PROF’L CONDUCT (2010) R. 1.4(b) (eff. Jan. 1, 2010).

Schuyler County. The county's public defender is part-time and otherwise is a private attorney. His office is located 60 miles away in an adjacent county, and there is no reliable public transportation between Schuyler County and the public defender's private office. The public defender is present at the courthouse every Wednesday, and he arrives one hour before court to be available to meet with clients in an office next to the courtroom.

The public defender does not accept collect calls from the jail, because the county will not reimburse him for the cost. The sheriff allows in-custody defendants to use a free phone to call their attorney, but it is happenstance as to whether the attorney is available to speak to them when they call. The public defender reports that he only visits the jail once a month, but that he has the jail bring in-custody defendants to see him at the courthouse when he is there on Wednesdays. Numerous criminal justice stakeholders report that defendants, and in particular in-custody defendants, are unable to talk to the public defender until right before court and do not have enough time to consult with him about their case.

By contrast, the private attorneys appointed in conflict cases do accept collect phone calls from the jail and do visit their in-custody clients at the jail.

Mercer County. The county's public defender is part-time and otherwise is a private attorney. His office is located over 30 miles away in another county, making it difficult for indigent defendants to get there.

As a general principle, the county's public defender routinely only meets with appointed clients (both those in-custody and out-of-custody) at the courthouse immediately before, during, or after court proceedings. The public defender does meet with in-custody defendants at the jail, and he attempts to see them within a week of being appointed to represent them but "many of them bail out" before he gets there. Numerous criminal justice stakeholders report that defendants, and in particular in-custody defendants, are unable to talk to the public defender until right before court and do not have enough time to consult with him about their case, "mak[ing] it difficult to get justice." Cases in which the state's attorney has made plea offers often cannot be resolved timely because the public defender has not discussed the plea offer with the defendant before court.

Stephenson County. In-custody defendants are allowed to call their attorneys on unmonitored phone lines, free of charge, at any time between 8:00 a.m. and 10:00 p.m. every day. Appointed attorneys are able to visit their in-custody clients at the jail without encountering long delays, and they can meet with clients in one of two unmonitored confidential full-contact meeting rooms. However, public defender office attorneys explain that they do not want to meet with appointed clients (both in-custody or out-of-custody) until they have received discovery from the state's attorney. Even if a client calls the public defender office to speak with their attorney, "it is unlikely the attorney will have reviewed the file to be able to advise the client." Instead, appointed attorneys most often meet with appointed clients (both those in-custody and out-of-custody) at the courthouse immediately before, during, or after court proceedings.

LaSalle County. For in-custody defendants, the public defender office investigator attempts to visit them at the jail to interview them within a week of arrest, but this aspiration is not always achieved. Once the investigator does interview an in-custody defendant, the public defender office sends a letter to the defendant explaining that they will not schedule another meeting until they receive discovery from the state's attorney. For out-of-custody defendants, the public defender office attorneys place responsibility on the defendant to contact the attorney.

Numerous criminal justice stakeholders report that defendants are unable to talk to their appointed attorney until right before court and do not have enough time to consult with their attorney about their case. As one interviewee explained, "too many defendants feel like they're not getting attention," while another has observed a growing number of indigent defendants requesting to waive their right to counsel after waiting a few weeks in jail without being able to talk to their appointed attorney.

To meet with in-custody clients, the jail has four non-contact visitation rooms with a pass-through slot to allow for signing of documents, but there is only one room where attorneys can meet with clients to review discovery with them and the attorney must schedule in advance to use this room. As one public defender office attorney explained, the attorneys "don't have time to sit and review [discovery] with [clients]."

The appointed attorneys most often meet with their clients (both those in-custody and out-of-custody) only at the courthouse immediately before, during, or after court proceedings, where it is often difficult to find a confidential area in which to talk. The public defender office in the courthouse does not have any confidential meeting area. There are only two conference rooms that are accessible from the hallways of the courthouse, and there is a jury room attached to each of the three courtrooms that hear criminal cases, but these spaces are not always available or private.

Champaign County. The public defender office attorneys do not want to meet or talk with their appointed clients until after they have received discovery and/or a plea offer from the state's attorney and had an opportunity to review it, which may be several weeks after being appointed to represent the defendant.

For in-custody defendants, the appointed attorney can call into the jail and the jail connects the attorney with the client on a secure phone line, but there is only one secure phone line in each housing pod of the jail facilities, so attorneys and their clients often have to wait in line. Attorneys can visit their in-custody clients in confidential contact visit rooms, and the jail will make other private rooms available if the regular rooms are in use.

The appointed attorneys most often meet with their clients (both those in-custody and out-of-custody) only at the courthouse immediately before, during, or after court proceedings, where it is often difficult to find a confidential area in which to talk. There are two confidential meeting rooms for attorney-client conversations outside of every courtroom, but these meeting rooms are frequently locked.

DuPage County. When the public defender office is appointed to represent an out-of-custody defendant, the attorney staffing court that day tells the defendant to go to the public defender office to do an intake interview with the office's investigator. There can be as many as 20 to 25 newly appointed out-of-custody defendants for the investigators to interview every day. The public defender office attorneys conduct the intake interviews of in-custody defendants whom they are appointed to represent, but these are the brief interviews that occur immediately before the initial appearance. After the intake interview, the appointed attorneys most often meet with their clients (both those in-custody and out-of-custody) at the courthouse immediately before, during, or after court proceedings.

Chapter VI

Sufficient time & caseloads

The U.S. Supreme Court in *Powell v. Alabama* notes that the lack of “sufficient time” to consult with counsel and to prepare an adequate defense was one of the primary reasons for finding that the Scottsboro Boys were constructively denied counsel.⁴³⁸ As one state supreme court observed over a quarter century ago, “as the practice of criminal law has become more specialized and technical, and as the standards for what constitutes reasonably effective assistance of counsel have changed, the time an appointed attorney must devote to an indigent’s defense has increased considerably.”⁴³⁹

Impeding counsel’s time “is not to proceed promptly in the calm spirit of regulated justice, but to go forward with the haste of the mob,” the *Powell* Court explained.⁴⁴⁰ The lack of sufficient time may be caused by any number of things, including but not limited to payment arrangements that create financial incentives for lawyers to dispose of cases quickly rather than in the best interests of their clients, or excessive workload. Whatever the cause, insufficient time to prepare and present an effective defense for each indigent defendant is a marker of the constructive denial of counsel.

A. Understanding caseloads & workloads of indigent defense system attorneys

No matter how complex or basic a case may seem at the outset, no matter how little or how much time an attorney wants to spend on a case, and no matter how financial matters weigh on an attorney, there are certain fundamental tasks each attorney must do on behalf of every client in every criminal case. Even in the simplest case, the attorney must, among other things:

- meet with and interview the client;
- attempt to secure pretrial release if the client remains in state custody (but, before doing so, learn from the client what conditions of release are most favorable to the client);
- keep the client informed throughout the duration of proceedings;
- request and review discovery from the prosecution;
- independently investigate the facts of the case, which may include learning about the defendant’s background and life, interviewing both lay and expert witnesses, viewing the crime scene, examining items of physical evidence, and locating and reviewing documentary evidence;
- assess each element of the charged crime to determine whether the prosecution can prove

⁴³⁸ *Powell v. Alabama*, 287 U.S. 45, 59 (1932).

⁴³⁹ *Louisiana v. Wigley*, 624 So.2d 425, 428 (La. 1993).

⁴⁴⁰ *Powell v. Alabama*, 287 U.S. 45, 59 (1932).

facts sufficient to establish guilt and whether there are justification or excuse defenses that should be asserted;

- prepare appropriate pretrial motions and read and respond to the prosecution’s motions;
- prepare for and appear at necessary pretrial hearings, wherein he must preserve his client’s rights;
- develop and continually reassess the theory of the case;
- assess all possible sentencing outcomes that could occur if the client is convicted of the charged crime or a lesser offense;
- negotiate plea options with the prosecution, including sentencing outcomes; and
- all the while prepare for the case to go to trial (because the decision about whether to plead or go to trial belongs to the client, not to the attorney).⁴⁴¹

The time an appointed attorney can devote to accomplishing each of these tasks in each defendant’s case depends on the total amount of time the attorney has available for all professional endeavors and the total amount of work the attorney must accomplish in that available time. This discussion is often framed in terms of “caseloads” or “workloads.”

1. Caseloads of indigent defense system attorneys

Caseload refers to the raw, quantifiable number of cases an attorney handles during a particular period of time. A lawyer’s total annual caseload is the count of all indigent representation system cases in which the lawyer provided representation during a given year, starting with the number of cases the attorney had open at the beginning of the year and adding to that the number of cases appointed to the attorney during the year.

Illinois statutes provide that, in all counties, the public defender is required to “keep a record of the services rendered” and file a written report of those services.⁴⁴² In Cook County, the public defender is to file the report quarterly with the president of the board.⁴⁴³ In all counties other than Cook, the public defender is to file the report with the county board and the circuit court clerk, either monthly or quarterly as determined by the county board.⁴⁴⁴

While state law requires counties to maintain indigent defense system records, Illinois does not require that all counties maintain records in a uniform manner nor that counties provide the information to the state. The state courts system likewise does not perform this function.⁴⁴⁵ The Supreme Court of Illinois directs the clerks of each circuit court to maintain uniform records of cases filed in each county, from which the Administrative Office of Illinois Courts (AOIC) records annual criminal and quasi-criminal caseload data by circuit court and by county.⁴⁴⁶

⁴⁴¹ See, e.g., NATIONAL LEGAL AID & DEFENDER ASS’N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (1995).

⁴⁴² 55 ILL. COMP. STAT. §§ 5/3-4010, 4010.1 (2018).

⁴⁴³ 55 ILL. COMP. STAT. § 5/3-4010.1 (2018).

⁴⁴⁴ 55 ILL. COMP. STAT. § 5/3-4010 (2018).

⁴⁴⁵ The Administrative Office of Illinois Courts does not collect any information about whether each defendant (or each case) is pro se, represented by appointed counsel, or represented by retained counsel.

⁴⁴⁶ See Supreme Court of Illinois, General Administrative Order on Recordkeeping in the Circuit Courts (May

However, it is not possible from the courts' data to determine each county's total indigent defense system caseload, nor the number of cases handled by each appointed attorney.⁴⁴⁷

As a result, the State of Illinois does not know, nor have any way of knowing, the caseloads of the indigent defense system in each county or of the individual attorneys within those systems. Illinois has no means of knowing on an ongoing basis whether the systems established by each county to provide indigent defense services have sufficient attorneys with sufficient time to provide effective assistance of counsel.

2. Workloads of indigent defense system attorneys

In addition to considering the raw number of cases of each type that an attorney handles, the U.S. Department of Justice has advised, and national standards agree, that “caseload limits are no replacement for a careful analysis of a public defender’s *workload* . . .”⁴⁴⁸ Workload includes the cases an attorney is appointed to handle within a given system (i.e., caseload), but it also includes the cases an attorney takes on privately, public representation cases to which the attorney is appointed by other jurisdictions, and other professional obligations such as obtaining and providing training and supervision.⁴⁴⁹ Further, national standards agree that the lawyer’s workload must take into consideration “all of the factors affecting a public defender’s ability to adequately represent clients, such as the complexity of cases on a defender’s docket, the defender’s skill and experience, the support services available to the defender, and the defender’s other duties.”⁴⁵⁰

20, 1968, as amended); ADMINISTRATIVE OFFICE OF ILLINOIS COURTS, MANUAL ON RECORDKEEPING (3d ed., eff. Apr. 1, 2017).

⁴⁴⁷ The Administrative Office of Illinois Courts tracks by calendar year the number of criminal (felony, misdemeanor, and DUI) and quasi-criminal (traffic, conservation, ordinance, and civil law) cases newly filed, reinstated, disposed of, and pending at year-end in each county and circuit court. There are several reasons this data does not provide the count of the indigent defense system’s caseload in each county.

It is impossible to know which of the quasi-criminal cases in the AOIC data carry a right to counsel for an indigent defendant. For example, traffic cases include both “major traffic offenses” punishable by less than one year imprisonment and “minor traffic offenses” punishable by fine only. Supreme Court of Illinois, Rule 501(f) (eff. July 1, 2020). The AOIC traffic case data does not distinguish between the two.

In types of cases which definitionally carry a right to counsel for an indigent defendant, the AOIC data does not distinguish between cases in which the defendant was represented by private retained counsel, cases in which the defendant was represented by an appointed attorney, and cases in which the defendant self-represented (i.e., appeared pro se).

⁴⁴⁸ Statement of Interest of the United States at 9, *Wilbur v. City of Mount Vernon*, No. C11-1100RSL, ECF No. 322 (W.D. Wash. filed Dec. 4, 2013), <http://www.justice.gov/crt/about/spl/documents/wilbursoi8-14-13.pdf>; AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 5 cmt. (2002).

⁴⁴⁹ AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 5 cmt. (2002).

⁴⁵⁰ Statement of Interest of the United States at 9, *Wilbur v. City of Mount Vernon*, (W.D. Wash. filed Dec. 4, 2013) (No. C11-1100RSL), ECF No. 322, <http://www.justice.gov/crt/about/spl/documents/wilbursoi8-14-13.pdf>. *See, e.g.*, Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L. J. 1031, 1125 (2006) (“Although national caseload standards are available, states should consider their own circumstances in defining a reasonable defender workload. Factors such as availability of investigators, level of support staff, complexity of cases, and level of attorney experience all might affect a workable definition. Data collection and a consistent method of weighing cases are essential to determining current caseloads and setting reasonable workload standards.”); NATIONAL STUDY COMM’N ON DEFENSE SERVS., GUIDELINES FOR LEGAL DEFENSE

Because the State of Illinois does not have any government office or person tasked with collecting and analyzing indigent defense system data, the state has no means of knowing the actual workloads of indigent defense system attorneys in each of Illinois' 102 counties.

B. Measuring whether attorneys have sufficient time to provide effective representation to each indigent person

To ensure that indigent defense system lawyers have adequate time to fulfill the duties they owe to each appointed client, national standards summarized in the *ABA Ten Principles of a Public Defense Delivery System* provide that an indigent defense system must control attorneys' workload.⁴⁵¹

1. The National Advisory Commission (NAC) caseload standards

The first national standards for caseloads of attorneys appointed to represent indigent defendants were established by the National Advisory Commission on Criminal Justice Standards and Goals (NAC) in 1973, as part of an initiative funded by the U.S. Department of Justice.⁴⁵² NAC *Standard 13.12* prescribes that a single attorney should not handle in a year any more than the absolute maximum numerical caseload of:

- 150 felonies; or
- 400 misdemeanors; or
- 200 juvenile delinquencies; or
- 200 mental health proceedings; or
- 25 appeals.⁴⁵³

It is these NAC caseload maximums to which national standards refer when they say that “in no event” should national caseload standards be exceeded.⁴⁵⁴

SYSTEMS IN THE UNITED STATES § 5.1 (1976).

⁴⁵¹ AMERICAN BAR ASS'N, *ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM*, Principle 5 & cmt. (2002); NATIONAL STUDY COMM'N ON DEFENSE SERVS., *GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES* § 5.3 (1976).

⁴⁵² Building on the work and findings of the 1967 President's Commission on Law Enforcement and Administration of Justice, the Administrator of the U.S. Department of Justice Law Enforcement Assistance Administration appointed the National Advisory Commission on Criminal Justice Standards and Goals in 1971, with DOJ/LEAA grant funding to develop standards for crime reduction and prevention at the state and local levels. The NAC crafted standards for all criminal justice functions, including law enforcement, corrections, the courts, and the prosecution. Chapter 13 of the NAC's report sets the standards for the defense function. NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, *REPORT OF THE TASK FORCE ON THE COURTS*, ch.13 (The Defense) (1973).

⁴⁵³ NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, *REPORT OF THE TASK FORCE ON THE COURTS*, ch.13 (The Defense), std. 13.12 (1973). This means a lawyer handling felony cases should not be responsible for more than a total of 150 felony cases in a given year, counting both cases the lawyer had when the year began and cases assigned to the lawyer during that year, and including all of the lawyer's cases (public, private, and pro bono). The NAC standards can be prorated for mixed caseloads. For example, an attorney could have a mixed caseload over the course of a given year of 75 felonies (50% of a maximum caseload) and 200 misdemeanors (50% of a maximum caseload) and be in compliance with the NAC caseload standards.

⁴⁵⁴ AMERICAN BAR ASS'N, *ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM*, Principle 5 cmt. (2002)

The NAC caseload limits presume that each lawyer devotes 100% of their time to providing representation in their appointed cases.⁴⁵⁵ When indigent representation system attorneys have managerial or supervisory responsibilities, this reduces the amount of their time that is available for representing clients, and so national standards require that for every ten attorneys who carry a full caseload there must additionally be one full-time supervisor.⁴⁵⁶ When indigent representation system attorneys have to perform tasks that do not require legal credentials or experience, this reduces the amount of their time that is available for representing clients, and so national standards require that for every four attorneys who carry a full caseload there must additionally be at least one legal secretary/assistant.⁴⁵⁷ When indigent representation system attorneys have to fulfill responsibilities in their appointed cases that require specialized skills the attorneys lack, this increases the amount of time the attorney must devote to each appointed case, and so national standards require that for every three attorneys who carry a full caseload there must be at least one investigator⁴⁵⁸ and one social service caseworker.⁴⁵⁹

The NAC caseload limits were established and remain as absolute maximums.

2. Illinois state or county standards

Since the adoption of the NAC caseload limits, increased complexity in forensic sciences and criminal justice technology have made correspondingly increased demands on the time attorneys must devote to each case in order to provide effective assistance of counsel. For these reasons,

(“National caseload standards should in no event be exceeded.”). *See* NATIONAL STUDY COMM’N ON DEFENSE SERVS., GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 5.1 (1976).

⁴⁵⁵ *See* NATIONAL ADVISORY COMM’N ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, ch.13 (The Defense), stds. 13.9, 13.14 (1973). *See also* NATIONAL LEGAL AID & DEFENDER ASS’N, MODEL CONTRACT FOR PUBLIC DEFENSE SERVICES ¶¶ VII.D., VII.F. (2000); AMERICAN BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE – PROVIDING DEFENSE SERVICES, std. 5-1.4 cmt. (3d ed. 1992); NATIONAL LEGAL AID & DEFENDER ASS’N, GUIDELINES FOR NEGOTIATING AND AWARDED GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES § III-6 (1984); NATIONAL STUDY COMM’N ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 4.1 (1976).

⁴⁵⁶ NATIONAL STUDY COMM’N ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 4.1 (1976).

⁴⁵⁷ NATIONAL LEGAL AID & DEFENDER ASS’N, MODEL CONTRACT FOR PUBLIC DEFENSE SERVICES ¶¶ VII.D., VII.F. (2000). *See also* NATIONAL LEGAL AID & DEFENDER ASS’N, GUIDELINES FOR NEGOTIATING AND AWARDED GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES § III-8 (1984); NATIONAL STUDY COMM’N ON DEFENSE SERVS., GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 4.1 (1976).

⁴⁵⁸ NATIONAL LEGAL AID & DEFENDER ASS’N, MODEL CONTRACT FOR PUBLIC DEFENSE SERVICES ¶¶ VII.D., VII.F. (2000); NATIONAL STUDY COMM’N ON DEFENSE SERVS., GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 4.1 (1976). *See also* AMERICAN BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE – PROVIDING DEFENSE SERVICES, std. 5-1.4 cmt. (3d ed. 1992); NATIONAL LEGAL AID & DEFENDER ASS’N, GUIDELINES FOR NEGOTIATING AND AWARDED GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES § III-8 (1984).

⁴⁵⁹ NATIONAL LEGAL AID & DEFENDER ASS’N, MODEL CONTRACT FOR PUBLIC DEFENSE SERVICES ¶¶ VII.D., VII.F. (2000). *See also* AMERICAN BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE – PROVIDING DEFENSE SERVICES, std. 5-1.4 cmt. (3d ed. 1992); NATIONAL LEGAL AID & DEFENDER ASS’N, GUIDELINES FOR NEGOTIATING AND AWARDED GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES § III-8 (1984); NATIONAL STUDY COMM’N ON DEFENSE SERVS., GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 4.1 (1976).

many criminal justice professionals argue that the caseloads permitted by the NAC standards are far too high and that the maximum caseloads allowed should be much lower.⁴⁶⁰

Policymakers in many states have recognized the need to set their own state caseload standards. State caseload standards are able to consider unique demands made on appointed attorneys in the local jurisdiction, such as the travel distance between the court and the local jail, or the prosecution's charging practices. State caseload standards are also able to address types of cases for which a state provides a right to counsel, but that are not contemplated by the NAC standards.

Illinois statutes and state supreme court rules do not establish any requirements about the caseloads of indigent defense system attorneys. Each circuit court has the authority to adopt rules governing criminal cases,⁴⁶¹ and the chief judge of each circuit has the authority to enter general administrative orders for the performance of judicial duties within the circuit.⁴⁶² However, none of the circuit courts within the nine sample counties have established county caseload standards.

C. Applying caseload standards to the caseloads & workloads of indigent defense attorneys in the sample counties

In the absence of state or county standards, the NAC caseload limits are applied to the indigent defense system caseloads in each of the nine representative counties, and national standards are applied to the workloads in each county.

At the time of this report, FY 2018 is the last fiscal year for which caseload data is available (to the extent it exists) for all nine sample counties. For that reason, FY 2018 data is used throughout this section to provide a basis for comparison across counties. FY 2018 ends:

November 30, 2019 – for the counties of Cook, DuPage, Gallatin, Hardin, LaSalle, Mercer, and Schuyler

December 31, 2019 – for the counties of Champaign and Stephenson

Where significant changes that affect a county's indigent defense system caseloads and workloads have occurred since FY 2018, information is also provided about those changes.

1. Counties that do not keep indigent defense system caseload records

Despite the state law requirement that the public defender in every county “keep a record of the services rendered” and file a written report of those services,⁴⁶³ in four of the nine representative counties – Hardin, Gallatin, Mercer, and Schuyler – no one keeps track of the indigent defense

⁴⁶⁰ See, e.g., AMERICAN COUNCIL OF CHIEF DEFENDERS, STATEMENT ON CASELOADS AND WORKLOADS (Aug. 24, 2007) (“In many jurisdictions, caseload limits should be lower than the NAC standards.”).

⁴⁶¹ ILL. S. CT. R. 21(a).

⁴⁶² ILL. S. CT. R. 21(b)-(c).

⁴⁶³ 55 ILL. COMP. STAT. §§ 5/3-4010, 4010.1 (2018).

system attorneys' caseloads. There is no local requirement that the public defender file a written report of services rendered, and so no reports are filed.

To whatever extent any of the indigent defense system attorneys in any of these sample counties can estimate the number of new cases to which they are appointed each year, they cannot estimate the number of cases that they already had open at the beginning of each year, so even their estimates undercount their caseloads.

In all four of these counties, the public defender is part-time (with no assistant public defenders) and no one keeps track of the number of days or hours that the public defender devotes to the county's indigent defense system cases, nor the amount of time that the public defender devotes to other professional endeavors.

In all four of these counties, some number of private attorneys are appointed to handle some number of indigent defense system cases. No one keeps track of the number of cases cumulatively or individually handled by these appointed private attorneys, nor the number of hours they devote to handling them.

In these four sample counties, and in any other of Illinois' 102 counties that do not keep track of indigent defense system caseloads and workloads, there is no means by which the state, county, or circuit court can measure whether there is a sufficient number of attorneys to provide effective assistance of counsel.

Hardin County. The individual indigent defense system attorneys do not maintain or report their own caseload or workload records. The county government and the circuit court⁴⁶⁴ do not keep track of nor monitor the caseloads or workloads of the county's indigent defense system attorneys.

Anecdotally, each year approximately 75-80% of the part-time Hardin County public defender's time is devoted to indigent representation system cases cumulatively arising out of both Hardin County and Gallatin County (where the Hardin County public defender is required to provide conflict representation).

Gallatin County. The individual indigent defense system attorneys do not maintain or report their own caseload or workload records. The county government and the circuit court do not keep track of nor monitor the caseloads or workloads of the county's indigent defense system attorneys.

⁴⁶⁴ The circuit court maintains records of individual payments made to private attorneys when they are appointed in cases where neither the Hardin County public defender nor the Gallatin County public defender (who handles conflicts in Hardin County in the first instance) were available. The payment records show the attorney's name, total amount paid, and the payment date, but do not show the date the case was appointed or disposed, the type or severity of the case, or anything else showing the actual services rendered. Therefore, it is not possible to determine from the court's payment records the number of indigent defense cases by case-type handled by appointed private attorneys in Hardin County during any given year.

Anecdotally, the circuit court estimates that there are probably 50 felony cases and 80 misdemeanor cases appointed cumulatively to the indigent representation system attorneys each year. The part-time public defender estimates that approximately 50-60% of his time each year is devoted to indigent representation system cases cumulatively arising out of both Gallatin County and Hardin County (where the Gallatin County public defender is required to provide conflict representation).⁴⁶⁵

Schuyler County. The individual indigent defense system attorneys (other than one appointed private attorney⁴⁶⁶) do not maintain or report their own caseload or workload records. The county government and the circuit court do not keep track of nor monitor the caseloads or workloads of the county's indigent defense system attorneys.

The part-time public defender estimates that he is appointed to represent approximately 95% of all indigent defense system cases in Schuyler County, including per year:

- felony, approximately 40 cases;
- misdemeanor, 60 to 90 cases;
- juvenile delinquency, less than 5 cases; and
- child welfare, 5 to 7 cases.

The part-time Schuyler County public defender also serves as the part-time public defender in Brown County, where he estimates that he is appointed each year to:

- felony, approximately 10 cases; and
- misdemeanor, 20 to 30.

In total, the part-time public defender estimates his appointed adult criminal caseload from both Schuyler County and Brown County each year to be approximately 50 felonies plus 85 to 100 misdemeanors. Under the NAC standards applied to even the lower estimate, 0.55 FTE attorneys are required to handle this adult criminal caseload,⁴⁶⁷ and additional FTE attorneys are required

⁴⁶⁵ The public defender contract in effect during FY 2018 required the Gallatin County public defender to “attend Court” in Gallatin County a minimum of six days each month and “otherwise as required,” and it was understood by the parties that the public defender would also provide conflict representation in Hardin County when appointed to do so. Contract, between the County of Gallatin and [named attorney] ¶ 4 (Dec. 15, 2016). When that public defender resigned, the new public defender contract similarly required attendance at court in Gallatin County a minimum of six days each month, and an express provision was added requiring the public defender to “be available for Court Three Court days per month in Hardin County.” Gallatin County, Illinois, Public Defense Contract, between the County of Gallatin and [named attorney] ¶¶ 2, 7 (May 16, 2019). When that public defender resigned, the new public defender contract contained both the six-day court attendance provision for Gallatin County and the three-day court attendance provision for Hardin County. Gallatin County, Illinois, Public Defense Contract, between the County of Gallatin and [named attorney] ¶¶ 2, 7 (Oct. 17, 2019).

⁴⁶⁶ Private attorneys are appointed on a case-by-case basis to conflict cases in Schuyler County, and anecdotally most of these appointments go to two private attorneys. One of those private attorneys tracks his time on all of his cases (both appointed and privately retained) using a computer program, and in June 2019 this private attorney had a cumulative total of six appointed adult criminal cases (four felonies and two misdemeanors) out of the three counties in which he accepts appointed cases. The other private attorney estimates that he is appointed in Schuyler County to approximately 10 criminal cases and two or three child welfare cases each year.

⁴⁶⁷ The low-end estimate is calculated by dividing the number of felony appointments by the NAC felony standard ($50 / 150 = .3333$) and dividing the low-end number of misdemeanor appointments by the NAC misdemeanor standard ($85 / 400 = .2125$), then adding the two results together ($.3333 + .2125 = .5458$; meaning 0.55 FTE attorneys are required). The high-end estimate is calculated by the same method, but using the high-end number

to handle the other appointed case types, yet the part-time public defender says he devotes only approximately 25% of time to all of his appointed cases from these two counties.

Mercer County. The individual indigent defense system attorneys do not maintain or report their own caseload or workload records. The county government and the circuit court⁴⁶⁸ do not keep track of nor monitor the caseloads or workloads of the county's indigent defense system attorneys.

The county has not instructed its part-time public defender to file a report with the court or the county, and the public defender has not filed any reports with the county. The part-time public defender estimates that he handles approximately 100 felonies, 120 to 150 misdemeanors, and 20 juvenile delinquency & dependency appointed cases in Mercer County each year. Under the NAC standards applied to even the lower estimate, 0.97 FTE attorneys are required to handle the adult criminal caseload,⁴⁶⁹ and additional FTE attorneys are required to handle the other appointed case types, yet the part-time public defender says he devotes only approximately 65-70% of his time to all of his appointed cases in Mercer County.

Mercer County contracts with one private attorney – referred to in the county as the “conflict public defender” – to provide representation in an unlimited number of cases whenever appointed by the court in Mercer County in trial-level felonies and misdemeanors and for appeals of juvenile delinquencies.⁴⁷⁰ The contract requires the private attorney to “maintain records which will include the amount of time necessitated by representation in matters assigned to him pursuant to this agreement, which records may be examined by the court or by representatives of the County.”⁴⁷¹ Neither the circuit court nor the county have ever requested to examine the contract private attorney's records, and the attorney does not keep track of his hours or caseload in Mercer County appointed cases. Anecdotally, the contract private attorney says he is in court in Mercer County for some amount of time every Monday and Tuesday, and occasionally

of misdemeanor appointments: $(50 / 150 = .3333) + (100 / 400 = .25) = .5833$; meaning 0.58 FTE attorneys are required.

⁴⁶⁸ The circuit court in Mercer County does not, in the regular course of its business, keep track of the number and types of cases appointed to indigent defense system attorneys. During this evaluation, the circuit court made several attempts to identify the number and types of cases appointed to its indigent defense system attorneys, by producing print-outs identifying by case number all cases in which the name of the part-time public defender or the contract private attorney appeared as attorney of record. These efforts ultimately were ineffective, among other reasons because both of these attorneys also handle privately retained cases in Mercer County.

⁴⁶⁹ The low-end estimate is calculated by dividing the number of felony appointments by the NAC felony standard ($100 / 150 = .6666$) and dividing the low-end number of misdemeanor appointments by the NAC misdemeanor standard ($120 / 400 = .30$), then adding the two results together ($.6666 + .30 = .9666$; meaning 0.97 FTE attorneys are required). The high-end estimate is calculated by the same method, but using the high-end number of misdemeanor appointments: $(100 / 150 = .6666) + (150 / 400 = .375) = 1.0416$; meaning 1.04 FTE attorneys are required.

⁴⁷⁰ “Mercer County Conflict Attorney Agreement” between the County of Mercer and [named attorney] (June 9, 2016).

⁴⁷¹ “Mercer County Conflict Attorney Agreement” between the County of Mercer and [named attorney] (June 9, 2016) (providing that the conflict attorney “agrees to maintain records which will include the amount of time necessitated by representation in matters assigned to him pursuant to this agreement, which records may be examined by the court or by representatives of the County”).

other days, for his Mercer County appointed cases. He estimates that he is appointed in Mercer County to approximately five to 10 cases each month, which can include a mixture of felonies, misdemeanors, juvenile delinquencies, and dependency cases.

2. Counties that keep indigent defense system caseload records

In five of the nine sample counties – Stephenson, LaSalle, Champaign, DuPage, and Cook – the public defender submits a written report each month to the county regarding services provided by the public defender office. The information contained in these reports varies from county to county.

In all five counties, caseload information is reported for the public defender office as a whole (except in Cook County, where it is reported by divisions of the public defender office).⁴⁷² As a result, it is not possible to know the caseload of any individual public defender office attorney. This is particularly significant in Stephenson and LaSalle counties, where some of the public defender office attorneys are part-time and do not devote 100% of their time to their appointed cases.

Among these five counties, only Cook County tracks the number of cases that the public defender office already had open at the beginning of each month and year. In the other four counties, even the tracked and reported caseloads undercount the actual cumulative annual caseloads of the public defender office attorneys.

Among these five counties, only Champaign County appoints private attorneys in any significant number of adult criminal cases. To whatever extent private attorneys are appointed in any type of case in these five counties, no one keeps track of the number of cases cumulatively or individually handled by appointed private attorneys, nor the number of hours they devote to handling them.

⁴⁷² In Champaign County, prior to May 2018, the public defender's monthly reports showed the number of cases opened and the number of cases closed by each assistant public defender. Starting in May 2018, the public defender's monthly reports provide that information only for the office as a whole.

Stephenson County. Each month, the public defender submits a report to the county board showing, for the public defender office as a whole, the number of new cases opened, cases closed, and overtime hours worked by public defender office attorneys. At year-end, the public defender produces a summary report for the year that additionally includes the number of hours billed (by month and in total for the year) by any part-time assistant public defenders. The reports show the following numbers of new adult criminal cases opened for FY 2017 and FY 2018.⁴⁷³

New Adult Criminal Cases Opened	FY 2017	FY 2018
Felony	459	510
FTE attys required (NAC stnd: 150)	3.0	3.4
Misdemeanor	931	924
Traffic	722	901
FTE attys required (NAC stnd: 400)	4.1	4.6
Total adult criminal FTE attorneys required by NAC stnds	7.2	7.9

Under the NAC standards applied to the FY 2018 new adult criminal cases, 7.9 FTE attorneys are required to handle this adult criminal caseload, and national standards require that the public defender office must additionally have 0.8 supervising attorneys, for a total of 8.7 FTE attorneys. Yet the Stephenson County public defender office had only 4.4 FTE attorneys (one full-time public defender, three full-time assistant public defenders, and one part-time (0.4 FTE position) assistant public defender). (*See* discussion at page 37.) Additionally, the public defender office had some number of adult criminal cases that were already open at the beginning of the year, and the same Stephenson County public defender office attorneys are also responsible for handling all of the other types of cases for which Illinois provides a right to counsel, all requiring additional FTE attorneys.

For an adult criminal caseload that requires 7.9 FTE attorneys under the NAC standards, national standards require that the Stephenson County public defender office must also have at least:

- 2.0 FTE legal secretaries/assistants;
- 2.6 FTE investigators; and
- 2.6 FTE social service caseworkers.

Additional support staff are necessary for all of the other cases handled by the public defender office attorneys. The Stephenson County public defender office had two full-time support staff (one receptionist and one office manager).

⁴⁷³ Stephenson County, Illinois, Public Defender Year End Report (for years 2017 and 2018). Stephenson County's fiscal year ends on December 31, so its FY 2018 covers the period of January 1, 2018 through December 31, 2018.

LaSalle County. Each month, the public defender submits a report to the county board and the circuit clerk showing, for the public defender office as a whole, the number of opened cases and the number of closed cases, by type of case (felony; misdemeanor; traffic; juvenile; and MH/MR). The reports show the following numbers of new adult criminal cases opened for FY 2017 and FY 2018:⁴⁷⁴

New Adult Criminal Cases Opened	FY 2017	FY 2018
Felony	491	541
FTE attys required (NAC stnd: 150)	3.3	3.6
Misdemeanor	499	482
Traffic	188	206
FTE attys required (NAC stnd: 400)	1.7	1.7
Total adult criminal FTE attorneys required by NAC stnds	5.0	5.3

Under the NAC standards applied to the FY 2018 new adult criminal cases, 5.3 FTE attorneys are required to handle this adult criminal caseload, and national standards require that the public defender office must additionally have 0.5 supervising attorneys, for a total of 5.8 FTE attorneys. The LaSalle County public defender office had one full-time public defender⁴⁷⁵ and four part-time assistant public defenders. (*See* discussion at pages 37 to 38.) No one tracks the number of hours that the part-time assistant public defenders devote to their LaSalle County appointed cases. Anecdotally, the part-time assistant public defenders estimate devoting 40-60% of their time to appointed cases in LaSalle County, and each regularly staffs court dockets two days per week and otherwise appears in court as needed.

Additionally, the public defender office had some number of adult criminal cases that were already open at the beginning of the year, and the same LaSalle County public defender office attorneys are also responsible for handling all of the other types of cases for which Illinois provides a right to counsel. The LaSalle County public defender office attorneys are occasionally appointed to conflict cases in neighboring Bureau and Grundy counties – between three and five cases annually for the public defender, and approximately one case apiece per year for each of the four assistant public defenders. All of these additional cases required additional FTE attorneys.

For an adult criminal caseload that requires 5.3 FTE attorneys under the NAC standards, national standards require that the LaSalle County public defender office must also have at least:

- 1.3 FTE legal secretaries/assistants;
- 1.8 FTE investigators; and
- 1.8 FTE social service caseworkers.

Additional support staff are necessary for all of the other cases handled by the public defender office attorneys. The LaSalle County public defender office had three full-time support staff (one

⁴⁷⁴ LaSalle County's fiscal year ends on November 30, so its FY 2018 covers the period of December 1, 2017 through November 30, 2018.

⁴⁷⁵ FY 2017 was the first year in which the LaSalle County public defender was a full-time (rather than part-time) position.

office manager and two investigators), with the investigators sometimes required to work on investigations in Bureau County.

Champaign County. Each month, the public defender submits a report to the county board showing the number of new cases opened and cases closed, by case type; until May 2018, case numbers were individually reported for each public defender office attorney, but beginning May 2018, the case numbers are reported for the public defender office as a whole. The reports show the following numbers of new adult criminal cases opened for FY 2017 and FY 2018:⁴⁷⁶

New Adult Criminal Cases Opened	FY 2017	FY 2018
Felony	1888	1882
FTE attys required (NAC stnd: 150)	12.6	12.5
Misdemeanor	1022	1120
Traffic	2495	2827
FTE attys required (NAC stnd: 400)	8.8	9.9
Total adult criminal FTE attorneys required by NAC stnds	21.4	22.4

Under the NAC standards applied to the FY 2018 new adult criminal cases, 22.4 FTE attorneys are required to handle this adult criminal caseload, and national standards require that the public defender office must additionally have 2.4 supervising attorneys, for a total of 24.8 FTE attorneys. Yet the Champaign County public defender office had only 14 FTE attorneys (one full-time public defender and 13 full-time assistant public defenders). (*See* discussion at pages 38 to 39.) Additionally, the public defender office had some number of adult criminal cases that were already open at the beginning of the year, and the same Champaign County public defender office attorneys are also responsible for handling all of the other types of cases for which Illinois provides a right to counsel, all requiring additional FTE attorneys.

Although the monthly reports do not show the caseloads of the individual public defender office attorneys, information provided during this evaluation explains that the cases are not distributed equally among the office's attorneys. The Champaign County public defender assigns two attorneys to handle misdemeanors and another two attorneys to handle traffic cases, so in FY 2018, these four assistant public defenders handled a caseload that required 9.9 FTE attorneys under the NAC standards. Six attorneys are assigned to handle the cases in the circuit court's three felony courtrooms, so in FY 2018, these six assistant public defenders handled a caseload that required 12.5 FTE attorneys under the NAC standards.

For an adult criminal caseload that requires 22.4 FTE attorneys under the NAC standards, national standards require that the Champaign County public defender office must also have at least:

⁴⁷⁶ Champaign County's fiscal year ends on December 31, so its FY 2018 covers the period of January 1, 2018 through December 31, 2018. Since May 2018 each case type in the public defender monthly reports is further broken down into trials, probation violations, and post-convictions, but previously a single number was reported for each case type. To provide consistency, this table shows the combined number of trials, probation violations, and post-convictions for each type.

- 5.6 FTE legal secretaries/assistants;
- 7.5 FTE investigators; and
- 7.5 FTE social service caseworkers.

Additional support staff are necessary for all of the other cases handled by the public defender office attorneys. The Champaign County public defender office had four full-time support staff (two legal secretaries, one executive assistant, and one investigator).

Champaign County does not appoint private attorneys in single party cases of any case type, nor for the first and second codefendants in multi-defendant criminal and delinquency cases, but Champaign County contracts with two private attorneys to provide representation to the third co-defendant and the fourth co-defendant in an unlimited number of multi-defendant criminal and delinquency cases whenever appointed by the court in Champaign County. No one keeps track of the number of cases cumulatively or individually handled by these appointed private attorneys, nor the number of hours they devote to handling them.

DuPage County. Each month, the public defender submits a report to the county board through its judicial & public safety committee showing, for the public defender office as a whole, the number of new cases opened, by case type. The reports show the following numbers of new adult criminal cases opened for FY 2017 and FY 2018:⁴⁷⁷

New Adult Criminal Cases Opened	FY 2017	FY 2018
Felony - CF MR	1,703	2,251
FTE attys required (NAC stnd: 150)	11.4	15.0
Misdemeanor - CM DV OV CV	2,433	2,796
Traffic - TR DT	1,309	1,267
FTE attys required (NAC stnd: 400)	9.4	10.2
Total adult criminal FTE attorneys required by NAC stnds	20.7	25.2

Under the NAC standards applied to the FY 2018 new adult criminal cases, 25.2 FTE attorneys are required to handle this adult criminal caseload, and national standards require that the public defender office must additionally have 2.5 supervising attorneys, for a total of 27.7 FTE attorneys. The DuPage County public defender office had 30.0 FTE attorneys, although one or more positions were vacant at any given time (one full-time public defender and 29 full-time assistant public defenders). Additionally, the public defender office had some number of adult criminal cases that were already open at the beginning of the year, and the same DuPage County public defender office attorneys are also responsible for handling all of the other types of cases for which Illinois provides a right to counsel other than cases under the sexually violent persons act and the sexually dangerous persons act,⁴⁷⁸ all requiring additional FTE attorneys.

⁴⁷⁷ DuPage County's fiscal year ends on November 30, so its FY 2018 covers the period of December 1, 2017 through November 30, 2018. Beginning in January 2019, the public defender ceased reporting "traffic – TR DT" as a separate case type.

⁴⁷⁸ The county contracts with one private attorney to provide representation in all appointed cases under the sexually violent persons act and the sexually dangerous persons act and, if needed, to provide representation in conflict cases. DuPage County Judicial and Public Safety Committee Final Minutes (Oct. 3, 2017); DuPage County,

For an adult criminal caseload that requires 25.2 FTE attorneys under the NAC standards, national standards require that the DuPage County public defender office must also have at least:

- 6.3 FTE legal secretaries/assistants;
- 8.4 FTE investigators; and
- 8.4 FTE social service caseworkers.

Additional support staff are necessary for all of the other cases handled by the public defender office attorneys. The DuPage County public defender office had 14 full-time support staff (one administrative assistant, six legal secretaries, six investigators, and one mental health clinician).

Cook County. Each month, the public defender submits a report to the county of the expenditures and services that the county requires as part of its “Set Targets, Achieve Results (STAR) program” for performance management of county agencies.⁴⁷⁹ Among other things, the reports show, for each division in the public defender office, the number of cases pending at the end of the month, new cases appointed during the month, and cases disposed during the month, by case type (felony, misdemeanor, juvenile, and civil). The reports show the following number of adult criminal cases pending at the beginning of the year plus new adult criminal cases opened during FY 2017 and FY 2018:⁴⁸⁰

Existing Plus New Adult Criminal Cases Opened	FY 2017	FY 2018
Felony	32,012	31,935
FTE attys required (NAC stnd: 150)	213.4	212.9
Misdemeanor	100,372	90,213
FTE attys required (NAC stnd: 400)	250.9	225.5
Total adult criminal FTE attorneys required by NAC stnds	464.3	438.4

Under the NAC standards applied to the FY 2018 adult criminal cases, 438.4 FTE attorneys are required to handle this adult criminal caseload, and national standards require that the public defender office must additionally have 43.8 supervising attorneys, for a total of 482.2 FTE attorneys. The Cook County public defender office had 505.2 FTE attorneys, although one or more positions were vacant at any given time (one full-time public defender and 504.2 full-time

Illinois, FY 2018 Departmental Budgets, at 197. See DuPage County, Illinois, Comprehensive Annual Financial Report for Fiscal Year Ended November 30, 2018, at 121 (grouping “legal services” into the broader category of “professional services”).

Effective May 1, 2019, the circuit court contracts with one private attorney to provide representation “to abused, neglected, dependent or delinquent minors or family members in cases, where the DuPage County Public Defender may not represent a party, including appeals in these matters,” in exchange for a fixed annual fee of \$45,000. Agreement, between the Eighteenth Judicial Circuit Court of DuPage County and [named attorney] (Apr. 2019); DuPage County, Illinois, FY2019 Financial Plan, at 194.

⁴⁷⁹ See *Performance Management*, COOK COUNTY GOVERNMENT, <https://www.cookcountyil.gov/agency/performance-management>; *STAR Reports*, COOK COUNTY GOVERNMENT, <https://www.cookcountyil.gov/service/star-reports>.

⁴⁸⁰ Cook County’s fiscal year ends on November 30, so its FY 2018 covers the period of December 1, 2017 through November 30, 2018. The felony data shown in the table excludes felonies reported as handled by the Cook County public defender’s first municipal division during the pre-trial case stages to prevent double-counting felony cases between the first municipal division and the felony trial division.

assistant public defenders). (See discussion at pages 40 to 41.) Additionally, though, the Cook County public defender office attorneys are also responsible for handling all of the other types of cases for which Illinois provides a right to counsel, all requiring additional FTE attorneys. And, among the existing public defender office attorneys, some attorneys work in divisions or teams that do not provide any direct representation to clients at trial and instead are responsible for:

- representing all persons arrested and detained by law enforcement anywhere in Cook County, 24 hours per day / 7 days per week, to assist those individuals in asserting their rights;⁴⁸¹
- representing all arrestees in Cook County appearing at bond court without counsel (of whom some arrestees never will have criminal charges filed against them, and others will hire private counsel or self-represent);⁴⁸²
- representing clients in post-trial matters (e.g., appeals, post-conviction petitions, and motions to vacate guilty pleas), and providing legal research, training, and litigation assistance to trial counsel;⁴⁸³
- assisting appointed trial counsel representing clients with cases involving any forensic evidence, such as DNA analysis, fingerprints, firearms and trace evidence, and providing forensic training and case review to trial counsel;⁴⁸⁴ or
- enhancing the representation provided in the various trial divisions by providing training and support for trial presentations, and otherwise being responsible for all matters relating to technology (hardware, software and trial presentation) for all public defender office staff.⁴⁸⁵

These responsibilities are part of the other types of important work a public defender office performs – the workload (beyond the caseload) – that reduces the time assistant public defenders have available to devote to appointed cases, and so additional FTE attorneys are required.

For an adult criminal caseload that requires 438.4 FTE attorneys under the NAC standards, national standards require that the Cook County public defender office must also have at least:

- 109.6 FTE legal secretaries/assistants;
- 141.1 FTE investigators; and
- 141.1 FTE social service caseworkers.

Additional support staff are necessary for all of the other cases handled by the public defender office attorneys. The Cook County public defender office had 171.2 full-time support staff, although one or more positions were vacant at any given time (60.1 investigators, 7 social work & mitigation, 2 interpreters, 102.1 other support positions).

⁴⁸¹ See *Police Station Unit*, LAW OFFICE OF THE COOK COUNTY PUBLIC DEFENDER, <https://www.cookcountypublicdefender.org/division/police-station-unit>.

⁴⁸² See Law Office of the Cook County Public Defender, Employee Manual § 2-2-2 (rev'd May 1, 2016) (Felony Trial Division).

⁴⁸³ See Law Office of the Cook County Public Defender, Employee Manual § 2-2-2 (rev'd May 1, 2016) (Legal Resources Division).

⁴⁸⁴ See Law Office of the Cook County Public Defender, Employee Manual § 2-2-2 (rev'd May 1, 2016) (Forensic Science Division).

⁴⁸⁵ See Law Office of the Cook County Public Defender, Employee Manual § 2-2-2 (rev'd May 1, 2016) (Trial Technology Division).

D. Using the caseloads & workloads of indigent defense attorneys in the sample counties to affect policy

As noted above, not all counties comply with the state law requirement for the public defender to submit monthly reports to the county of services rendered. But even in those counties in which the public defender does submit monthly reports, some public defenders question the usefulness of the information provided and the value to county government. One public defender expressed doubt as to whether policymakers can reach informed conclusions about the indigent defense system's workload, stating: "the fact of the matter is, our [monthly] reports don't give anyone who wants to know anything about our office any meaningful information." Or, as a different public defender put it: "None of [the county board members] know what to do" with the caseload numbers provided each month, and "I don't know that they actually even look at them. No county board member has ever asked me questions" about the monthly reports.

Data collected regularly can form the basis for decisions relating to workload within an office, for developing budget proposals, and for board action in light of the information provided. For example, the Cook County public defender routinely incorporates data from its monthly STAR Reports to support annual budget requests to the county for additional attorney and non-attorney staff positions. Similarly, in DuPage County, in mid-2018 the county board noticed that the public defender office's reported caseload numbers had "fluctuations" and asked why, allowing the public defender to explain the increased workload resulting from the bail reform law that had gone into effect on January 1, 2018; the county board considered and approved a budget increase in August 2018 to fund an additional public defender attorney position to handle the increased workload.

Chapter VII

Impeding independence and creating systemic conflicts of interest

In *Strickland v. Washington*, the U.S. Supreme Court declared that “independence of counsel” is “constitutionally protected,” and “[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.”⁴⁸⁶ Reflecting this command, the first of the *ABA Ten Principles of a Public Defense Delivery System* requires that the public defense function, including the attorneys it provides, must be “independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel.”⁴⁸⁷

In *United States v. Cronin*, the U.S. Supreme Court pointed to the deficient representation received by the defendants known as the “Scottsboro Boys” in the case of *Powell v. Alabama* as exemplifying the constructive denial of the right to counsel.⁴⁸⁸ Perhaps the most noted critique of the Scottsboro Boys’ defense is that it lacked independence from the judge presiding over the case. The *Powell* Court observed that the right to counsel rejects the notion that a judge should direct the defense:

[H]ow can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that, in the proceedings before the court, the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional.⁴⁸⁹

With regard to independence from the executive and legislative branches of government, in the 1979 case of *Ferri v. Ackerman*, the United States Supreme Court stated that “independence” of appointed counsel to act as an adversary is an “indispensable element” of “effective

⁴⁸⁶ *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

⁴⁸⁷ AMERICAN BAR ASS’N, *ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM*, Principle 1 cmt. (2002).

⁴⁸⁸ *United States v. Cronin*, 466 U.S. 648, 659-60 (1984) (“[I]f counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. . . . Circumstances of that magnitude may be present on some occasions when, although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. *Powell v. Alabama*, 287 U.S. 45 (1932), was such a case.”).

⁴⁸⁹ *Powell v. Alabama*, 287 U.S. 45, 61 (1932).

representation.”⁴⁹⁰ Two years later, the Court observed in *Polk County v. Dodson* that states have a “constitutional obligation to respect the professional independence of the public defenders whom it engages.”⁴⁹¹ Commenting that “a defense lawyer best serves the public not by acting on the State’s behalf or in concert with it, but rather by advancing the undivided interests of the client,” the Court notes in *Polk County* that a “public defender is not amenable to administrative direction in the same sense as other state employees.”⁴⁹²

Governmental interference that infringes on an appointed lawyer’s independence to act in the stated interests of clients causes a constructive denial of the right to counsel under *Cronic*.⁴⁹³ The Court in *Cronic* determined that, when an appointed attorney works within a system where factors are present that constructively deny the right to counsel, then the appointed attorney is presumptively ineffective. The government bears the burden of overcoming that presumption. The government may argue that, despite such conflicts, the appointed lawyer in a specific case was not ineffective, but it is the government’s burden to establish this. As the Seventh Circuit Court of Appeals noted in *Wahlberg v. Israel*, “if the state is not a passive spectator of an inept defense, but a cause of the inept defense, the burden of showing prejudice is lifted. It is not right that the state should be able to say, ‘sure we impeded your defense – now prove it made a difference.’”⁴⁹⁴

Although manifesting differently from one county to the next, in all of the nine sample counties of this evaluation, the indigent defense systems lack independence from the political and judicial branches of county government. This lack of independence causes systemic conflicts of interest that interfere with the provision of effective assistance of counsel. The State of Illinois has a constitutional obligation to ensure that the indigent defense systems established by county boards and circuit court judges are free from conflicts that interfere with appointed counsel’s ability to render effective representation to each indigent defendant.

⁴⁹⁰ 444 U.S. 193, 204 (1979).

⁴⁹¹ 454 U.S. 312, 321-22 (1981).

⁴⁹² 454 U.S. 312, 318, 321 (1981).

⁴⁹³ *United States v. Cronic*, 466 U.S. 648, 656-57 (1984) (“Thus, the adversarial process protected by the Sixth Amendment requires that the accused have ‘counsel acting in the role of an advocate.’ The right to the effective assistance of counsel is thus the right of the accused to require the prosecution’s case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted – even if defense counsel may have made demonstrable errors – the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.”) (internal citations omitted); *see also id.*, at 656 n. 17 (“Indeed, an indispensable element of the effective performance of [defense counsel’s] responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation.”) (citing *Ferri v. Ackerman*, 444 U. S. 193, 204 (1979)).

⁴⁹⁴ 766 F.2d 1071, No. 84-2435, ¶ 27 (7th Cir. 1985).

A. Weighing the interests of the political and/or judicial branches against the legal interests of the client

As explained previously (*see* discussion of conflicts of interest at pages 31 to 32), one of the ways that a lawyer can have a conflict of interest in a defendant's case is when the lawyer has a relationship with a third party (such as the lawyer's employment relationship with a county or court) that conflicts with the legal interests of the client whom the lawyer is appointed to represent.⁴⁹⁵ When an indigent defense system is not independent of the judicial and political branches of government – when there is no independent body, charged solely with ensuring effective assistance of counsel, that is responsible for overseeing the indigent representation system – then attorneys working within that system are subject to a series of potential conflicts of interest. This is because the appointed attorneys are first beholden for their livelihoods to the political and judicial branches of government. Effective assistance of counsel cannot be ensured in an indigent defense system that places appointed attorneys in a position where, often subconsciously, the lawyers respond to power that some third party holds over them, creating a conflict of interest between the interests of the other party and the legal interests of the indigent defense system's clients.

Under the framework established by the State of Illinois, there are 60 counties in which the county government decides whether a public defender office exists.⁴⁹⁶ At any time, for any reason or no reason, the county board in each of these counties can wholly eliminate the public defender office and all of its employees (both attorneys and non-attorney staff).

Even among the 42 counties in which a public defender office is statutorily mandated,⁴⁹⁷ only in Cook County is the public defender required to be a full-time position.⁴⁹⁸ In all other counties, the county board determines whether the public defender is a full-time or part-time position. And in all counties, the county board sets the amount of the public defender's compensation.⁴⁹⁹

In all counties other than Cook, the circuit court judges hire the public defender and can fire the public defender at any time, for any reason or no reason.⁵⁰⁰ The circuit court judges also determine the number (if any) of assistant public defenders and support staff in the public defender office, within the funding allocated and compensation set by the county board.⁵⁰¹

⁴⁹⁵ ILL. R. PROF'L CONDUCT (2010) r. 1.7(a)(2) (“[A] lawyer shall not represent a client if . . . there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to . . . a third person . . .”), r. 1.7 cmt 1 (“Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client. Concurrent conflicts of interest can arise from the lawyer’s responsibilities to . . . a third person or from the lawyer’s own interests.”).

⁴⁹⁶ 55 ILL. COMP. STAT. § 5/3-4002 (2018). *QuickFacts*, [each Illinois county], U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045219>.

⁴⁹⁷ 55 ILL. COMP. STAT. § 5/3-4001 (2018). *QuickFacts*, [each Illinois county], U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045219>.

⁴⁹⁸ 55 ILL. COMP. STAT. § 5/3-4004.2(b) (2018).

⁴⁹⁹ 55 ILL. COMP. STAT. §§ 5/3-4004.2(d), 5/3-4007 (2018).

⁵⁰⁰ 55 ILL. COMP. STAT. § 5/3-4004 (2018).

⁵⁰¹ 55 ILL. COMP. STAT. §§ 5/3-4004, 5/3-4008 (2018).

In Cook County, the county board president hires the public defender for a six-year term, during which the public defender can only be removed for good cause or dereliction of duty,⁵⁰² but the county board president can choose not to re-hire that public defender for any reason or no reason at the end of the six-year term. The county board also determines the number (if any) and compensation of any assistant public defenders and support staff.⁵⁰³

To whatever extent private attorneys are appointed in a county (and if any county today were to eliminate its public defender office), then the circuit court judges are responsible for choosing the private attorneys to appoint and for deciding what “reasonable fee” to pay them.⁵⁰⁴

In short, all indigent defense system attorneys in Illinois are directly dependent for their jobs on remaining in the good graces of the county board and/or circuit court judges who hire them. As a result, and often without realizing it, the indigent defense system attorneys take into consideration what they perceive to be the desires of the county board and circuit court judges, rather than advocating solely on behalf of their appointed clients’ legal interests, as is their ethical and constitutional duty. As the public defender in one Illinois county noted, the lack of structural independence from the county and courts is and will continue to be the greatest structural barrier for any indigent defense system, because each appointed public defender risks termination of employment should they seek the funding necessary to effectively represent all appointed clients.⁵⁰⁵

Necessary resources. One county’s public defender does not ask for additional resources needed by the public defender office to effectively represent its clients, saying “it doesn’t hurt” to get the same budget amount year after year. The public defender fears that his budget will be cut every year and considers it a victory when that does not happen. In a different county, the public defender has not sought an increase in his compensation, because the county is in tough financial times. In a third county, the part-time public defender has not asked for county benefits, despite believing he is entitled to them, because he does not want to appear to rock the boat with regard to county funders.

⁵⁰² 55 ILL. COMP. STAT. § 5/3-4004.2 (2018).

⁵⁰³ 55 ILL. COMP. STAT. § 5/3-4008.1 (2018).

⁵⁰⁴ 55 ILL. COMP. STAT. § 5/3-4006 (2018); 725 ILL. COMP. STAT. § 5/113-3(b), (c), (e) (2018).

⁵⁰⁵ This very scenario took place in February 2011 when then-chief public defender of New Mexico, Hugh Dangler, was terminated by the New Mexico Governor in the middle of the legislative session for suggesting that the New Mexico Public Defender Department was underfunded. Mr. Dangler recounted his dismissal in the *Santa Fe Reporter*, stating:

“I fear that I was not taking positions that the Governor liked in various obligations for the Public Defender,” Dangler says. “We have a very, very bad budget crisis, and I was testifying last week in front of the various committees. In fact it’s kind of interesting that my firing comes the week after my testimony. And I basically said, ‘We can’t make it with the budget we’ve been offered by either the [Legislative Finance Committee] or the Governor. And I think you’re supposed to say that, ‘Of course, we support the Governor’s option.’”

Wren Abbott, *Chief Public Defender dismissed, Testimony at state Legislature a possible trigger*, SANTA FE REPORTER (Feb. 17, 2011). When a public defender is appointed and serves as an at-will employee of government (or even when replaceable by that government at the end of a specific term), the public defender must keep the government happy to keep the job.

Indigent defendants ordered to pay for the cost of their representation. In five of the nine sample counties (Champaign, Hardin, Mercer, Schuyler, and Stephenson), indigent defendants are made to pay for at least some portion of the cost of their defense. Most often, the revenue collected from indigent defendants goes into the county's general revenue fund. Sometimes, it is reported as public defender income – for example, the Stephenson County public defender's monthly reports shows the amount of revenue collected from indigent defendants as "Income to PD Fund." Regardless, the indigent defense system attorneys in each county are aware that the fees collected are part of the county's budget, out of which the county funds the indigent defense delivery system. As a result, in each case, appointed lawyers are placed in a position of weighing the financial interests of the county against the client's free exercise of the right to counsel.

In Mercer and Schuyler counties, it is not common for indigent defendants to be assessed a public defender reimbursement fee, but it does occur from time to time.

Hardin County frequently recoups some costs of defense representation from indigent defendants "as part of a negotiated plea." There is no standard fee amount assessed against an indigent defendant and the amount is part of the plea negotiation.

In Stephenson County, in nearly every misdemeanor case the court collects a \$25 fee as reimbursement for the costs of the public defender, which is included in every plea offer from the state's attorney as leverage to secure quick case resolutions. If the misdemeanor defendant is convicted at trial, at sentencing the state's attorney may ask for the maximum reimbursement fee of \$500. The public defense lawyers in Stephenson County do not participate in the court's determination of recoupment, making no argument for or against imposition of public defender fees upon their clients.

The Champaign County state's attorney asks for a "public defender fee" at the time of appointment in every case in which the court appoints counsel – a flat \$200 for felonies, \$100 for misdemeanors, and \$75 for traffic cases – which the court later assesses at sentencing, frequently without a hearing on the defendant's ability to pay the fees.

Indigent defendants' rights. As an example, a circuit court judge in Stephenson County acknowledges that his interpretation of the Illinois statutory right to counsel at bail differs from that of most other judges. Rather than ensuring that public counsel is present to represent the arrestee at the initial bail hearing, the judge permits the defendant the option of either: requesting counsel to be present at a bail hearing held the next court date, or having the judge set their bail without representation that day. The circuit court judge says colleagues have informed him that he is wrong about his application of the bail reform law, but the judge says he will continue until some higher authority tells him otherwise. The county's public defender, who is appointed by and serves at the will of the circuit court judges, is aware of the practice but has not taken any action to remedy the issue on behalf of indigent defendants in the county.

A seat at the criminal justice system table. Many of the issues that affect the delivery of indigent defense services are beyond the sole control of the indigent defense system attorneys. Likewise, no individual component of the justice system operates in a vacuum. Rather, the policy decisions of one component necessarily affect another.

Counties can create a forum where all of the independent stakeholders in the county's justice system can meet together and attempt to coordinate their policies and practices. For example, in DuPage County a group of criminal justice stakeholders including the public defender, state's attorney, chief judge, circuit clerk, court administrator, and sheriff meet quarterly to discuss pressing criminal justice issues facing DuPage County.⁵⁰⁶ Partly as a result of having a seat at this criminal justice table, the DuPage County public defender is considered an equal partner in the justice system, alongside the court and state's attorney. In fact, the public defender office as a whole has a strong reputation in the community, and many assistant public defenders have strong relationships with other criminal justice stakeholders in DuPage County.

By contrast, the Champaign County public defender is not considered an equal part of the criminal justice system in the county. The county has no criminal justice policy coordinating roundtable or forum. Justice system components have met recently on an ad hoc basis to discuss pressing justice system issues, but the public defender has not been included. For example, the presiding judge of the circuit court, the state's attorney, the county sheriff, and the circuit clerk – but not the public defender – announced the closing of the Champaign County courthouse as the coordinated response of the “Champaign County justice departments” to the coronavirus pandemic.⁵⁰⁷ As one assistant public defender put it: “We're treated as an arm of the courthouse, but not a full-fledged member.”

A similar dynamic exists in the smallest counties, where the appointed part-time public defenders are not viewed as equals to the prosecution and judicial functions. In Mercer County, for example, a circuit judge noted that no one representing the interests of indigent defendants regularly appears before the county board to lobby for necessary resources. As a result, the Mercer County board finds it easy to rationalize cutting the public defender's salary.

Wherever the indigent defense system is absent from discussions among criminal justice system components regarding the structures, policy decisions, and procedures of each that affect the others – as well as the county's budgetary choices as a whole – then, necessarily, there is no voice to express the systemic tensions deriving from the individual conflicts of interest that are described throughout this chapter.

⁵⁰⁶ State law provides that counties with populations greater than 500,000 (currently, Cook, DuPage, Kane, Lake, and Will counties), may establish a formal “Judicial Advisory Council” to continuously study and devised means to improve the administration of justice in the county. 55 ILL. COMP. STAT. §§ 5/5-18001, 5/5-18002 (2018). DuPage County has not established a formal “Judicial Advisory Council.” Cook County has done so.

⁵⁰⁷ Champaign County, Illinois, Statement of Sheriff Dustin Heuerman, Circuit Judge Thomas Difanis, State's Attorney Julia Rietz, and Circuit Clerk Katie Blakeman regarding the closing of the Champaign County courthouse, effective March 16, 2020 (Mar. 15, 2020) (on file with Sixth Amendment Center).

B. Weighing the appointed lawyer's own financial interests against the legal interests of the client

As explained previously (*see* discussion of conflicts of interest at pages 31 to 32), another way that a lawyer can have a conflict of interest in a defendant's case is when the lawyer's own personal interests conflict with the legal interests of the client whom the lawyer is appointed to represent.⁵⁰⁸ When an indigent defense system attorney has no protection from the loss of their employment, that attorney often may agree to work within a compensation scheme that pits the lawyer's own financial interests against the legal interests of the appointed client.

Fixed fee compensation. Whenever a private attorney is paid a set amount of money to provide indigent defense representation during a given period of time, rather than being paid an hourly rate, this is referred to as a "fixed fee." When an attorney who is paid a fixed fee is also required to handle an unlimited number of cases during that period of time, this creates a conflict of interest between the appointed attorney's own financial interests and the legal interests of the indigent defendants whom he is appointed to represent. This is because the attorney is paid exactly the same amount no matter how few or how many cases he is appointed to handle and no matter how few or how many hours he devotes to each case. As a result, it is in the attorney's own financial interest to spend as little time as possible on each individual defendant's case.

These fixed fees that cause a financial conflict of interest occur in one form or another in seven of the nine representative counties in this evaluation: Hardin, Gallatin, Schuyler, Mercer, LaSalle, Champaign, and DuPage. In some counties, part-time public defenders and/or assistant public defenders are paid a fixed part-time salary, in exchange for representing an unlimited number of appointed clients, that leaves the attorneys free to devote the remainder of their time to more lucrative work. In some counties, private attorneys have a contract for a fixed amount of compensation, in exchange for representing an unlimited number of appointed clients, that leaves the attorneys free to devote the remainder of their time to more lucrative work. In both forms, the fixed fee compensation creates a conflict between the attorney's own financial interest and the legal interests of the indigent defendants whom he is appointed to represent and also create a conflict between the legal interests of an attorney's paying clients and those of his indigent clients.

For example, if an attorney is paid \$30,000 a year to represent all indigent defendants, and if his indigent cases take up all of his available working hours, then this attorney cannot earn more than \$30,000 in a year. On the other hand, if this attorney devotes only half of his working hours to his indigent clients, then he can spend the other half of his working year on more lucrative paying cases or other employment, thereby greatly increasing his annual income. When the lawyer is paid a fixed fee for representing an unlimited number of indigent defendants, this

⁵⁰⁸ ILL. R. PROF'L CONDUCT (2010) r. 1.7(a)(2) ("[A] lawyer shall not represent a client if . . . there is a significant risk that the representation of one or more clients will be materially limited by . . . a personal interest of the lawyer."), r. 1.7 cmt 1 ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. . . . Concurrent conflicts of interest can arise . . . from the lawyer's own interests. . . . The lawyer's own interests should not be permitted to have an adverse effect on representation of a client.").

creates an incentive for the attorney to rush a client to plead guilty without regard to the facts of the case, avoid conducting investigation or legal research, and avoid engaging in hearings or a trial. It also incentivizes the attorney to favor the legal interests of his paying clients or other employment over the legal interests of the indigent defendants he is appointed to represent.

LaSalle County has four part-time salaried assistant public defenders, all with private law practices. Almost uniformly, the attorneys say they took the assistant public defender job in order to receive benefits as county employees, like health insurance. Typically, the part-time assistant public defenders work 20 to 30 hours per week when not in trial, but upwards of 80 hours in weeks when they have a trial. Thus, where indigent defendants' cases go to trial, the part-time assistant public defenders have less time available to devote to more lucrative paying clients' cases – the compensation method creates a financial incentive for the part-time assistant public defenders to dispose of indigent clients' cases without going to trial.

The Schuyler County part-time public defender is paid an “annual salary of \$33,625” as an employee of the county “for purposes of IMRF, FICA and Medicare.” There is no provision establishing a caseload maximum, nor permitting any additional compensation for complex cases requiring extra time. The lawyer maintains a private law practice, and his private office is located in another county about 60 miles away.

In Mercer County, the part-time public defender is paid a fixed annual salary, and the county contracts with a private attorney to handle conflict cases for a fixed annual fee. There is no limit to the number of cases to which either part-time indigent defense lawyer can be appointed, and both attorneys have private law offices located in another county about a 45-minute drive away.

These issues are compounded in more rural areas where attorneys sometimes work for fixed fee compensation in the indigent defense system of more than one county. In addition to a conflict between the attorney's own financial interest and the legal interests of his appointed clients in a single county, the fixed fees create a conflict of interest between the legal interests of the attorney's indigent clients in one jurisdiction and those of his indigent clients in another jurisdiction. For example, the Schuyler County part-time public defender is paid a fixed fee to represent an unlimited number of clients in Schuyler County, is separately paid a fixed fee by neighboring Brown County to serve as that county's part-time public defender representing an unlimited number of clients, and also maintains a private law practice.

Appointed attorneys required to personally pay for overhead and/or case-related expenses.

The situation of an attorney's financial interests coming into conflict with the legal interests of his appointed client is made worse yet if the attorney is required to personally pay for overhead and case-related expenses in appointed cases. In these circumstances, the attorney must first pay for all overhead expenses (including, for example, law office rent and compensation of support staff) and then pay for all case-related expenses incurred in representing appointed clients (including, for example, costs of investigation or transcripts or copies or travel to interview witnesses), before the attorney earns any pay at all. The more that the appointed attorney spends on necessary overhead and case-related expenses for appointed clients, the less money the

attorney has left over for their personal compensation. A federal court in 2013 considered a fixed fee contract in which the appointed attorneys were required to pay for all of the overhead and case-related expenses in an unlimited number of cases, and found it to be an “[i]ntentional choice[.]” of government that left “the defenders compensated at such a paltry level that even a brief meeting [with clients] at the outset of the representation would likely make the venture unprofitable.”⁵⁰⁹

These principles are reflected in Illinois statutes and case law. In a 1981 decision, the Appellate Court of Illinois examined a state statute, which then authorized (and continues to authorize) payment of a “reasonable fee” to appointed private attorneys in criminal cases, stating:

Practical considerations lend support to the legislative determination that appointed counsel must be adequately compensated. A 1975 economic survey conducted by the Illinois State Bar Association indicates that an attorney’s gross income is reduced by an average of 35% for overhead expenses. And costs have increased substantially since 1975. It takes no advanced degree in calculus to recognize that an attorney must be able to meet expenses if his practice is to survive.

A reasonable fee infers at least some compensation. As such, fees awarded appointed counsel must reimburse the attorney for office overhead and expenses and yield something toward his own support. A fee awarded by the court should neither unjustly enrich nor unduly impoverish appointed counsel and should allow the financial survival of his private practice.⁵¹⁰

Commenting that the constitutional guarantee of “effective representation” requires appointed counsel to “maintain a high degree of competence and skill and faithfully guard his clients’ interests,” the Illinois Supreme Court affirmed the appellate court’s decision.⁵¹¹ Reasoning that “nominal compensation” for court appointed counsel is “no longer feasible,” the Illinois Supreme Court held that “reasonable compensation should reimburse assigned counsel for his overhead and yield something toward his own support” and established a formula for trial courts to apply in determining a reasonable fee in each case.⁵¹²

⁵⁰⁹ *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1132 (W.D. Wash. 2013).

⁵¹⁰ *In re People v. Johnson*, 93 Ill. App. 3d 848, 853 (Ill. App. Ct. 1981) (internal citations omitted) (holding that the trial court abused its discretion in awarding petitioner attorneys “less than \$8 per hour for the time expended representing the defendants,” which “does not even reimburse counsel for their overhead expenses”), *aff’d*, *People v. Johnson*, 87 Ill. 2d 98 (Ill. 1981).

⁵¹¹ *People v. Johnson*, 87 Ill. 2d 98, 104 (Ill. 1981) (“We think the days are past when a lawyer could be expected to do this solely as a public service. If society is to demand representation by counsel in an expanding variety of proceedings and to insist on a high level of competency in the performance of such representation, then counsel should be paid.”) (quoting *Luke v. County of Los Angeles* (1969), 269 Cal. App. 2d 495, 499, 74 Cal. Rptr. 771, 774).

⁵¹² *People v. Johnson*, 87 Ill. 2d 98, 105-6 (Ill. 1981) (“The formula for reasonable compensation should be the hourly fee normally charged for comparable trial court services, less an amount adequate to satisfy the *pro bono* factor. In determining what constitutes a reasonable fee, the trial court must consider a number of factors, including, but not limited to, time spent and services rendered, the attorney’s skill and experience, complexity of the case,

When the resources necessary to represent an indigent defendant come out of the attorney's compensation, it creates a disincentive for the attorney to hire an investigator or experts, or to accept collect calls from the jail, or to incur any overhead costs that benefit indigent defendants (such as secretarial time, legal research capability through books or online, or malpractice insurance), without regard to whether the resources are necessary to provide effective representation. Unless the government provides or reimburses an appointed attorney for the cost of overhead and case-related expenses, appointed attorneys have a financial incentive to reduce those costs – or to forego certain costs altogether – without regard to what resources are necessary to provide effective assistance of counsel to indigent clients.

In Schuyler County, the part-time public defender is expressly required, by county board resolution, to personally pay for all overhead (other than the room provided for his use in the courthouse) and for all case-related expenses in cases to which he is appointed in Schuyler County.⁵¹³

Gallatin County provides its contract part-time public defender a stipend of \$100 per month to cover overhead, but any additional expenses beyond the first \$100 per month will come out of the public defender's pay. One attorney who recently served as the appointed part-time Gallatin County public defender found the stipend inadequate to cover the cost of office space; instead, the lawyer worked out of his home. The current Gallatin County public defender works out of her private law office located in Harrisburg, approximately 20 miles away. Because her appointed clients are of limited means, it can be "very difficult" for them to travel to meet with her at her private law office, and so the part-time public defender makes an effort to meet with clients wherever they decide is easiest for them, but she most often meets with clients at the courthouse on the day of their hearings.

LaSalle County provides the public defender with limited office space, but it is inadequate for the four part-time assistant public defenders who must share a single desk. Instead, the part-time assistant public defenders work out of their respective private law firm's physical offices most days of the week. On their assigned court days, the part-time assistant public defenders seek out one of the two meeting rooms at the courthouse for conferences with clients, as there is no meeting space available in the public defender's office space provided by the county.

In addition to an office space for meetings with clients, indigent defense system attorneys have additional required expenses – for example, to maintain their licenses to practice law, all Illinois lawyers must attend continuing legal education seminars (and pay the cost of travel

overhead costs, and expenses of trial. Another consideration is local conditions, which refers to the number of attorneys, in a given location, who could be called upon to perform pro bono work. Where there are only a few criminal-trial lawyers in a particular locale, the court must necessarily appoint attorneys from the same select group to represent indigent defendants. This process imposes an unfair burden on that group of attorneys, a burden which is not being shared by all members of the bar. The trial court must also consider this inherent inequity in determining compensation.”).

⁵¹³ Schuyler County, Resolution No 2014-R-28 regarding the appointment of the Schuyler County Public Defender (Oct. 13, 2014).

and registration, if not provided free of charge) and pay annual bar dues;⁵¹⁴ to conduct legal research, lawyers must have access to legal research software licenses or physical law libraries – which, if not paid by the county, will come out of the lawyer’s pay. For example, facing budget cuts in fiscal year 2020, the Stephenson County public defender no longer provides funding for staff training and for attorney bar dues. Likewise, DuPage County assistant public defenders are required to maintain law licenses and, “[w]hen the budget allows,” the office will reimburse attorneys for the cost of their bar dues.⁵¹⁵ In Schuyler County, court appointed lawyers are permitted to use the courthouse library computers, but the computers are located in the library that the circuit judge uses as his office, making appointed attorneys reluctant to use the computers to conduct legal research.

Finally, the defendant’s access to effective assistance of counsel depends in part upon the lawyer’s access to necessary support services.⁵¹⁶

A sine qua non of quality legal representation is the support personnel and equipment necessary for professional service. In private law firms, overhead expenses, of which support services are a significant part, average about 45 percent of all office expenses. Secretarial tasks can only be performed properly with adequate word-processing equipment (usually computers); telephones with the ability to send and receive fax messages; adequate copying and mailing facilities; adequate data-processing and filing systems; and whatever specialized equipment may be required to perform necessary investigations. Quality legal representation cannot be rendered either by defenders or by assigned counsel unless the lawyers have available other supporting services in addition to secretaries and investigators.⁵¹⁷

In Hardin, Mercer, and Schuyler counties, any necessary administrative support comes out of indigent defense system attorneys’ fees. Likewise, in Gallatin County, all expenses beyond the first \$100 per month will come out of the public defender’s pay.

In Schuyler County, any resources devoted to an indigent defendant will come out of the county’s part-time public defender’s \$33,625 annual compensation. This creates a disincentive for the attorney to hire an investigator or experts or to, for example, accept collect calls from the jail, in the case of an indigent defendant, or to incur any overhead costs that benefit indigent defendants (even such as secretarial time, legal research capability through books or online, or malpractice insurance), without regard to whether the resources are necessary to provide effective representation.

⁵¹⁴ The fee is \$385 for lawyers admitted before 2017 and \$121 for lawyers admitted between Jan. 1, 2017 and Dec. 31, 2018. *2020 Registration Fee Schedule*, ATTORNEY REGISTRATION & DISCIPLINARY COMMISSION, https://registration.iardc.org/attyreg/Registration/Registration_Department/Fee_Schedule/Registration/regdept/2020_Fee_Schedule.aspx?hkey=1506dee5-35f5-4172-ba9f-efc27efd5c521.1.2017 (last visited July 8, 2020).

⁵¹⁵ DUPAGE COUNTY ILLINOIS PUBLIC DEFENDER EMPLOYEE HANDBOOK § 2E(C) (rev’d Feb. 11, 2020).

⁵¹⁶ AMERICAN BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES, std. 5-1.4 (3d ed. 1993).

⁵¹⁷ AMERICAN BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES, std. 5-1.4 cmt. (3d ed. 1993).

Appointed private attorneys beholden to the prosecutor for their compensation. In some counties, when the appointed private attorneys petition the court for payment of attorney's fees and/or reimbursement for case-related expenses, those petitions are reviewed by the state's attorney in advance of court action. For example, the Mercer County state's attorney is reported to sometimes object to the appointed private attorneys' billing, and often the subsequent hearing results in attorneys having their hours cut by the court. The Mercer County circuit court routinely pays appointed private attorneys at a rate of \$65 per hour. At the end of a case, the appointed attorney submits a bill, which the state's attorney reviews and, if the state's attorney objects to the requested payment, the court holds a hearing on the appointed attorney's motion for payment. In one Mercer County case, the appointed private attorney billed a total of \$7,800, and the state's attorney objected because, among other items, the attorney billed the court for three hours for a court appearance where the defense attorney drove to court and at the hearing asked the court for a continuance on the client's case.

Similarly, in Schuyler County, appointed private attorneys are paid at the rate of \$60 per hour, which is set by the county board. Appointed private attorneys submit hourly bills for payment, which the state's attorney first reviews "for reasonableness" and if approved the state's attorney submits the bill to the judge for the court's approval. Should the state's attorney disapprove of the appointed lawyer's bill, the state's attorney could negotiate with the appointed attorney to change the bill. Nevertheless, should that initial negotiation fail, the court holds a hearing to resolve the dispute between the state's attorney and the appointed attorney – but this has "never" been required in Schuyler County. Even where the state's attorney approves a bill, the judge has discretion to reduce it if deemed unreasonable.

Procedures like these render the appointed private attorneys in these counties beholden to the prosecutors – their courtroom adversaries – who will either approve or disapprove of the attorneys' requests for payment. From the outset of the appointment, the lawyer subconsciously factors in whether the prosecutor will object to the amount of time the attorney devotes or the case-related expenses the attorney incurs during their indigent client's representation. As a result, even if only subconsciously, appointed attorneys inevitably account for what the prosecution might think is "reasonable" rather than solely focusing on fulfilling the client's case-related needs, which stands in contrast to the adversary system of justice upon which the right to counsel is founded.

C. Weighing the legal interests of one appointed client against the legal interests of other of the lawyer's clients

As explained previously (*see* discussion of conflicts of interest at pages 31 to 32), another way that a lawyer can have a conflict of interest in a defendant's case is when the lawyer represents two or more clients at the same time and those clients have conflicting interests.⁵¹⁸ The indigent defense system attorneys in each Illinois county have no control over the number of criminal cases they are appointed to defend in the trial courts, and each indigent defense system attorney must effectively represent each and every person to whom they are appointed. If a lawyer simply has so many clients that the lawyer no longer has sufficient time or sufficient funding to devote to the next client's case – a situation often referred to as “case overload” or “excessive workload” – then the attorney cannot ethically represent the next new client.⁵¹⁹ When an indigent defense system attorney has no protection from the loss of their employment, that attorney often may take on more cases than they can effectively handle, pitting the legal interests of one of the lawyer's clients against the legal interests of other of the lawyer's clients. Indigent defense system attorneys throughout the representative counties of this evaluation express serious concerns about their caseloads and workloads.

Assistant public defenders in Champaign County speak openly about their fear of “burnout” from excessive caseloads. Some attorneys note the heightened severity of charging decisions from the state's attorney's office in recent years has increased the time required to handle the most serious cases, which leaves less time available to devote to other clients. One attorney notes, for example, that the volume of cases leaves insufficient time for important legal research or communication with clients. Felony lawyers say that, just to keep up with the work, they take “a lot of discovery home” and regularly work weekends. Lawyers staffing misdemeanor courts often are overwhelmed by the number of clients to represent at each court date. One attorney characterizes her role as managing the volume through “triage.” Another assistant public defender describes having pretrial conferences scheduled with 50 clients one court date and 100 more clients with pretrial conferences the very next day. With so many clients to represent at one

⁵¹⁸ ILL. R. PROF'L CONDUCT r. 1.7(a)(2) (“[A] lawyer shall not represent a client if . . . there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client . . .”). *See also* ILL. R. PROF'L CONDUCT (2010) R. 1.7, 1.9 (eff. Jan. 1, 2010).

⁵¹⁹ ILL. R. PROF'L CONDUCT (2010) r. 1.16(a)(1) (“[A] lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if . . . the representation will result in violation of the Rules of Professional Conduct or other law . . .”). *See also* ILL. R. PROF'L CONDUCT (2010) r. 1.7 cmt 3 (“A conflict of interest may exist before representation is undertaken, in which event the representation must be declined . . .”).

The ABA's *Criminal Justice Standards, Defense Function* direct that “[d]efense counsel should not carry a workload that, by reason of its excessive size or complexity, interferes with providing quality representation, endangers a client's interest in independent, thorough, or speedy representation, or has a significant potential to lead to the breach of professional obligations.” AMERICAN BAR ASS'N, CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, std. 4-1.8(a) (4th ed. 2017). National standards, as summarized in the *ABA Ten Principles*, explain that defense counsel should refuse new case appointments when those appointments would create a conflict of interest because the attorney would have insufficient time to dedicate to all cases given the workload. AMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 5 & cmt. (2002).

court docket, the lawyer cannot keep up: “There are a number of people who I haven’t spoken with [by their court date]. So there’s often a line of up to 50 people waiting to speak with me before court.”

In DuPage County, the assistant public defenders speak openly about needing more time on their cases. For example, the assistant public defenders who are assigned to the general misdemeanor rotation frequently have between six and ten cases scheduled for trial in a single day, with one or two of them actually going to trial each day. One attorney estimates he is only able to review about 70% of the discovery in any given case, and worse, “there are days where I only get through about 10% of the discovery in a case.” The DuPage County public defender regularly monitors attorney caseload data while preparing monthly reports and relies on the data for insight as to whether a particular attorney feels overwhelmed or for diagnosing more systemic issues (e.g., cases failing to move along for reasons outside of the public defender’s control, such as delay in discovery production, unacceptable plea offers, etc.). But the public defender does not have staff available to re-allocate cases according to the caseload reports; “I don’t have any wiggle room” in the budget “and we’re spread thin.” When an assistant public defender is out sick, the public defender personally has to cover for that attorney and still manage the office. “I miss some issues or put things on the back burner. It’s like M.A.S.H. – you’re just triaging things that come in.”

The Stephenson County public defender takes pride in the ability of his assistant public defenders to “tear through” cases. Nevertheless, the public defender assigns himself to handle the bulk of the office’s post-conviction matters, which “take a lot of time and effort,” often requiring him to work weekends to keep up with the workload. The chief judge believes additional funding is needed to hire more public defense attorneys, because public defenders throughout the circuit all have what he perceives to be very high caseloads.

In Cook County, excessive caseloads are compounded by the absence of sufficient case-related resources. Assistant public defenders speak of feeling “overwhelmed,” of “crushing depression,” and of being alone “on an island” without adequate support. The pressure is felt by attorneys throughout the public defender office. As one assistant public defender put it: “We need bodies here. We don’t have time to go to the washroom and drink water. We need people.”

Staffing decisions are a constant dilemma for the Cook County public defender’s management team. Case assignments are tied to courthouse location, such that, as lawyers transfer from one division to another, they leave behind their open pending cases and pick up whatever open pending cases await them at their new division. One assistant public defender described transferring into a misdemeanor branch court team as having “walked into a disaster caseload.” The assistant public defender had 15 misdemeanor cases already set for trial in the first few weeks; the lawyer “watched body [camera] video to the wee hours” just to catch up. In other words, even if the Cook County public defender were to address a caseload crisis in one office location, the shuffling of personnel compounds a different caseload crisis elsewhere in the county.

Mid-level managing attorneys in Cook County are deeply alarmed. As one division chief put it: “There is not enough time to prepare, investigate, interview clients, to work up a case like you should.” Another division chief is concerned about lawyers burning out, becoming jaded, or having health problems, but the culture of the office is to “learn how to manage, how to survive, work within the conditions you have. We make do.” A third division chief worries about a risk of burnout, but notes that most lawyers have learned not to complain about excessive caseload to management; the “good lawyers” have learned to cope through triage, and “the bad ones give up.”

In Mercer County, the indigent defense system attorneys commented that their workload probably requires full time public defenders, considering all the obligations the public defenders need to meet in Mercer County, including time in court, meeting clients, and working on cases. As one attorney put it, the circuit judges in Mercer County “expect us to drop everything and get out there,” sometimes on very short notice.

Between April 2019 and October 2019, Gallatin County saw its part-time public defender change three times. One public defender “moved up” to become a state’s attorney; another decided not to renew because the indigent defense work was much more time-intensive than he was led to believe, leaving less time than he wanted to spend on private paid cases.

The court in Schuyler County considers a public defender’s failure to quickly resolve cases as evidence the lawyer has too many cases, and if the part-time public defender has too many cases, then the court expects that part-time public defender to reduce the time he spends on his private paid cases.

Chapter VIII

Findings & recommendations

A. Findings

FINDING 1: The State of Illinois delegates to its county boards and circuit court judges most of its constitutional obligation to ensure the provision of effective assistance of counsel to indigent criminal defendants in the trial courts. Yet the state does not have any oversight structure by which to know whether each county’s indigent defense system has a sufficient number of attorneys with the necessary time, training, and resources to provide effective assistance of counsel at every critical stage of a criminal case for each and every indigent defendant.

In 1963, the U.S. Supreme Court held in *Gideon v. Wainwright* that providing the Sixth Amendment right to effective assistance of counsel for the indigent accused in state courts is an obligation of the states under the due process clause of the Fourteenth Amendment.⁵²⁰ Because the “responsibility to provide defense services rests with the state,” national standards as summarized in the *ABA Ten Principles of a Public Defense Delivery System* unequivocally declare “there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.”⁵²¹

Today, the State of Illinois delegates to its counties and trial court judges the responsibility for providing and overseeing attorneys to effectively represent indigent defendants, and it delegates to its counties nearly all of the responsibility for funding the right to counsel of indigent defendants. With only limited guidance and assistance from the state, each county’s government along with the judges of the trial court for the county are left to decide how to provide and pay for attorneys to represent the indigent people who are charged with crimes in the county that carry incarceration as a possible penalty. In every Illinois county, whatever indigent defense system the county supervisors and trial court judges have created must provide representation to indigent people in all of the types of cases for which Illinois provides a right to counsel. When a state chooses to delegate its federal constitutional responsibilities to its local governments and courts, the state must guarantee not only that they are capable of providing effective representation but also that they are in fact doing so.⁵²²

⁵²⁰ *Gideon v. Wainwright*, 372 U.S. 335, 343-45 (1963).

⁵²¹ American Bar Ass’n, *ABA Ten Principles of a Public Defense Delivery System*, Principle 2 cmt. (2002).

⁵²² *Cf. Robertson v. Jackson*, 972 F.2d 529, 533 (4th Cir. 1992) (although administration of a food stamp program was turned over to local authorities, “ultimate responsibility” . . . remains at the state level.”); *Osmunson v. State*, 17 P.3d 236, 241 (Idaho 2000) (where a duty has been delegated to a local agency, the state maintains “ultimate responsibility” and must step in if the local agency cannot provide the necessary services); *Claremont School Dist.*

Illinois is one of just seven states that do not have any state commission, state agency, or state officer with oversight of any aspect of trial-level indigent representation services in adult criminal cases.⁵²³ As detailed throughout this report, the indigent defense systems in the nine representative counties of this evaluation vary greatly. With 102 counties in the state, it is likely that any or all of those counties present even greater variations in their indigent defense systems, yet the State of Illinois has no method of knowing any of the following information:

- **Public defender office.** The state has no method of knowing whether any county provides office space for the public defender office, and the state has no method of knowing whether any county pays for the necessary expenses incurred by a public defender office in defending the cases to which it is appointed. The state similarly has no method of knowing the caseload or workload of each county's public defender office as a whole or of the individual attorneys within the public defender office.
 - *Public defender.* State law does not establish clear requirements about whether a public defender must be a county employee or whether a county may instead contract with a private attorney to serve as the public defender. State law does not clearly establish what benefits (such as retirement, insurance, and vacation), if any, a county must provide to its public defender. The state has no method of knowing any of this information about the public defender in each county. The state has no method of knowing whether the public defender in each county maintains and files the statutorily required reports of services rendered nor what information they contain.
 - *Assistant public defenders and support staff.* State law does not establish any requirements about whether assistant public defenders must be county employees or whether a county may instead contract with private attorneys to fulfill this function. State law does not establish the amount or method of compensation for nor whether a county must provide benefits (such as retirement, insurance, and vacation) to its assistant public defenders and support staff. State law does not establish any requirements about the circumstances under which assistant public defenders and support staff are required to be full-time or allowed to be part-time, and in the case of assistant public defenders whether they are allowed to also engage in private practice. The state has no method of knowing any of this information about the assistant public defenders and support staff in each county's public defender office or whether there are any.

v. Governor, 794 A.2d 744 (N.H. 2002) (“While the State may delegate [to local school districts] its duty to provide a constitutionally adequate education, the State may not abdicate its duty in the process.”); Letter and white paper from American Civil Liberties Union Foundation et al to the Nevada Supreme Court, regarding Obligation of States in Providing Constitutionally-Mandated Right to Counsel Services (Sept. 2, 2008) (“While a state may delegate obligations imposed by the constitution, ‘it must do so in a manner that does not abdicate the constitutional duty it owes to the people.’”), http://www.nlada.net/sites/default/files/nv_delegationwhitepaper09022008.pdf.

⁵²³ The other six states are Arizona, California, Nebraska, Pennsylvania, South Dakota, and Washington.

- **Private attorneys.** State law does not establish any requirements about how the courts select the private attorneys whom they appoint nor any qualifications those private attorneys must have. State law does not establish any requirements about whether the circuit court judges or the county boards may or may not enter into a contract with a private attorney, in advance of the need to appoint a private attorney in any specific case, to secure that attorney's availability (e.g., for all cases requiring a private attorney, for all cases of a certain type, for all cases allotted to a certain judge, etc.). State law does not establish any requirements about how much private attorneys are to be paid, other than the limitations imposed for Cook County, nor how those attorneys are paid (e.g., by the hour, by the case, by the year, etc.). The state has no method of knowing any of this information about the private attorneys appointed by the circuit courts and paid by the counties to represent indigent adults in trial-level criminal cases. The state similarly has no method of knowing the caseload or workload of any of the private attorneys appointed to represent indigent defendants in any county.

In the absence of this information, the State of Illinois cannot accurately say how many people or cases, and of what case types, require appointed counsel nor by whom the representation is being provided, if at all, and the State of Illinois cannot know how much the provision of indigent representation *should* cost nor how to provide it effectively in all 102 counties. Instead, policy decisions about indigent defense systems are left to anecdote, speculations, and potentially even bias.

FINDING 2: The state's limited framework for how county boards and circuit court judges are to establish and implement the indigent defense system in each county institutionalizes political and judicial interference with the appointed attorneys' independence to act in the stated legal interests of their indigent clients. This lack of independence causes systemic conflicts of interest that interfere with the provision of effective assistance of counsel.

First, the state has no means of knowing on an ongoing basis whether each county's indigent defense system actually complies with the few requirements established by state law. Perhaps more importantly, though, the framework established by the State of Illinois for how counties are to create and implement their indigent defense systems: (1) limits the sources of revenue available to counties to fund those systems, and limits the counties' choices about how to control and distribute their criminal justice spending (as explained at pages 41 to 48); and (2) mandates that all indigent defense system attorneys in Illinois are directly dependent for their jobs on the county board and/or circuit court judges who hire and pay them (as explained in chapter VII).

When an indigent defense system is not independent of the judicial and political branches of government – when there is no independent body, charged solely with ensuring effective assistance of counsel, that is responsible for overseeing the indigent representation system – then attorneys working within that system are subject to a series of potential conflicts of interest. It is not that the county boards or circuit court judges are maliciously or consciously trying to undermine the basic constitutional right to counsel. Rather, often without realizing it, the

indigent defense system attorneys inevitably take into consideration what they perceive to be the desires of the county board and circuit court judges in order to stay in their good graces, rather than advocating solely on behalf of their appointed clients' legal interests, as is their ethical and constitutional duty.

In one or another of the nine sample counties in this evaluation, indigent defense system attorneys work under systemic conflicts of interest that result in their:

- failing to advocate for sufficient resources necessary for the effective representation of appointed clients;
- working for fixed fee compensation that pits their own financial interests against the legal interests of their appointed clients;
- paying personally for overhead and/or case-related expenses of their appointed clients' cases, pitting their own financial interests against the legal interests of their appointed clients;
- handling excessive caseloads and workloads that prevent providing effective assistance of counsel to each individual indigent defendant;
- failing to object when indigent defendants are ordered to pay for costs of their representation;
- failing to advocate for the constitutional and statutory rights of indigent defendants; and
- failing to provide a voice for indigent defendants in the criminal justice system.

The limited fiscal resources available to each county, along with the state's requirement that each county fund the bulk of the costs of both prosecution and indigent defense, means that there is a lack of parity between the prosecution and indigent defense system in many counties, and in some counties an appointed private attorney's compensation is subject to approval by the state's attorney.

The State of Illinois has a constitutional obligation to protect the independence of the defense function and to ensure that the indigent defense systems established by county boards and circuit court judges are free from conflicts of interest that interfere with appointed counsel's ability to render effective representation to each indigent defendant.

FINDING 3: The indigent defense systems established in Illinois' counties lack oversight and accountability that can result in a constructive denial of the right to counsel to at least some indigent defendants, and in some instances can result in the actual denial of the right to counsel to at least some indigent defendants.

An indigent defense system's effectiveness must be measured by the representation it provides to its appointed clients. As explained in chapters III through VI, in one or more of the sample counties, the qualifications, training, and supervision required of and/or provided to indigent defense system attorneys are inadequate to ensure effective assistance of counsel:

- the inadequacy of required qualifications and the lack of required procedures for selecting the indigent defense system attorneys means that some of those attorneys may have little to no prior experience in criminal defense and yet be assigned to represent indigent clients in every type of case (criminal and civil) of all levels of complexity and severity,

up to and including homicides (except in Cook County that has qualifications for assistant public defenders who are assigned the most complex of criminal cases);

- the inadequacy of requirements that indigent defense system attorneys receive on-going training, at government expense, tailored to the types and levels of cases to which each attorney is appointed, means that some appointed attorneys may lack competency to handle the cases to which they are appointed; and
- the absence of any supervision of appointed private attorneys, and the lack of sufficient supervision of many public defender office attorneys, similarly means that some appointed attorneys may lack competency to handle the cases to which they are appointed.

In one or more of the nine sample counties, the funding provided overall is frequently inadequate to ensure effective assistance of counsel, and the manner in which compensation is paid to indigent defense system attorneys often creates a conflict of interest that results in the constructive denial of the right to counsel:

- some counties do not provide office space and other overhead necessary for the effective representation of indigent defendants, instead requiring the indigent defense system attorneys to personally pay for necessary overhead, while in other counties the office space and overhead provided is insufficient;
- some counties do not provide funding for necessary case-related expenses for the effective representation of indigent defendants, instead requiring the indigent defense system attorneys to personally pay for necessary case-related expenses, while in other counties the funding for case-related expenses is insufficient; and
- some counties do not pay sufficient compensation to indigent defense system attorneys.

Across the nine sample counties, some indigent defendants are actually deprived of counsel at a critical stage of their criminal case, while in other instances an indigent defense system attorney is appointed but under circumstances that cause a constructive denial of the right to counsel:

- some in-custody indigent defendants do not receive a full initial appearance when they first appear before a court, and instead must return to court at a later date to have counsel appointed to represent them for the remainder of the proceedings against them;
- some in-custody indigent defendants are required to appear by video conference for the initial appearance, rendering it difficult if not impossible for the indigent defendant to consult with appointed counsel during the proceedings;
- some in-custody indigent defendants are required to choose between having a timely pre-trial release determination without being represented by counsel or delaying their pre-trial release determination to a later date when counsel can be present;
- some indigent defendants are required to enter a plea at their initial appearance without first being allowed counsel;
- some judges require or allow unrepresented indigent defendants to negotiate directly with prosecutors before the defendants are advised of and waive their right to appointed counsel;
- the lack of standardized indigency screening procedures and the lack of a standardized definition for what constitutes indigency mean that a defendant may be denied appointed

counsel by one judge while a similarly situated defendant may receive appointed counsel in the courtroom next door; and

- for some indigent defendants who received appointed counsel, it may be several days or even weeks before they learn the identity of the attorney representing them and/or have an opportunity to speak with that attorney.

In four of the nine representative counties, no one keeps track of the caseloads and/or workloads of indigent defense system attorneys; and among the other five sample counties, only DuPage County has a sufficient number of indigent defense system attorneys to provide effective assistance of counsel in the adult criminal caseload, before even considering all of the other types of cases in which the same attorneys are appointed.

B. Recommendations

RECOMMENDATION 1. The State should statutorily create, and appropriately fund, an independent Illinois public defense commission to oversee trial-level indigent defense services and authorize the public defense commission to promulgate and enforce binding standards.

Because the constitutional right to counsel is an obligation of *state* government⁵²⁴ – not counties and not individual lawyers⁵²⁵ – the State of Illinois has an affirmative duty to ensure effective public defense representation to each and every indigent defendant facing a potential loss of liberty in a criminal proceeding.

National standards first unequivocally declare “there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.”⁵²⁶ Second, heeding the U.S. Supreme Court’s admonitions regarding the independence of the defense function, national standards require that “[t]he public defense function, including the selection, funding, and payment of defense counsel, is independent.”⁵²⁷ Third, national standards agree that the best way

⁵²⁴ *Gideon v. Wainwright*, 372 U.S. 335, 341-45 (1963) (“[T]hose guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment. . . . [A] provision of the Bill of Rights which is ‘fundamental and essential to a fair trial’ is made obligatory upon the States by the Fourteenth Amendment. . . . The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”); *In re People v. Johnson*, 93 Ill. App.3d 848, 853 (Ill. App. Ct. 1981), *aff’d*, 87 Ill. 2d 98 (Ill. 1981).

⁵²⁵ *In re People v. Johnson*, 93 Ill. App.3d 848, 853 (Ill. App. Ct. 1981) (“In 1963, the United States Supreme Court held that the United States Constitution requires the States to furnish counsel to an indigent accused. . . . The duty of fulfilling the State’s obligation to the accused indigent has continued to be placed upon members of the bar. The justification for requiring lawyers to accept appointments to represent indigent defendants for little or no compensation has been that an attorney is an officer of the court and a license to practice carries with it the obligation to serve the court whenever called to do so. As a result, individual lawyers have been forced to bear the expense of fulfilling an obligation that belongs to the State.”) (internal quotations and citations omitted), *aff’d*, 87 Ill. 2d 98 (Ill. 1981).

⁵²⁶ AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 2 cmt. (2002) (compiling national standards on statewide oversight).

⁵²⁷ AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 1 (2002) (compiling national standards on independence of the defense function).

to protect defense counsel independence *and* ensure state oversight of right to counsel services is by establishing an independent statewide public defense commission.⁵²⁸ Toward that end, thirty states have created some form of a commission system.⁵²⁹

There is no one cookie-cutter model for a commission that must be imposed on each state. Illinois policymakers must decide whether and how best to establish a new independent oversight commission that meets national standards regarding its composition, with responsibility solely for trial-level right to counsel services in the state, and the Sixth Amendment Center encourages looking to the practices of other states that have implemented independent oversight structures in compliance with standards.

For example, the State of Illinois could establish a single commission that is statutorily authorized to oversee all right to counsel services in the state.⁵³⁰ Alternatively, the State of Illinois could establish one commission to oversee trial-level representation and a separate commission to oversee appellate representation.⁵³¹ Or, the State of Illinois could establish one commission to oversee primary representation and a separate commission to oversee all conflict representation.⁵³²

⁵²⁸ AMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 1 cmt. (Feb. 2002) (compiling national standards and explaining that, in order to “safeguard independence and to promote the efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems”).

⁵²⁹ The 30 states with state oversight commissions are: Arkansas, Connecticut, Colorado, Georgia, Hawaii, Idaho, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, New Mexico, New York, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, Texas, Utah, Virginia, West Virginia, and Wisconsin.

⁵³⁰ For example, the Massachusetts Committee for Public Counsel Services is responsible for the delivery of indigent representation services in all criminal and civil case types in which state and federal law provides a right to counsel, in both trial and appeal, and whether direct services are provided by attorneys who are government salaried employees or private assigned counsel. *See* MASS. GEN. LAWS, ch. 211D, §§ 1 through 16 (2018) (committee for public counsel services).

⁵³¹ For example, the Michigan Indigent Defense Commission oversees the provision of indigent defense services in adult criminal trials, while the Michigan State Appellate Defender Commission oversees appellate representation. *See* MICH. COMP. LAWS §§ 780.981-780.1003 (2018) (indigent defense commission act); §§ 780.711-780.719 (2018) (appellate defender act).

⁵³² For example, the Colorado Public Defender Commission oversees primary representation at trial and appeal provided by the Office of the Public Defender, which administers 22 regional public defender offices across the state, each staffed by full-time, salaried, government employee attorneys and support staff. *See* COLO. REV. STAT. §§ 21-1-101 through 21-1-106 (2018) (state public defender). In cases of conflict, the Colorado Alternate Defense Commission is a fully separate commission, supported by a central office, that oversees representation provided by private attorneys appointed on a case-by-case basis. COLO. REV. STAT. §§ 21-2-101 through 21-2-107 (2018) (alternate defense counsel).

The Illinois State Appellate Defender Commission

Under Illinois statutes, there currently exists a nine-member State Appellate Defender Commission responsible for advising the Office of the State Appellate Defender.^a However, the statutory composition of the State Appellate Defender Commission does not adhere to national standards for the protection of defense independence, because the three branches of government do not have an equal number of appointments (the judicial branch appoints six of the nine state appellate defender commission members),^b and the commission exists only to “advise” Illinois’ state appellate defender,^c who is selected by and is removable by a majority vote of Illinois Supreme Court justices (rather than by the commission members).^d

This evaluation studied adult criminal trial-level representation, and thus this assessment did not examine the Office of the State Appellate Defender nor the State Appellate Defender Commission that oversees it. Illinois policymakers should address trial-level right to counsel oversight and separately should consider commissioning a future evaluation of the provision of right to counsel services in appeals and post-conviction proceedings in Illinois.

^a 725 ILL. COMP. STAT. § 105/1 through 105/4 (2018) (state appellate defender commission).

^b 725 ILL. COMP. STAT. 105/4(a) (2018) (“There is created the State Appellate Defender Commission, to consist of 9 members appointed as follows: (1) A chairman appointed by the Governor; (2) One member appointed by the Supreme Court; (3) One member appointed by each of the 5 Appellate Courts; (4) One member appointed by the Supreme Court from a panel of 3 persons nominated by the Illinois State Bar Association; (5) One member appointed by the Governor from a panel of 3 persons nominated by the Illinois Public Defender Association.”). This statutory provision violates national standards requiring that no single branch of government has the ability to exert outsized influence over the delivery of public defense services. *See* NATIONAL STUDY COMMISSION ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, guideline 2.10 (1976) (“(b) The members of the Commission should represent a diversity of factions in order to ensure insulation from partisan politics. [] (c) No single branch of government should have a majority of votes on the Commission.”). The legislative branch of Illinois government is excluded from holding any stake in or responsibility for the success of the appellate public defense system, as are members of the client community, academicians, researchers, minority constituents, and others who might have much to contribute. The Illinois Supreme Court and five appellate courts certainly could choose to appoint persons from these stakeholder groups, but nothing within current statute requires their participation or that their input be considered.

^c 725 ILL. COMP. STAT. 105/6(a) (2018) (“The commission shall advise the State Appellate Defender and may, subject to rules of the Supreme Court, recommend policies for the operation of the office of State Appellate Defender.”).

^d 725 ILL. COMP. STAT. 105/5 (2018) (“The Supreme Court shall by a vote of a majority of the judges thereof appoint the State Appellate Defender for a four-year term and until his successor is appointed and qualified. . . . The Supreme Court may remove the State Appellate Defender only for cause and after a hearing.”). This statutory provision violates national standards requiring that the independent oversight commission selects the defender director in order to insulate the defense

function from potential undue political or judicial influence. *See* NATIONAL STUDY COMMISSION ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, guideline 2.11 (1976) (“The primary function of the Defender Commission should be to select the State Defender Director.”); AMERICAN BAR ASS’N, CRIMINAL JUSTICE SECTION STANDARDS: PROVIDING DEFENSE SERVICES, Standard 5- 1.3 (3d ed. 1992) (“The [indigent defense system] and the lawyers serving under it should be free from political influence and should be subject to judicial supervision only in the same manner and to the same extent as are lawyers in private practice. . . . An effective means of securing professional independence for defender organizations is to place responsibility for governance in a board of trustees. . . . The primary function of boards of trustees is to support and protect the independence of the defense services program.”).

Illinois public defense commission membership. An Illinois public defense commission responsible for oversight of trial-level representation should be made up of members selected by diverse appointing authorities, so that no single branch of government has the ability to usurp power over the chief defender or exert outsized influence over the delivery of public defense services. The earliest *Guidelines for Legal Defense Systems in the United States*⁵³³ explain:

A special Defender Commission should be established for every defender system, whether public or private.

The Commission should consist of from nine to thirteen members, depending upon the size of the community, the number of identifiable factions or components of the client population, and judgments as to which non-client groups should be represented.

Commission members should be selected under the following criteria:

- (a) The primary consideration in establishing the composition of the Commission should be ensuring the independence of the Defender Director.
- (b) The members of the Commission should represent a diversity of factions in order to ensure insulation from partisan politics.
- (c) No single branch of government should have a majority of votes on the Commission.
- (d) Organizations concerned with the problems of the client community should be represented on the Commission.
- (e) A majority of the Commission should consist of practicing attorneys.
- (f) The Commission should not include judges, prosecutors, or law enforcement officials.

Members of the Commission should serve staggered terms in order to ensure continuity and avoid upheaval.⁵³⁴

In practice, jurisdictions with indigent defense commissions generally give an equal number of appointments to the executive, legislative, and judicial branches of government.⁵³⁵ To fill out the remainder of appointments, governments often give responsibility for one or two positions to the state bar association. Many jurisdictions try to have a voice from communities most affected by the indigent defense function represented on the commission.⁵³⁶ Jurisdictions have also found

⁵³³ NATIONAL STUDY COMMISSION ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES (1976). The *NSC Guidelines* were created in 1976 in consultation with the United States Department of Justice under a DOJ Law Enforcement Assistance Administration (LEAA) grant.

⁵³⁴ NATIONAL STUDY COMMISSION ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, guideline 2.10 (1976).

⁵³⁵ Connecticut (CONN. GEN. STAT. §§ 51-289 through 51-300 (2019)); Idaho (IDAHO CODE §§ 19-848 through 19-866 (2019)); Indiana (IND. CODE §§ 33-40-5 *et seq* (2019)); Louisiana (LA. REV. STAT. §§ 15:141 through 15:184 (2019)); Maryland (MD. CRIM. PROC. CODE §§ 16-101 through 16-403 (2019)); Massachusetts (MASS. GEN. LAWS ch. 211D, §§ 1 through 16 (2019)); Michigan (MICH. COMP. LAWS §§ 780.981 through 780.1003 (2019)); Nevada (NEV. REV. STAT. §§ 180.002 through 180.640 (2019)); New Mexico (N.M. STAT. ANN. §§ 31-15-1 through 31-15-12 (2019)); New York (N.Y. EXEC. LAW, art. 30 §§ 832 (2019), 833 (2019)); North Carolina (N.C. GEN. STAT. §§ 7A-498.1 through 7A-499 (2019)); North Dakota (N.D. CENT. CODE §§ 54-61-01 through 54-61-04 (2019)); South Carolina (S.C. CODE §§ 17-3-5 through 17-3-600 (2019)); Utah (UTAH CODE ANN. §§ 78B-22-101 *et seq* (2019)); and Virginia (VA. CODE ANN. §§ 19.2-157 through 19.2-163.8 (2019)).

⁵³⁶ For example, the African-American bar association appoints one member of the Louisiana Public Defender

that giving appointments to the deans of accredited law schools can create nexuses that help the indigent defense commissions (for example, law schools can help with standards-drafting, training facilities, etc.).⁵³⁷ Appointments by non-governmental organizations generally must go through a confirmation process by an official branch of state government.

Importantly, while the *NSC Guidelines* state that the commission should not include sitting judges, prosecutors, or law enforcement officials,⁵³⁸ many jurisdictions find *former* judges, prosecutors, and law enforcement officials to make very good commission members. Additionally, more and more jurisdictions have found it a conflict to have as a member any person who stands to benefit financially from the policies of the commission. This means that some jurisdictions have banned attorneys who currently handle public defense cases from serving on such commissions.

Illinois public defense commission’s authority to set and ensure compliance with state standards. National standards state that the commission “should not interfere with the discretion, judgment and zealous advocacy of defender attorneys in specific cases,” and instead the commission should be authorized to establish, implement, and enforce mandatory standards regarding the provision of the right to counsel, within the parameters set by state law.⁵³⁹

The Illinois legislature should follow the practice of those states that statutorily require the commission to promulgate and enforce specific standards. For example, Michigan delineates its oversight commission’s overall powers and duties through statute, which provides:

[The Michigan Indigent Defense Commission] shall establish minimum standards, rules, and procedures to effectuate the following:

- The delivery of indigent criminal defense services shall be independent of the judiciary but ensure that the judges of this state are permitted and encouraged to contribute information and advice concerning that delivery of indigent criminal defense services.
- If the caseload is sufficiently high, indigent criminal defense services may consist of both an indigent criminal defender office and the active participation of other members of the state bar.
- Trial courts shall assure that each criminal defendant is advised of his or her right to counsel. All adults, except those appearing with retained counsel or those who have made an informed waiver of counsel, shall be screened for eligibility under this act,

Board. *See* LA. REV. STAT. § 15:146(A)(3) (2019).

⁵³⁷ *See, e.g.*, Kentucky (KY. REV. STAT. § 31.015(1)(a)(5) (2019) (“The dean, ex officio, of each of the law schools in Kentucky or his or her designee” shall serve as members of Public Advocacy Commission)); New Mexico (N.M. STAT. ANN. § 31-15-2.1 (2019) (“the dean of the university of New Mexico school of law shall appoint three members”)).

⁵³⁸ NATIONAL STUDY COMMISSION ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, guideline 2.10 (1976). *See also* AMERICAN BAR ASS’N, CRIMINAL JUSTICE SECTION STANDARDS: PROVIDING DEFENSE SERVICES, Standard 5- 1.3(b) (3d ed. 1992).

⁵³⁹ NATIONAL STUDY COMMISSION ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, guideline 2.11 (1976).

and counsel shall be assigned as soon as an indigent adult is determined to be eligible for indigent criminal defense services.⁵⁴⁰

At minimum, the Illinois legislature should require the commission to promulgate standards in the following areas, made binding in all jurisdictions statewide:

- independence of the defense function from undue political and judicial interference;
- the criteria for and method of determining whether a defendant is indigent, such that all defendants are treated equally;
- the qualifications, training, and supervision of attorneys;
- the selection and appointment of counsel in each case;
- withdrawal from representation due to a conflict of interest and the appointment of separate counsel;
- early appointment of and continuous representation by a qualified attorney, whereby the same attorney provides representation from appointment through disposition;
- client communication;
- fair compensation of attorneys and provision for overhead and necessary case-related expenses, including the use of investigators, social workers, paralegals, and experts;
- time sufficiency and workload limits;
- performance duties of all appointed attorneys; and
- data collection and oversight procedures to ensure statewide compliance with mandatory standards.

States have devised three models to ensure state oversight through minimum compliance with state standards: a unified state system; providing state funding to local governments to enable compliance; and assessing penalties on local governments for non-compliance. Regardless of the method employed, the State of Illinois should direct that the commission's standards are made binding in all jurisdictions.

⁵⁴⁰ MICH. COMP. LAWS § 780.991(1)(a) - (c) (2019). Michigan law further requires the Michigan Indigent Defense Commission (MIDC) to implement minimum standards, rules, and procedures that adhere to the following principles:

- Defense counsel is provided sufficient time and a space where attorney-client confidentiality is safeguarded for meetings with defense counsel's client.
- Defense counsel's workload is controlled to permit effective representation. Economic disincentives or incentives that impair defense counsel's ability to provide effective representation shall be avoided. The MIDC may develop workload controls to enhance defense counsel's ability to provide effective representation.
- Defense counsel's ability, training, and experience match the nature and complexity of the case to which he or she is appointed.
- The same defense counsel continuously represents and personally appears at every court appearance throughout the pendency of the case. However, indigent criminal defense systems may exempt ministerial, nonsubstantive tasks, and hearings from this prescription.
- Defense counsel is required to attend continuing legal education relevant to counsel's indigent defense clients.
- Defense counsel is systematically reviewed at the local level for efficiency and for effective representation according to MIDC standards.

MICH. COMP. LAWS § 780.991(2)(a) - (f) (2019).

Model 1: Unified state system. The Illinois legislature should look to Colorado, Massachusetts, Montana, and New Mexico as illustrative examples of statewide oversight through a unified state system model.

When Montana created its statewide indigent defense commission in 2005,⁵⁴¹ the state determined it could best ensure uniformly effective assistance of counsel by administering indigent defense services at the state level. But the state struggled with how to pay for the improved services, including compliance with standards. After exploring many options, Montana elected to cap the amount that counties were required to spend on indigent defense at the amount they had spent during the immediate prior year. The state adjusted the matrix by which it provides funding to counties for all obligations, and essentially lowered the state's financial obligations to the counties by the capped amount.

In effect, Montana's public defense system became 100% state funded, though the state did not have to come up with the entire funding amount in the first year. This was a good deal for counties, because the counties were assured that their spending on indigent defense is never going to increase regardless of any future expansion of the right to counsel by the U.S. Supreme Court or increased responsibilities based on standards. And it is easier to enforce standards statewide, because the delivery of all right to counsel services throughout Montana is placed under the auspices of a unified statewide system and it is incumbent on the unified system to argue for adequate resources to meet standards through the normal state budgeting process.⁵⁴²

Similar to Montana, New Mexico has a unified statewide and fully state-funded system for providing indigent defense services. One independent commission oversees the entire system, including a public defender, an appellate division, and a contract counsel division which assigns cases to a panel of private attorneys when the public defender has a conflict. The public defender division contains a mixture of public defender offices in urban areas and assigned counsel panels in less densely populated regions of the state, but all attorneys are required to meet the same qualifications established by the New Mexico Public Defender Commission.

Alternatively, Illinois could explore a bifurcated system with separate offices to oversee primary and conflict representation. For example, Colorado has a state public defender commission, which appoints a public defender and oversees the provision of services statewide. Whenever the public defender has a conflict, the case is sent to an entirely different agency, headed by a separate commission and separate defense counsel, eliminating the need for ethical screens to prevent attorneys in one agency from accessing potentially sensitive client information about a defendant with competing interests. Both the public defender commission and alternate defense commission are funded entirely by the State of Colorado.

⁵⁴¹ Montana Public Defender Act, 2005 Mont. Laws ch. 449 (codified as amended at MONT. CODE ANN. §§ 47-1-104 et seq (2019)).

⁵⁴² Montana's public defender commission was repealed in 2017; a state director is now responsible for oversight of the statewide public defender system, including monitoring and enforcement of binding standards. *See* MONT. CODE ANN. §§ 47-1-104 (2019) (statewide system), 47-1-105 (2019) (duties of director), 2-15-1028 (2019) (commission, repealed by 2017 MONT. LAWS ch. 358 § 45).

A model that blends elements from both New Mexico and Colorado is that employed by Massachusetts, where the state-run Committee for Public Counsel Services (CPCS) administers all indigent defense services statewide. CPCS has two divisions: a public counsel division, consisting of government employee public defender offices that serve the larger urban areas, and a private counsel division, which administers panels that take conflict cases from the public counsel division and serves as the primary service provider in rural areas. As in New Mexico, all private attorneys in Massachusetts must meet CPCS's minimum qualifications to receive appointments in criminal cases, starting with a mandatory weeklong training program before receiving appointments to misdemeanor cases. To serve on the assigned counsel panels, which are overseen by a state-level administrator separate and distinct from the public counsel division, private attorneys must become qualified and maintain their qualifications year after year. Experienced attorneys help by mentoring lesser-experienced attorneys, and attorneys with many years of experience and strong professional reputations assist in vetting attorney qualifications.

Model 2: State funding to enable compliance. The Illinois legislature should look to Michigan and Utah for examples of statewide oversight through state funding to enable local governments' compliance with state standards.

The Michigan legislature took a similar approach to Montana in terms of capping costs to counties, while leaving control of services at the local level. In Michigan, counties are required annually to spend no less than the average of the funding they spent in the three fiscal years preceding the adoption of the Michigan Indigent Defense Commission Act.⁵⁴³ Any new monies to meet standards above and beyond that required local spending amount are the responsibility of the state.

As each new standard is promulgated and approved by the state, the Act requires each Michigan county to submit a plan for how it intends to meet the new standard. For example, if the Michigan Indigent Defense Commission (MIDC) requires counties to implement continuous representation by the same attorney appointed to represent a defendant, and if County A traditionally uses horizontal representation (i.e., one attorney handles the arraignment, a different lawyer handles preliminary hearings, a third attorney handles trial, etc.), then County A might submit a plan to MIDC stating that they need to hire additional attorneys at an additional cost of, say, \$500,000 to comply with the new standard. If MIDC then approves the county's plan, the \$500,000 of additional costs get factored into a statewide plan presented to the governor and legislature during budget negotiations. So, if county compliance with state standards requires additional funding, the state is the responsible party.

However, if a local unit of government fails to meet MIDC standards, the MIDC is authorized to take over the administration of indigent criminal defense services for the local unit of government. As a disincentive for counties to purposefully fail to meet standards, the Act mandates that county government in jurisdictions taken over by MIDC will pay a percentage of the costs the MIDC determines are necessary to meet standards, *in addition* to the county's

⁵⁴³ MICH. COMP. LAWS § 780.993 (2019).

originally required local contribution – in the first year, the county will have to pay 10% of the state costs, increasing to 20% in year two of a state take-over, and 30% in year three.

Utah followed a similar course of reform to Michigan. In 2016, the Utah legislature created the Utah Indigent Defense Commission (UIDC), which has authority to promulgate advisory standards for all counties to ensure effective representation. To be eligible to receive state funding, a county must show that it will comply with the UIDC standards and maintain county funding capped at 2016 levels. In order to meet the principles, a county can apply for either a “matching fund” grant (in which the state pays a percentage of the total costs of representation in a county, based on the county’s population size) or a “critical need” grant (in which the state pays for specific line items that would impose an “undue burden” on the county). If counties so choose, they can also combine resources through cooperative agreements to have a single indigent defense system (with a public defender office, private assigned counsel, or some combination thereof) serving more than one county.

Model 3: Penalties for non-compliance. The Illinois legislature should look to Idaho as a model for providing statewide oversight through penalties for non-compliance by local governments.

As in Michigan, Idaho counties remain responsible for administering and overseeing trial-level indigent defense services. However, the Idaho legislature took a different approach to Montana and Michigan in terms of county indigent defense funding. In 2014, the Idaho legislature created the Idaho State Public Defender Commission (SPDC) within the Department of Self-Governing Agencies⁵⁴⁴ – under a constitutional provision in Idaho that means the commission, though technically in the executive branch, does not have to answer directly to the governor. The SPDC is empowered to promulgate standards consistent with *United States v. Cronin* and the *ABA Ten Principles*.⁵⁴⁵ Idaho’s counties continue to administer and oversee the delivery of trial-level indigent defense services at the local level.

Counties can apply to the SPDC for financial assistance in meeting state standards, though they must comply with the standards without regard to whether they seek state funding.⁵⁴⁶ The hammer to compel compliance with standards is significant. If the SPDC determines that a county “willfully and materially” fails to comply with state standards, and if the SPDC and county are unable to resolve the issue through mediation, the SPDC is authorized to step in and remedy the specific deficiencies, including by taking over all services and charging the county for the cost.⁵⁴⁷ If the county does not pay within 60 days, “the state treasurer shall immediately intercept any payments from sales tax moneys that would be distributed to the county,” the intercepted funds go to reimburse the commission, and the “intercept and transfer provisions shall operate by force of law.”⁵⁴⁸

⁵⁴⁴ Idaho Public Defense Act, 2014 Idaho Sess. Laws H0542 (codified as amended at IDAHO CODE §§ 19-848 *et seq.* (2019)).

⁵⁴⁵ IDAHO CODE § 19-850(a)(vii) (2019).

⁵⁴⁶ IDAHO CODE § 19-862A (2019).

⁵⁴⁷ IDAHO CODE § 19-862A(11) (2019).

⁵⁴⁸ IDAHO CODE § 19-862A(12) (2019).

RECOMMENDATION 2. The Illinois public defender commission should have statutory authority to carry out its duties through the creation of a central office of indigent defense services. The public defender commission should be authorized to hire an executive attorney to employ permanent central office staff to provide training and regional supervision of indigent defense services throughout the state.

No matter the method used in each jurisdiction, the independent public defense commission has a fiduciary duty to taxpayers to exercise oversight of the system they have established to provide the Sixth Amendment right to counsel. Therefore, the commission requires a central office, led by an executive attorney and executive staff, to help oversee all indigent defense services in the state.

National standards state that the independent commission should select the executive attorney “on the basis of a non-partisan, merit procedure which ensures the selection of a person with the best available administrative and legal talent, regardless of political party affiliation, contributions, or other irrelevant criteria.”⁵⁴⁹ In addition to the executive attorney, in order to effectively and efficiently collect and analyze the information needed to accurately project the number and type of attorneys and resources necessary to provide consistently effective representation, the commission’s statewide central office requires – and the Illinois legislature should appropriate necessary state funds for – adequate professional staff positions devoted full time to training, compliance, finance, information technology, and research and data analysis.

Illinois must provide adequate funding to the state’s indigent defense systems to ensure that lawyers are appointed only to cases that they are qualified to handle. Because ongoing training is an active part of the job of being an attorney, the independent commission’s central office must have a full-time professional staff, including a full-time training director reporting directly to the executive attorney, to provide all indigent defense system attorneys statewide with ongoing, mandatory training,⁵⁵⁰ tailored to the types and levels of cases to which each attorney is appointed.⁵⁵¹

⁵⁴⁹ NATIONAL STUDY COMMISSION ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, guideline 2.12 (1976) (providing further that the executive attorney’s “term of office should be from four to six years in duration and should be subject to renewal,” and the executive attorney “should not be removed from office in the course of a term without a hearing procedure at which good cause is shown”). *See also* NATIONAL STUDY COMMISSION ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, guideline 2.11 (1976) (“The primary function of the Defender Commission should be to select the State Defender Director.”).

⁵⁵⁰ *See generally* NATIONAL LEGAL AID & DEFENDER ASS’N, DEFENDER TRAINING AND DEVELOPMENT STANDARDS (1997). *See also* NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, TASK FORCE ON COURTS, Chapter 13, The Defense, std. 13.16 (1973); NATIONAL STUDY COMM’N ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, guidelines 2.4(4), 5.7-5.8 (1976).

⁵⁵¹ For example, an attorney who is appointed in drug-related cases must be trained in the latest forensic sciences and case law related to drugs. *See* AMERICAN BAR ASS’N, CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, std. 4-1.12(c) (4th ed. 2017) (“Counsel defending in specialized subject areas should receive training in those specialized areas.”). *See also* AMERICAN BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE: PROVIDING DEFENSE SERVICES, § 5-1.5 & cmt. (3d ed. 1992) (“Criminal law is a complex and difficult legal area, and the skills necessary for provision of a full range of services must be carefully developed. Moreover, the consequences of mistakes in defense representation may be substantial, including wrongful conviction and death or the loss of liberty.”).

Attorneys who were once well-qualified and well-trained can, for any number of reasons, lose their competency to handle criminal cases over time, and indigent defendants do not get to choose which attorney is appointed to represent them. For these reasons, national standards require that all attorneys who are appointed to represent indigent defendants must be “supervised and systematically reviewed” to ensure that they continue to provide effective assistance of counsel to each and every indigent defendant. The Illinois legislature should appropriate funds necessary to ensure ongoing systemic oversight of indigent defense services, measured against the commission’s policies and standards. Some states of similar geographic size to Illinois have established regional director positions to assist the executive attorney in monitoring and enforcing compliance with state standards at the local level. Illinois policymakers should look to Colorado, Michigan, and Montana as examples.

- *Colorado.* The Colorado State Public Defender has statutory authority to establish regional offices to carry out his duties and has created 22 branch offices throughout the state. Directors of those branch offices ensure policies are implemented in their region, and report back to the state public defender on compliance with those standards.⁵⁵²
- *Michigan.* Although not expressly established by statute, the Michigan Indigent Defense Commission (MIDC) makes use of regional directors, who report to the MIDC executive director. The six regional directors are responsible for: ensuring each county under his or her direction develops and submits a compliance plan for a proposed standard; working with MIDC and the county to get MIDC approval for the compliance plans; and overseeing the county’s compliance with standards on an ongoing basis through data collection and reporting, and court observations.
- *Montana.* Eleven regional directors oversee trial-level services, all of whom report to the Office of State Public Defender (OSPD). The regional directors determine the delivery method for their region, in consultation with OSPD. Each region has some combination of government staff attorneys and private attorneys who contract with OSPD to handle conflict and overload cases from the state system.⁵⁵³

The central office requires accounting, budgeting, and finance services to assist the executive attorney in developing and presenting accurate, timely, and transparent budgets to the state commission (and ultimately to the state legislature) for review and approval. In addition, the central office must have data collection and analysis procedures that allow the system to address shifts in criminal justice priorities and practices in coming years. Take defender workloads, for example: in order to create the recommended workload standards, the independent commission requires current, comprehensive, statewide data of attorney time tracked against specific performance criteria to garner a more accurate projection of what it actually takes to handle each component of a client’s advocacy needs, based on each type of case – a far more accurate method of measuring (and thereby limiting) workload than any other available. More than that, however, requiring attorneys to track their time enables policymakers to tie specific variables

⁵⁵² See COLO. REV. STAT. ANN. § 21-1-102 (2020).

⁵⁵³ MONT. CODE ANN. §§ 47-1-104, 47-1-215 (2019).

(such as “time meeting with the client in person”) not only to specific case outcomes and dispositions, but also to systemic outcomes (like recidivism rates, or the rate of former clients now employed and contributing to the tax base).⁵⁵⁴

Moreover, because indigent defense system attorneys do not generate or control the amount of their own work, the size of the indigent representation system in Illinois must expand and contract as demand for right to counsel services rises and falls. In future years, the Illinois legislature could reduce the need for public defense services by decriminalizing entire categories of criminal conduct; a reduction in local police funding could lead to decreased arrests; or state’s attorneys could prioritize prosecutions of certain offenses or offer defendants more favorable plea deals – all of which could decrease the indigent defense system’s workload. Likewise, any expansion in law enforcement and prosecution function funding and policy has the opposite effect. By implementing proper processes for data collection and analysis, the indigent representation system will be able to more accurately predict its staffing and resource needs, permitting the commission to provide the legislature with accurate budget projections.

Therefore, the Illinois legislature should provide adequate funding to the indigent defense commission to obtain and operate the technology necessary to, among other things: monitor the indigent defense system’s true workload year by year, jurisdiction by jurisdiction; and determine whether attorneys have sufficient time and sufficient resources to provide effective representation in each case.

Finally, the Illinois legislature should require the commission, through its central office, to submit periodic reports to the legislature regarding the status of right to counsel services statewide on the key indicators of systemic effectiveness under *United States v. Cronin*,⁵⁵⁵ which include the early appointment of qualified and trained attorneys, who have sufficient time and resources to provide effective representation under independent supervision.

⁵⁵⁴ For example, in September 2013, the Montana Office of the State Public Defender filed a motion seeking to decline new cases in two courts of limited jurisdiction. Though the lower court found in October of that year that it did not have the authority to grant relief, a subsequent appeal was put on hold to allow for a political resolution. Because they had significant time-based data, the office received significant funding to resolve the excessive caseload issues. See David Carroll, *Montana caseload challenge results in a significant increase in resources*, SIXTH AMENDMENT CENTER (Apr. 17, 2014), <https://sixthamendment.org/montana-caseload-challenge-results-in-a-significant-increase-in-resources/>.

⁵⁵⁵ 466 U.S. 648 (1984).

