FINAL REPORT

Judicial Council
Study Committee on Appellate Representation
of Indigent Criminal Defendants

January 6, 2011

Although the Study Committee on Appellate Representation of Indigent Criminal Defendants was commissioned by the Judicial Council, this Report represents solely the deliberations and recommendations of the Committee and not necessarily the views or position of the Judicial Council. For additional information, contact the Administrative Office of the Courts, 450 South Main Street, Salt Lake City, Utah 84114.

TABLE OF CONTENTS

COMMITTEE MEMBERSHIP

Judge Stephen L. Roth
Utah Court of Appeals
Study Committee Chair

Paul Boyden
Executive Director, Statewide
Association of Prosecutors
Associate Chair

David Brickey
Summit County Attorney

Laura Dupaix, Ex Officio
Utah Attorney General's Office

Lorie Fowlke
State Representative, District 59

Kent Hart
Executive Director, Utah Association of
Criminal Defense Lawyers

Brent Johnson
General Counsel,
Administrative Office of the Courts

Linda Jones
Salt Lake Legal Defenders Association

Richard Mauro
Mauro Law Office

Judge Gregory K. Orme
Utah Court of Appeals

Rick Schwermer
Assistant Court Administrator,
Administrative Office of the Courts

Roger Tew
Vice Chair, Utah Constitutional Revision
Commission

Kirk Torgensen
Deputy Attorney General

Adam Trupp, Ex Officio
General Counsel, Utah Association of
Counties

Judge J. Frederic Voros Jr.
Utah Court of Appeals

Melvin Wilson, Ex Officio
Director, Utah Office of Crime Victim
Reparations

Kelly Wright, Ex Officio
Deputy Salt Lake County Attorney

Michael D. Zimmerman
Snell & Wilmer, LLP

* * *

Additional Participants

Gary Anderson
Utah County Commissioner

Tani Downing
Governor's Office

Greg Bell
State Senator, District 22
(now Lt. Governor)

Staff: Mary Westby
Utah Court of Appeals

INTRODUCTION

In June 2008, the Judicial Council established a study committee to address the issue of appellate and post conviction representation of indigent defendants. In a letter to the Committee's chair, Chief Justice Durham in general terms defined the task to be undertaken:

> The issue of appellate and post conviction representation[1] is a long standing area of concern. This issue was last examined in a comprehensive way fourteen years ago. That study succeeded in clarifying the issues, but little concrete action resulted. In the interim, these issues have grown more complex and it would appear timely to reexamine the issue and possible responses.

Letter from Chief Justice Christine M. Durham to Judge Stephen L. Roth, dated June 5, 2008.

The Judicial Council designed the Committee's membership to bring together people with experience and training in a wide variety of roles pertinent to the task. In this respect the committee members are unusually diverse in their backgrounds, experience, and perspectives. Although there have been some changes from time to time, Committee members have included elected officials, a County Attorney; current and former judges, the head of the Attorney General's Criminal Appeals Division, prosecutors, trial and appellate defense attorneys, and court officials. Working integrally with the Committee as ex officio members have been Adam Trupp, General Counsel of the Utah Association of Counties; Kelly Wright, Salt Lake County Deputy District Attorney, Civil Co-Chair of

---

1. Although this Report is final with respect to the subject of appellate representation of indigent defendants, it does not address the issue of representation of criminal defendants in post conviction proceedings and, to that extent, is interim in nature. Post conviction representation raises issues that are distinct from the issues of appellate representation principally because, under current law, appellate representation of indigent defendants is a constitutional and statutory mandate, whereas representation is not a right in the post conviction process, except in capital cases where representation is provided for by statute. For this reason, the Committee deferred work on post conviction issues until completion of its work on appellate-level representation. The committee expects to address post conviction representation in its next phase, in parallel with its work regarding trial- and juvenile-level representation.

the Statewide Association of Prosecutors, and coordinating staff for the Utah County and District Attorneys Association (UCDAA), a relatively new organization that is concurrently addressing indigent representation issues; Melvin Wilson, Director of the Office of Crime Victim Reparations and former prosecuting attorney and public defender; and Laura Dupaix, Chief of the Criminal Appeals Division, Utah Attorney General's Office.

This report summarizes the work of the Committee over the past two years and offers some proposals for change in the current approach to appellate representation that we hope will improve the ability of Utah's counties to meet their responsibility to provide representation in criminal appeal cases to indigent defendants, as well as the overall quality and effectiveness of such representation. Following this introduction is an Executive Summary of the Committee's work and recommendations, followed by a more detailed explanation of the process by which we arrived at these proposals and a fuller description of the recommendations themselves. Pertinent subcommittee reports and data are attached as appendices.

EXECUTIVE SUMMARY

The Committee was charged with examining the issue of appellate representation of indigent defendants and proposing approaches to improve such representation. Because indigent representation is a county function in Utah, the Committee coordinated closely with the Utah Association of Counties (UAC) and the Utah County and District Attorneys Association (UCDAA).

Approach. The Committee attempted to identify the nature and scope of any problem before crafting solutions. To do this, three subcommittees were formed:

- The Contracts Subcommittee canvassed contracts currently in use by counties to retain the services of defense attorneys to handle indigent appeals.
- The Appeal Tracking Subcommittee collected and analyzed numerical data, by county, on the filing and disposition of appeals filed in the Utah Court of Appeals.
- The Briefing Quality Subcommittee examined, by county, the quality of briefs filed on behalf of indigent defendants in the Utah Court of Appeals.

Findings. The Committee drew the following conclusions by assembling, analyzing, and comparing the information collected by the subcommittees:

- Contracts currently in use by the counties to retain indigent counsel often include trial and appellate representation in a single contract. Compensation levels and other terms vary widely from county to county.
- In some Utah counties, indigent appeals are rarely, if ever, filed.
- The statewide default rate for all criminal appeals is over 22%; however, over the past few years the default rate for cases with appointed counsel has been relatively insignificant.
- Some correlation exists between the population of a county and the quality of its appellate representation, but the key determinant seems to be the quality and experience of appellate counsel, not population size or location.

Recommendations. The Committee unanimously makes the following recommendations for improving indigent representation on appeal:

- Encourage counties to use a model contract that separates trial and appellate representation and avoids the pitfalls and disincentives of many contracts now in use.
- Through a revised appellate Rule 38B, create an appellate oversight committee that will establish a roster of attorneys qualified to contract with the counties to provide

indigent appellate representation, establish criteria for such qualification, and require that appointed attorneys be on the roster in order to appear before the appellate courts.

- Repeal appellate Rule 23B to decrease appeal costs. The rule has proven a significant obstacle to retaining indigent appellate counsel on appeal, because of increased workload, and has not been commensurately effective in increasing the effectiveness of appellate representation.
- Implement policies in the appellate courts designed to eliminate defaults on criminal appeals.
- Encourage counties to pool resources in order to best provide for adequate appellate representation of indigent defendants, while maintaining local control and flexibility.

BACKGROUND

As alluded to in Chief Justice Durham's letter, this issue was last formally addressed about fifteen years ago by a Supreme Court Task Force on Appellate Representation of Indigent Defendants that, after some months of study, issued a Final Report in September 1994. That task force recommended the formation of a statewide appellate public defender's office with a centralized office and staff of attorneys specialized in appellate work in order "to provide consistently competent representation of indigent criminal defendants at the appellate level." Final Report of the Task Force on Appellate Representation of Indigent Defendants, September 14, 1994 (the 1994 Report), at 5. This proposal would have required significant state funding and it never garnered the support it needed for implementation.

When this committee began its meetings in September 2008, there was a preliminary sense among the members that the work done in 1994 would be updated and that a similar recommendation for a statewide appellate defenders office would be likely. However, as we began to grapple with the realities and the practicalities (including the present economic situation), it soon became apparent that the formation of a new statewide office was not likely to find much more support than it did in 1994 because, based on estimates provided in the 1994 Report, the cost would likely be significantly greater than available resources would allow. We decided to gather data on how representation was provided to see if we could identify what the problems really were and practical approaches to solving them, preferably within the limitations of available resources, which in the current economic environment meant solutions that would require little or no additional funding from the state. In addition, Utah remains one of two states (the other being Pennsylvania) having a strictly county-based indigent defense system with no statewide oversight. We also concluded that the viability of any proposal for useful change would depend on recognizing continued county autonomy. Counties view autonomy in this regard as not so much tied to local control per se, but more to control of funding. They have expressed concern that centralization of indigent defense would likely turn into a state-level mandate that they would ultimately be required to fund locally at much higher levels than now required and with presently diminishing sources of revenue. With those very practical considerations in mind, this report takes a notably less academic approach than it might have, with the hope that practical recommendations will lead to real, rather than hypothetical, improvements in the system.[2]

---

2. The 1994 Report's recommendation of a state office to handle indigent appellate defense noted a definite nationwide trend toward centralization of this responsibility at the state level. That trend clearly continued after 1994, although some states that

Under Utah's Indigent Defense Act (the IDA), Utah's counties have the responsibility to provide indigent defendants charged with more significant crimes with competent representation at trial and for the first appeal of right. Utah Code Ann. § 77-32-301. The committee members recognized from the beginning that the counties were the key to both identifying and resolving any representation problems. We approached the Utah Association of Counties (UAC) early on in the process as a means of gaining needed information and discovered that the counties were already concerned about the challenges of indigent representation and ready to explore ways to better fulfill their responsibilities under the IDA. We have moved forward from that day to this with the full cooperation and involvement of UAC and its members, as well as the newly formed UCDAA, an organization of the county and district attorneys from all of Utah's twenty-nine counties. Both county organizations have been working in parallel and together with the Committee toward the shared end of improving appellate representation. The Committee's work has been the subject of presentations and discussion at UAC and UCDAA meetings from time to time as a means of gaining and disseminating information. As a result, we believe that our recommendations will be more acceptable and effective because they have been developed with input and cooperation from the counties that will evaluate and implement them.

To put the Committee's final recommendations in context, it is helpful to have some understanding of the process that led to them. Based on committee members' experiences and on some preliminary information gathered from the appellate courts about the number of criminal appeals filed in individual counties, it became apparent that there was a notable difference in filings between the more populated and the rural counties. We discussed possible reasons for this discrepancy and came to focus on the nature of the contracts used by the counties to retain trial and appellate counsel. For example, if a county hired the same attorney to represent a defendant at trial and on appeal, ineffective representation issues might not be raised or even perceived. If such a unitary contract provided a fixed fee covering both trial and appeal, there could be a real disincentive for the attorney to file an appeal and thus dilute the real value of the fee by increasing contract workload. Questions arose as to whether contract counsel were appropriately

---

established state offices appear to have found them not to be an unalloyed benefit. When the Committee began this process there was an initial sense that our recommendation would probably be to form a state appellate defense office as recommended in 1994, but the growing effects of the recession required us to look at a different approach. And in doing so, we have gained respect for the counties' willingness and potential ability to provide appropriate representation. Perhaps unexpectedly, we are no longer convinced that a state-wide office is the only possible way to do this, despite its apparent advantages.

assessing whether appeals ought to be filed in particular cases and, in that regard, as to what standards were being used to retain appellate counsel and to evaluate performance once hired or, indeed whether any standards were in place. Concerns were raised, as well, about the quality of representation on appeal, e.g., whether briefing was competently done and whether appeals filed were actually pursued to a substantive conclusion by contract counsel, rather than being dismissed or abandoned.

Committee members agreed that there was insufficient information then available from which reliable conclusions could be drawn about whether there actually were problems with the existing indigent appellate representation system and, if so, the nature of those problems. Accordingly, as a threshold task, the Committee set up a process to gather and analyze the data needed to determine the kind and scope of problems in the present system. To this end, three subcommittees were established to look at three areas of basic concern: the nature of the contracts used by the counties to hire appellate lawyers; the numbers of criminal appeals being filed from each county; and the quality of appellate briefing by contract attorneys, with a focus on the Court of Appeals. A summary of the significant findings of each subcommittee is set out below.

FINDINGS

1. Contracts Subcommittee

As mentioned above, under Utah law, individual counties are tasked with the responsibility to provide constitutionally adequate trial and appellate counsel to indigent defendants. Aside from some rather broad statutory standards, counties have been left to create a system to accomplish this largely on their own, either by creating public defender offices or by contracting with individual attorneys or public defender associations. *See* Utah Code Ann. § 77-32-301. Only Salt Lake and Utah Counties have formal public defender offices. The Salt Lake Legal Defenders Association (SLLDA)[3] serves Salt Lake County while the Utah County Public Defender Office handles Utah County cases. All other counties provide defender services through contract attorneys. Weber County had historically contracted for services through a public defender association composed of a number of attorneys who were not necessarily from a single law office, but that approach

---

3. It is apparent that SLLDA is nationally recognized as one of the most successful and effective public defender organizations in the country. As such, SLLDA may be of great value in the ongoing efforts to improve the effectiveness of indigent defense efforts in the state, both as a resource and as an example, even though disparate circumstances mean that it is unlikely to simply be replicated on a broader scale.

changed in 2009. At present, Weber County has contracted with one supervising attorney to coordinate public defense efforts handled by individual attorneys who contract separately with the county. Davis County employs a similar system. To better understand the details of how the counties were actually providing representation, this subcommittee, chaired by Utah Association of Criminal Defense Lawyers (UACDL) Executive Director Kent Hart, undertook the primary task of gathering and analyzing examples of contracts utilized by virtually every county in Utah to engage the services of attorneys to represent indigent defendants on appeal. The process of obtaining exemplar contracts from across the state was facilitated by the invaluable assistance of UAC and UCDAA.

Once the contracts were gathered, the Commission on Criminal and Juvenile Justice provided the services of Analyst Christine Mitchell to create a detailed breakdown of each contract in a number of categories. Specifically, her report set out the compensation paid for defender services, the courts in which services were to be rendered (district, juvenile, justice, appellate), how conflicts are handled, attorney qualifications, whether appeals are included or separately handled, payment of investigative and other expenses, responsibility for office overhead, reports required, and caseload provisions. The data compilation, Indigent Defense Contracts Summary, December 2, 2009, is part of the Contract Subcommittee Report, attached to this report as Appendix A.

The contract analysis showed that counties were providing indigent defense at trial and appellate levels by varying means. Most rural counties hired a single criminal defense lawyer to represent indigent criminal defendants for a flat annual fee, based on the lowest bid if more than one attorney was seeking the appointment. Many of those contracts covered defense at all court levels, including justice, juvenile, district, and appellate. Others distributed the engagements among more than one attorney, with each handling one court level, or, in the case of appeals, provided for some additional compensation, but often at a flat fee per appeal or with a payment cap. Most contracts addressed conflicts of interest sparingly or not at all. Among those that did, some contracts required the attorney to pay for conflict counsel out of the contract sum, while others recognized the need for the county to enter into separate contracts and provide separate funding in the case of conflicts. Most contracts did not address caseload or workload issues, essentially presuming that the contract counsel had sufficient time and resources to represent all defendants adequately. Directly pertinent to this Committee's charge, many defender contracts also combined trial and appellate responsibilities with no additional compensation for appeals.

The subcommittee noted a number of concerns with the approaches being used by most counties that may affect the quality of representation both at trial and on appeal. First, most contracts are with attorneys who are not working full time on indigent defense

work, but for whom the contract is part of a broader legal practice with private clients. Combined with a flat fee and a lack of any limitation on caseload within the contract or workload outside of it, such contracts may create a natural incentive for attorneys to devote less time to indigent defense cases so as to have more time to spend on the work of private clients whose work may be proportionally more remunerative. Where investigative and expert expenses must be paid from the flat fee and are not separately funded, there is a disincentive to include such services as part of the representation, even where they might reasonably be needed, because of the added financial burden on the contract attorney. In addition, where conflict attorneys must be paid by the contract defender from fixed contract funds, the contract attorneys may have diminished sensitivity to conflicts of interest and may be discouraged from disqualifying themselves where appropriate.

Finally, financial and issue-related disincentives are present where the defense contract includes both trial work and appeals. The financial disincentive is apparent where appeals must be funded out of a single flat fee applicable to both trial and appellate work. But there is also the potential that appropriate appeals may not be filed because so many criminal appeals must arise from counsel errors at trial and trial counsel may not be appropriately attuned to his or her own mistakes or willing to disclose them in the context of an ineffective assistance of counsel claim on appeal. In any event, under Utah case law, only new counsel may claim on appeal that trial counsel was ineffective.

In summary, the subcommittee found a variety of contract approaches, most of them involving flat-fee, low-bidder contracts that did not take into account the number or complexity of cases, with a number of them combining responsibility for trial and appellate work in one contract, often involving a single attorney. The subcommittee considered the current contracting approaches to be actually and potentially problematic and recommended changes, principally the development of model contracts that avoided the pitfalls of those currently in use and incorporated best practices culled from local and national sources. While this information was being compiled and analyzed, UCDAA, with the encouragement of UAC and its member counties, who had been advised from time to time of the information developed from the subcommittee's ongoing work, was in the process of developing model defender contracts for trial and appellate levels for counties to use as soon as their next contracting cycle. As further discussed below, a copy of the draft appellate model contract is attached to this Report as Appendix B.

2. **Appeal Tracking Subcommittee**

The Appeals Tracking Subcommittee was asked to provide an overview of how criminal appeals were being filed and ultimately disposed of in Utah's appellate courts, with primary focus on the Court of Appeals, the forum for most criminal appeals under current Utah law and practice. The subcommittee collected data on the appeals filed from each county for the years 2003 to 2008 and compiled the results in a chart listing felony filings, felony guilt determinations, and appeals, with their dispositions. The chart and a summary of the data is attached to this Report as Appendix C.

The subcommittee noted some significant limitations on the scope of the data. Only numerical information was available, and no substantive evaluation of appeals could be extrapolated from the data. Accordingly, it could not be ascertained whether issues were properly identified, preserved, or raised on appeal, or whether appeals that reasonably should have been filed were not pursued. In addition, it could not be discerned from the numbers how many guilt determinations were the result of trials rather than pleas. Nevertheless, some information can be gleaned from the collected information. For instance, the statewide average for appeals from felony dispositions is 1.4%, with San Juan and Grand Counties having the highest appeal rates at 4.9% and 3.2%, respectively. It is no surprise that the highest raw numbers of appeals were filed from the four most populous counties, with Salt Lake County having the highest number at 267. Fourteen of the rural counties had less than ten appeals during the period and four had none, with three of those being among the least populated counties.

The subcommittee concluded that perhaps the most useful data is drawn from the categories of cases on appeal that resulted in dismissal by default, voluntary dismissal, summary dismissal, or summary disposition. In the case of a default, it can be assumed that the appellant failed to complete or comply with some procedural or substantive requirement to perfect the appeal once filed (e.g., failure to file a docketing statement or brief). The reasons for the other sorts of premature or summary disposition are more difficult to discern from simple numbers but nonetheless suggest some problem in the prosecution of the appeal that raises concerns. The state average for defaults on appeal is over 22%, with the highest rate, 50%, coming from a county that only had two appeals during the period, whereas Salt Lake County, with the highest number of appeals, had a relatively low default rate of 12%. Two of the four most populous counties had default rates well above the average, while San Juan County, with the highest percentage of cases appealed (at 4.9%), also had the lowest default rate (at 9%). Eleven rural counties were above the average in defaults, but nine fell below the state average. It is perhaps notable that there appears to be no trend in the default rates that correlates to the relative population of Utah's counties. It is important to recognize that this default rate includes

cases with appointed and retained counsel, as well as self-represented defendants. It is also worth noting that over the past few years the default rate for cases with appointed counsel has been relatively insignificant, so the default rate, while a concern, does not amount to an indictment of appointed counsel. Nevertheless, in response to this information, the appellate courts have already adopted a policy to eliminate defaults in criminal cases.

3. **Briefing Quality Subcommittee**

This subcommittee reviewed the briefs filed by appointed counsel in a significant number of cases to get a sense of the quality of representation of indigent defendants in this important aspect of appellate practice. The four subcommittee members reviewed briefs from seventy-six appeals, filed between 2003 and 2008, in all of which the Court of Appeals issued decisions after full briefing. The review included cases from every county that had a qualifying appeal during the time period, a total of twenty-one counties.[4] Although there is necessarily an element of subjectivity in an assessment of this kind, a score sheet was developed, with point values assigned to various briefing criteria, addressing substantive qualities as well as compliance with appellate rules. The analysis was confined to the quality of briefing, as broader considerations of effective representation on appeal, such as whether issues for appeal were appropriately identified, were beyond the scope of the task. A score of 70 out of 100 was considered to be passing; a score below 70 indicated significant deficits. The subcommittee members strove for consistency in grading and believe they generally achieved that goal. A copy of the subcommittee's report and data is attached to this Report as Appendix D.

Overall, the subcommittee found significant disparity in briefing quality among the counties. Of the twenty-one counties whose briefs were evaluated, scores on individual briefs ranged from 28 to 100. Fifteen counties had average briefing scores of over 70, while the other six had average scores that ranged from 38 to 61. Generally, the counties with the highest populations did better than those with the lowest. Salt Lake County, for example, the state's most populous county and one of two counties with a formal public defender office, had the highest average score at 95, with no brief lower than 91. But that pattern was not uniform; for example, four counties with populations under 15,000–San Juan, Grand, Duchesne, and Kane–had average scores of 75 or better, while relatively populous Cache County had an average briefing score of 58. It may be significant that

---

4. Eight counties had no appeals eligible for review. Two did not have appeals filed during the time frame and the other six had no appeals that met the basic criteria, i.e., appointed counsel and full briefing.

the appeals from both San Juan and Grand Counties were handled by the same few attorneys. This was also true in many of the counties with the lowest scores.

The subcommittee inferred from the data that the quality of appellate briefing and (to the extent that such may reflect the quality of appellate representation as a whole) indigent representation on appeal depends less on relative county population numbers than on access to capable counsel. The subcommittee report concluded,

> This data suggests that appellate representation could be improved by a statewide system that would increase all counties' access to a pool of qualified appellate attorneys. This could be accomplished by a statewide appellate defender office [as recommended in the 1994 Report] or a statewide hiring pool of pre-qualified appellate attorneys.

Briefing Subcommittee Report, at 2. It seems to follow that appellate representation could be significantly improved by an approach that would increase all counties' access to qualified appellate attorneys from which counties could hire with increased confidence that representation of indigent defendants on appeal would meet acceptable standards.

RECOMMENDATIONS

Based on the information developed by the subcommittees and considerable ongoing analysis and discussion since its inception, the Committee has developed several recommendations which it presents for consideration by the Judicial Council. These recommendations recognize the central role of the counties in providing representation for indigent defendants and the present scarcity of resources available to finance significant changes in direction that might be effective but are unlikely to be adopted. As discussed above, these recommendations have been developed with the encouragement and cooperation of county organizations, such as UAC and UCDAA, who have kept their membership advised on an ongoing basis of the information developed by the Committee. The Committee believes that these recommendations provide a certain focused centralization of oversight, with its potential for improving quality and consistency of representation of indigent defendants, while maintaining the flexibility for each county to take into account its own particular circumstances. In this regard, the counties appear to be ready to accept and implement mechanisms to improve their ability to provide an appropriate quality of appellate representation to indigent defendants in accordance with their statutory and constitutional responsibilities. The two key components of the recommendations are a mechanism to ensure that appellate counsel representing indigent defendants are qualified and the uncoupling of appellate and trial representation.

It may be worth noting, as well, that the findings and recommendations of this Report have been endorsed unanimously by Committee members who represent the broad spectrum of those most involved in and affected by them, including most significantly county representatives, prosecutors, and defense counsel. This is particularly important because these recommendations can be successfully implemented only with the participation and good will of these critically important constituencies.

The Committee believes that its recommendations will not directly require significant funding. For example the proposed Rule 38B committee, discussed below, will be composed of volunteers and staffed by the Administrative Office of the Courts from current resources, much like the state Alternative Dispute Resolution Committee. Nevertheless, establishing a qualified attorney roster and requiring that attorneys representing indigent defendants on appeal be roster-qualified is likely, at least initially, to somewhat reduce the number of attorneys available for this kind of work and increase the cost of their services to some extent based on simple supply and demand considerations. It is also likely that improvements in quality of representation (at both trial and appellate levels) will increase the number of appeals because appeal issues are more likely to be identified and pursued. None of these outcomes is certain, of course, but some increase in costs may be a natural consequence of changes that have the desired result of improving the quality of representation overall.

Based on the information gathered and analysis conducted during the course of its work, the Committee makes the following recommendations, which we believe can be initiated without expending significant additional public resources and should lead to significant improvements in the quality of representation of indigent defendants on appeal:

1. **Model Contracts**. Counties should be encouraged to use model contracts at both trial and appellate levels that avoid the pitfalls identified by the Committee and incorporate best practices designed to produce an acceptable quality of representation. As discussed earlier, the UCDAA has been working on a model contract form for a number of months using some of the ideas and information developed by the Committee. A copy of the current version of the UCDAA model contract is attached to this Report as Appendix B. We understand the draft is still in the process of refinement, but a sufficiently advanced draft should be ready shortly for the use of the counties. The Committee's observations and recommendations regarding contract issues follow:

a. Separate Trial and Appellate Representation. Contracts for indigent representation should not include both trials and appeals; rather the appellate contract should be separate. It is important, as well, that the trial and the appellate contracts

not both be awarded to the same attorney. Both contracts could be awarded to a firm or group of attorneys so long as adequate safeguards are in place to ensure that the trial attorney is not also responsible for any appeal and that the decision whether to appeal is independently addressed.

b. Compensation Mechanisms to Avoid Disincentives. The approach to compensation should avoid disincentives to filing appeals. Perhaps the biggest problem to be avoided is the contract that sets a flat fee for representation without regard to case volume or complexity. In such arrangements it is too easy for subsequent circumstances to result in a work load that may become increasingly disproportionate to the set fee, leaving contract counsel with the difficult task of balancing proportionately diminishing resources with the obligation for competent representation. The obligation to strike this kind of balance ought not to be left solely on the shoulders of counsel or the quality of representation may too readily be compromised. Thus, while the Committee recognizes the tension between open-ended contracts and the counties' need for predictable budgets from year to year, that tension cannot always be resolved entirely in favor of predictability. In this regard, the Committee believes that a combination of inter-county pooling arrangements that spread risk (as further discussed below) and contract compensation mechanisms that provide some flexibility in terms of unforeseen increases in caseload numbers and complexity may provide appropriate representation without ignoring fiscal realities. For example, an indigent appeal contract could involve an initial flat fee, but with an agreement that appeals beyond a specified number be compensated separately. The mechanisms for accomplishing this sort of balance may be various, but the principle that compensation mechanisms should not be a disincentive to filing appropriate appeals or adequately pursuing them should be paramount. The UCDAA's draft model contract recognizes the principles discussed here in a comment to its "Consideration" provision; but that draft remains a work in process and the UCDAA intends to further address the issue in subsequent iterations of the document.

c. Trial Counsel Consultation Regarding Appeals. While trial and appellate representation should be separated, trial-level contracts should require counsel to consult with the defendant and to file a notice of appeal when the client directs. Criminal defendants have a state constitutional right to appeal that only they can waive. Trial counsel has a duty to explain the pros and cons of an appeal, but ultimately the defendant has the right to challenge a conviction. And, as detailed above, because trial counsel may not be the best judge of the merits of an appeal given counsel's closeness to the case, trial counsel should file a timely notice of appeal whenever the client so instructs. After the notice of appeal is filed, appellate counsel should discuss the merits of the appeal further with the defendant and advise the

defendant accordingly. At that point, appellate counsel may voluntarily withdraw if the client consents to dismissal of the appeal. Consultations by both trial and appellate counsel should increase the likelihood that appropriate appeals are pursued.

d. Conflict Counsel. Contracts at both trial and appellate levels should make adequate provision for conflict counsel in a way that does not penalize contract counsel for recognizing conflicts and taking appropriate steps to deal with them.[5]

2. **New Rule 38B-Indigent Appellate Counsel Committee**. The Commission recommends that the present Utah Rule of Appellate Procedure 38B, which deals with "Qualifications for appointed appellate counsel" be replaced by a new rule having the same subject matter and title, but with a significantly different approach:

a. The present rule requires that only attorneys proficient in appellate practice be appointed as appellate counsel for indigent defendants and leaves the burden of establishing such proficiency on counsel. The revised rule establishes a roster of qualified appellate attorneys and provides that "only an attorney on the roster" may represent indigent defendants before either the Utah Supreme Court or the Court of Appeals. The "determination of eligibility for the roster shall be made by the Indigent Appellate Counsel Committee" established in accordance with further provisions of the rule. [Proposed] Rule 38B(a), attached as Appendix E. This new Rule 38B committee would operate under the aegis of the Judicial Council.

b. Thus, in order to be eligible for county appellate defense contracts, attorneys would be required to be certified as qualified and listed on the roster of qualified counsel to be established and maintained by the Indigent Appellate Counsel Committee. The revised rule also gives the committee the authority to establish training standards and requires periodic renewal of roster eligibility. The proposal would thus provide a critical level of statewide oversight to ensure the competence of appointed appellate attorneys, while leaving to the counties the choice of whom to contract with from the roster of eligible, qualified counsel.

---

5. Although generally outside its appellate task, the Committee recognizes that contracts for trial counsel should generally include funding for investigative resources and expert witnesses that is separate from compensation for counsel. To the extent appellate Rule 23B continues in effect, however, the parties to appellate representation contracts also should consider the potential need for investigative (and possibly expert witness) resources in the event of remand to the trial court for determination of a claim for ineffective assistance of trial counsel. As a control over costs, such provisions could require trial judges to approve expenses based on documented need for additional funds.

c. The Indigent Appellate Counsel Committee would be chaired by the General Counsel of the Administrative Office of the Courts and be comprised of an attorney designated by the Utah Attorney General's Office, an active or retired trial judge, an active or retired appellate judge, a private civil attorney with appellate expertise, two county attorneys, and two criminal defense attorneys experienced in appellate practice.

d. The criteria for inclusion on the qualified attorney roster would include bar membership; approved training and experience in criminal law and the appellate process; adequate brief-writing ability, determined by committee review of submitted briefs based on established criteria; capacity to devote sufficient time and resources; "the ethics, diligence, competency, and general capability of the attorney"; and any other factor relevant to counsel's ability to provide effective representation.

e. An attorney's eligibility to remain on the roster would be redetermined every two years.

f. In order to remain eligible, an attorney would be required to complete at least twelve hours of CLE approved by the Indigent Appellate Counsel Committee within each two-year period. It is anticipated that the Committee would identify CLE opportunities and that the UACDL would sponsor a yearly CLE event that would meet the Committee's approval.

3. **Eliminate Defaults in Criminal Appeals**. The Committee has concluded that Utah appellate courts should consider adopting a policy aimed at eliminating defaults in criminal appeals. This recommendation has already been addressed by the Utah appellate courts, which have put into place mechanisms to identify appeals that are at risk of default and address problems before defaults can occur.

4. **Repeal of Rule 23B**. A subcommittee looked at the issues surrounding Appellate Rule of Procedure 23B. Based on the subcommittee's report, it is the Committee's recommendation, reflecting a consensus between both prosecution and defense interests, that Rule 23B of the Rules of Appellate Procedure be repealed. The idea behind the rule was to give qualifying criminal defendants the opportunity for a hearing in conjunction with the first appeal of right with the assistance of appointed counsel, which would largely be unavailable were the process deferred to the post conviction stage. Experience suggests that the costs involved in rule 23B proceedings, however, outweigh their advantages. Since 1994, 199 rule 23B motions have been filed and 40 granted, with a very small fraction of those resulting in relief for the appellant. Adequate rule 23B investigations and hearings are costly and require skills and resources that appellate

attorneys often lack; and, as a consequence, competent appellate counsel may be discouraged from bidding on appellate public defender contracts. Utah is one of only a very few states with a such a remand rule, and such rules have "failed to curb the problem of trial attorney ineffectiveness." Eve Brensike Primus, "Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims," 92 Cornell L. Rev. 679 (2007). A copy of a summary report by the Rule 23B Subcommittee is attached to this Report as Appendix F. The Contract Subcommittee has also separately recommended repeal of rule 23B, and a discussion of the rationale for that recommendation is contained in the Contract Subcommittee Report at page 7, Appendix A.

The Committee agrees with the subcommittee recommendations with regard to rule 23B and believes that repeal of this rule will help to keep down appellate defense costs for indigent defendants without reducing the effectiveness of criminal appeals. We understand that the Supreme Court's Committee on the Rules of Appellate Procedure has repeal of this rule under consideration.

5. **County Implementation Options**. The Committee considered the need to identify options that the counties could use to hire appellate counsel that take into consideration their varying demographics and economic constraints. Several possible approaches are presented in a document entitled Mechanics and Implementation Options, attached to this Report as Appendix G. The counties are likely in the best position to decide whether it is in their interest to proceed individually to hire counsel from the proposed appellate counsel roster or to pool resources, in ways that are available to them under current law, to hire appellate counsel. They are also capable of identifying other options that might better suit their respective circumstances than those set out in the subcommittee report. Nevertheless, the Committee thought it could be useful to start the discussion with some suggestions. In particular, because the appellate courts are located centrally in Salt Lake City, there is less need for counsel to be locally situated and pooling resources to hire approved counsel may be more easily accomplished than it might be for the trial level. Because of the significant advantages in terms of predictability of cost and quality of representation that resource pooling offers, the Committee strongly recommends that counties consider this approach, particularly the sort of pooling arrangement that would bring together counties with sufficient aggregate appeal numbers to hire a single attorney on a full time basis. Some of the possibilities explored are:

a. Single-County Contracts. Individual counties could continue to enter into separate contracts with attorneys for appellate representation of indigent defendants. Based on other changes recommended in this Report, however, there should be overall improvements in the quality of representation, but the Committee still recommends pooling arrangements because of their significant advantages.

b. Regional Pools. Counties could organize by judicial district or geographical region, entering into an agreement to share the qualified attorney resources available in a more populous county with smaller counties with fewer attorney resources.[6] Such pooling arrangements could involve smaller counties agreeing to contribute a certain sum annually, say $3,000 to $5,000 each, in order to cover the costs of the few appeals that might be expected from time to time in a way that makes budgeting more predictable. Provision would have to be made, as well, for the contingency where there were a spate of appeals going beyond the pooled contribution level, but this approach would have the advantage of putting together a plan for the unusual, rather than simply reacting to it. As mentioned before, hiring a qualified attorney to work full-time on such appeals can provide many advantages in terms of funding predictability and quality control. Such pools could operate on the kind of self-insurance model adopted to successfully operate the Capital Defense Fund over a number of years. Over time, this sort of self-insurance pool could even out the effects of variations in the numbers of appeals from year to year, because increases in appeals in any particular year could be offset by decreases in other years.

c. Guardian Ad Litem Model. The counties could agree to organize and fund a central office in Salt Lake County with regional satellite offices. This approach would provide for local control at regional offices, with the central office bringing a level of consistency and oversight to filings in the appellate courts, as well as attorney training and performance standards. Start-up costs could be an issue, however.

d. Centralized Appellate Office. Counties could pool resources to establish a single appellate office in Salt Lake County. While this may appear to be a replication of the statewide appellate office recommended by the 1994 Report, the significant difference is that the organizational design and funding of the central office would be under county rather than state control and would not be mandated by statute. The subcommittee identified two possible approaches to such a central operation:

---

6. The IDA allows counties within judicial districts to pool their resources to fund public defense offices. Utah Code Ann. §77-32-306(3) ("A county legal defender's office may, through the county legislative body, contract with other counties and municipalities within a judicial district to provide the legal services as prescribed."). The UAC and UCDAA believe that there is no legal impediment, however, to the counties' ability to enter into pooling agreements that do not strictly involve "legal defender's offices" or that go beyond the boundaries of judicial districts. This is an issue that the counties can further address, however, as the need may arise.

i. Office-Sharing Arrangement with SLLDA. The Salt Lake Legal Defenders Association provides representation for Salt Lake County's indigent defendants at trial and on appeal. In addition, SLLDA currently provides separate representation to Salt Lake City on a separate budget. SLLDA is willing to provide, through a similar contract arrangement, office-sharing and oversight for a small group of full-time appellate attorneys and support staff who would represent other counties on appeals. The advantage to the counties would be the benefit of a central appellate office at less cost than a more formal, stand-alone statewide appellate office would likely require, as well as the aid and mentoring of seasoned appellate attorneys from SLLDA in "next-door" proximity. This sort of arrangement could provide the assurance of competent representation with relatively few complications and relatively low start-up costs. Costs for this approach are likely to be a minimum of about $350,000 per year to cover the three or four qualified appellate counsel needed to handle the fifty-five to one hundred appeals likely to be filed each year. The subcommittee report gives some suggestions for handling predictable disparities in appeal numbers depending on county size. The cost would, however, likely be significantly less than what would be required to maintain a statewide, fully independent appellate defense office on the model recommended by the 1994 Report.

ii. County-Funded Statewide Appellate Office. As mentioned earlier, a statewide office can offer the same kind of economies of scale, oversight, training, quality control, and funding predictability anticipated by the 1994 Report's recommendation, while leaving organization and funding mechanisms within county control and without the potential inflexibility of statutory mandates. While similar in effect to the statewide appellate office recommended by the 1994 Report, this approach would avoid the risk of unfunded mandates and leave organizational and financial control with the entities that have ultimate responsibility to provide indigent representation.

CONCLUSION

The findings and recommendations of this Report have been endorsed unanimously by Committee members who represent the broad spectrum of those most involved in and affected by them, including, perhaps most significantly, representatives of the counties themselves, as well as prosecutors and defense counsel. This consensus is particularly important because these recommendations can be successfully implemented only with the participation and good will of these critically important constituencies. We would be happy to respond to any questions or concerns.

A

CONTRACT SUBCOMMITTEE REPORT

In June of 2008, Utah Supreme Court Chief Justice Christine Durham, at the direction of the Utah Judicial Council, formed a Study Committee ("the Committee") to research indigent criminal defense services on appeal in each of Utah's 29 counties. Then third District Judge Stephen Roth has chaired the Committee and Paul Boyden, Executive Director of the Statewide Association of Prosecutors has served as its vice-chair. In 2010, Judge Roth was nominated and confirmed as a member of the Utah Court of Appeals and remained chair of the Committee. Committee members included elected county officials, current and former appellate court judges, prosecutors, defense attorneys, court officials, and legislative leaders.

Before Beginning Its Deliberations, The Committee Resolves to Avoid Any Assumptions That Problems Exist and Then, Should Any Problems Be Found, to Partner With Counties to Address Those Problems.

As the Committee began deliberations, all participants agreed that before proceeding further the Committee should confirm that problems actually existed among the counties in how they delivered representation to indigent criminal defendants on appeal. Although the Judicial Council apparently believed that some systems were flawed, the Committee concluded that data was needed to actually determine what, if any, problems were occurring.

Similarly, Committee members immediately recognized that even if serious problems existed, little or no state funding was likely available to address deficient representation on appeal given the sagging economy. Likewise, because county governments were experiencing similar budget woes, the counties would certainly oppose any unfunded mandates that the Committee might propose. As a result of these realizations, the Committee concluded that any proposed solutions must be creative and arrived at in cooperation with the counties themselves. Rather than identifying problems and solutions without county input, the Committee determined to make the counties partners in its fact-finding and problem-solving efforts.

As one of its first actions, the Committee enlisted the expertise of the Utah Association of Counties ("UAC") to ensure that the entire Committee understood counties' needs and concerns. Likewise, at the suggestion of several Committee members, Summit County Attorney David Brickey and Salt Lake County Assistant District Attorney Kelly Wright were enlisted to serve as liaisons with the counties and prosecutors. Both of these prosecutors had been instrumental in forming the newly-created Utah County and District Attorneys Association ("UCDAA"). UCDAA consists of county attorneys from each of the 29 counties across the state who represent both urban and rural counties' interests.

Also early on, the Committee recognized that to determine the quality of appellate representation in criminal cases, it must learn how trial attorneys were performing.

Under appellate practice rules, legal issues must be raised first in the trial court before an appellate court will review those issues on their merits. For example, possibly illegal searches must be raised in the trial court by motions to suppress. Motions in limine must be filed prior to trial to exclude prejudicial or inadmissible evidence. And, objections must be raised on the record in the trial court before they can be fully argued on appeal. Although appellate courts can review plain legal errors that are not raised in the trial court, plain error review is a high hurdle to overcome and is often fatal to legal issues on appeal. Accordingly, the Committee sought to determine whether trial attorneys were preserving issues for appeal and how commonly appellate courts were invoking and finding plain errors.

The Committee Forms the Contracts Subcommittee to Assess How Counties Fund and Provide Indigent Defense on Appeal.

Based on this understanding of appellate rules, the Committee decided to research how trial attorneys' performance and funding affected the adequacy of representation on appeal. Because adequate resources is a threshold question to determining whether trial attorneys are able to provide adequate representation, the Committee formed a subcommittee to survey the various defense delivery systems throughout the state. As a start, this subcommittee, dubbed the "Contracts Subcommittee," enlisted UAC's and UCDAA's help in collecting copies of all indigent defense contracts that the counties had entered into with criminal defense lawyers from around the state. The contracts provided the Contracts Subcommittee a picture of how indigent defense services were being delivered and whether trial attorneys had adequate funding to provide quality representation.

To assist in analyzing the adequacy of indigent defense funding, the Committee approached the Utah Commission on Criminal and Juvenile Justice ("CCJJ") for its expertise in meaningfully presenting data. CCJJ offered the services of Analyst Christine Mitchell. At Ms. Mitchell's suggestion, the subcommittee first gathered all of the county defense contracts and then she categorized and compiled the data. Should any questions remain once the data was compiled, the Contracts Subcommittee would send out a survey to the counties for additional information.

Although Counties Employ Varying Types of Appellate Services, The Prevailing Use of Flat Fee Contracts Poses Significant Financial and Ethical Hurdles to Producing Quality Representation on Appeal.

The contracts revealed that counties were employing varying types of delivery systems for indigent representation. For the most part, rural counties (counties of the 3rd through 6th classes) entered into agreements with a single criminal defense lawyer to represent all indigent criminal defendants for a fixed annual fee. The fixed fee amounts generally correlated to county population but were often disparate and unrelated to population. Moreover, the contracts often did not discuss attorney caseloads, the relative complexity of cases, or the resulting workload on attorneys. Instead, they presumed

that attorneys had adequate time and resources to represent all indigent defendants adequately. Specifically, these contracts required the defender to represent indigent persons in local justice courts, state district courts, juvenile courts, and on appeal.

The Contracts Subcommittee noted that established national standards discouraged the use of fixed fee contracts that do not account for caseload maximums, case complexity, or attorney workload. Independent, prosecution, and defense sponsored groups have all noted the perils of flat fee contracts including the American Bar Association, the United States Department of Justice, the National Association of Criminal Defense Lawyers, and the National Legal Aid and Defender Association. These groups have discouraged the use of that fixed fee contracts that fail to account for attorney caseloads and workloads because they create disincentives for attorneys to devote adequate time to indigent defense contracts. Specifically, these contracts pay the same amount regardless of how much time and effort a defense attorney devotes to public defense cases. Thus, these types of fixed fee contracts create incentives to spend less time on each case and even penalize attorneys financially for devoting needed time and resources to any one case. This dilemma is especially acute when indigent defense contracts allow attorneys to solicit legal work from paying clients in addition to providing contracted indigent defense services. When contracts fail to limit workloads or to include mechanisms to ensure that contracting attorneys devote adequate time and resources to indigent defense cases, these attorneys may be tempted to devote only minimal efforts to indigent clients while inviting additional legal work from paying clients.

Other problems plagued many of the contracts, including the lack of effective mechanisms for dealing with conflicts of interest. Although some rural counties recognized that conflicts of interest required a contract with a second trial attorney, other counties required a lone contract defender to pay for conflict counsel out of the annual fixed fee given to the contract defender. Contract Subcommittee members agreed that such a contract provision may financially discourage attorneys from disqualifying themselves based on potential conflicts of interest.

Because Combining Trial and Appellate Services in a Single Contract Limits Counties' Ability to Provide Quality Representation on Appeal, the Contracts Subcommittee Drafts Separate Model Contracts.

The Contracts Subcommittee members also had concerns that some of the contracts combined trial and appellate responsibilities and failed to address other expenses commonly incurred in criminal cases. First of all, some contracts provide no extra compensation for pursuing appeals. Instead, they provide a single fixed fee for all work performed at trial and on appeal regardless of how many cases an attorney handles. Combining trials and appeals under a fixed fee contract that does not address caseload and workload limits may create a financial disincentive for attorneys to appeal convictions.

Second, the members agreed that trial court work and appellate practice differ

considerably in type and in the skills required. Trial attorneys perform most of their advocacy in the court room before judges and jurors and need not concern themselves with appellate doctrines that limit the nature and scope of arguments on appeal. In contrast, appellate attorneys primarily research lengthy written records and write complex appellate briefs. Although appellate attorneys also appear in court for oral argument, they must be prepared to persuade judges who are constrained by technical standards of review that require them to focus on whether appropriate processes were followed and the law properly applied, rather than on the actual merits of a case. In fact, appellate practice is a specialty in the law that most trial attorneys lack. Thus, trial and appellate attorneys require different skills and expertise.

Third, the contracts further revealed that fixed fee contracts usually do not provide for investigative and expert expenses. Under such contracts, if an attorney wants to investigate the facts of a case, test evidence, or evaluate the client's mental faculties, the attorney must pay for those costs out of the attorney's own pocket. Thus, fixed fee contracts that do not provide for caseload and workload limits place a financial burden on attorneys whenever substantial investigation is needed.

After reviewing the contracts and the data compiled from them, the Contracts Subcommittee presented its findings to the Committee as a whole. The Committee concluded that the contracts provided an adequate picture of how criminal indigent defense services were being delivered in Utah and that no follow-up surveys were needed with the counties. The Committee also agreed that the financial disincentives implicit in simple fixed fee contracts created significant ethical and practical problems that were interfering with defense attorneys' performance both at trial and on appeal.

At Kelly Wright's suggestion, the Committee authorized Mr. Wright to draft model trial and appellate contracts for counties to implement before the 2011 calendar year. He consulted with Contract Subcommittee members, gathered model contracts from national groups, and inquired with county officials about their unique needs. In the summer of 2010, Mr. Wright presented separate trial and appellate model contracts to these interested parties who all approved the model contracts. These models define best practices nationally to avoid the problems inherent in fixed fee agreements, while giving counties the flexibility to adapt the model contracts to their own needs. For example, counties may choose to contract with a single appellate attorney, enter into interlocal agreements with other counties (perhaps when a county's caseload is low), or agree with public defender agencies in larger counties that employ appellate attorney experts.

Mr. Wright and David Brickey have shared the model contracts with UCDAA and with county officials across the state. UAC counsel and Contracts Subcommittee member Adam Trupp also urged counties to implement the model contracts for the 2011 calendar year. Several counties have accepted this advice and have either adopted the model agreements or have indicated an intention to adopt them in upcoming negotiations for indigent defense services. This collaborative effort confirms the

Committee's initial hope that counties can resolve their own problems when shown what problems actually exist and then given viable options to solve the problems on their own. Counties' self-motivated efforts to improve their own indigent defense delivery systems has already been a great success for the Committee.

Requiring Attorneys to be Certified as Qualified as a Prerequisite to Entering Into Appellate Defense Contracts Prevents Many of the Problems that Arise When Trial Attorneys Handle Appeals.

In addition to the model contract process, Contract Subcommittee members concluded that another key component to improving how counties provide indigent representation on appeal was to ensure appellate counsel is qualified. Because appellate practice is a specialty that requires expertise, counties should seek to contract with only qualified appellate counsel for appellate contracts. Consequently, the subcommittee members agreed to support creating a court rule that would establish a statewide Certification Board to develop minimum qualifications and standards for appellate attorneys. Only those attorneys who were certified by the Board as qualified would be eligible to enter into defense contracts with counties. This certification process would ensure that only experienced and knowledgeable appellate attorneys handled criminal appeals in indigent cases.

Certifying qualified appellate attorneys resolves many problems that other subcommittees have identified with counties' defense delivery contract systems. Most prominently, the Briefing Subcommittee observed that some of the smaller counties produced excellent appellate briefs that compared favorably with briefing from attorneys in the Salt Lake Legal Defender Association's ("LDA") Appellate Division. As explained more fully in that subcommittee's own report, the Briefing Subcommittee reviewed appellate briefs from over 20 counties and scored those briefs for quality. LDA attorneys consistently scored the highest in overall quality and performance. Thus, LDA sets the benchmark for indigent defense appellate briefing in the state. But, comparably high briefing scores in smaller counties demonstrate that something other than county size or overall resources affected the quality of appellate practice.

Upon further investigation, the Briefing Subcommittee detected that defense attorneys with appellate experience and who had demonstrated an interest and proficiency in appellate practice distinguished one county from another. In counties who employed primarily trial attorneys to handle appeals, the briefing scores were much lower than in counties that employed experienced appellate lawyers. This demarcation confirmed the Contracts Subcommittee's conclusion that separate trial and appellate contracts were needed.

The Appeals Tracking Subcommittee's findings further substantiated the need to limit indigent criminal appeals to qualified appellate attorneys. That subcommittee gathered statistics on the number of appeals that were dismissed for procedural defaults such as the failures to produce transcripts, file the required docketing statement, respond to

motions for summary dismissal, etc. These failures to perfect an appeal generally indicate a lack of familiarity with appellate court rules, poor expertise on appeal, lack of concern with appellate court rules, and failure to communicate with appellate courts.

These problems were far less common when appellate counsel was an experienced appellate attorney. Attorneys who have appellate experience or who primarily focus on appellate practice seldom allow appeals to be dismissed based on procedural defaults or for failing to pursue an appeal. Although criminal defendants have a right to appeal a conviction regardless of the merits of the case and ultimately decide whether to appeal, qualified appellate attorneys are better able to advise defendants about the pros and cons of an appeal. And, once the defendant decides to appeal, qualified appellate counsel are able to identify which issues to appeal and which have little or no chance of success on appeal. In sum, experienced appellate attorneys not only provide defendants better quality representation, they increase appellate court efficiency by ferreting out bad appeals and appeals issues for appellate courts.

The Briefing and Appeals Tracking Subcommittees' findings illustrate that securing qualified, experienced counsel resolves many of the problems associated with trial attorneys handling appeals. Faced with these findings, the Committee created a subcommittee to draft proposed Rule of Appellate Procedure 38B that would require defense lawyers to be certified as qualified before being eligible to contract with counties for indigent appeals. The Rule would also empower the Certification Board to establish performance and continuing legal education standards for appellate attorneys to remain eligible for contracts. With only qualified attorneys handling indigent criminal appeals, many unnecessary appeals will be avoided, thus leaving only the more deserving and well-briefed cases for appellate review.

Conclusions and Recommendations

The implementation of model contracts and the creation of a Certification Board will remedy many of the problems that currently plague indigent criminal defense on appeal. By enlisting counties in the assessment and recommendation process, the Committee has ensured that the actual decision-makers for indigent criminal defense understand their legal obligations, the extent of the problem, and the need for reform. The Contracts Subcommittee has earnestly sought the counties' expertise and input because one solution may not fit every county's needs. By proposing different solutions but requiring that only qualified appellate attorneys handle appeals, the Contracts Subcommittee is confident that counties will continue to use the model contracts and that additional substantial progress in improving indigent defense on appeal will continue. Additional dialogue will also ensure that this progress is realized. County executives across the state have been receptive to the ideas that have been proposed by the Contacts Subcommittee as well as the larger committee. The UCDAA has expressed its commitment to continuing to explore the problems identified by the Committee and to assisting to implement solutions to the most pressing problems. The Contracts Subcommittee members recognize that even as this phase of their work

wraps up, their participation in the defense services improvement process needs to continue.

In summary, the Contracts Subcommittee recommends the following measures:

1. A new Rule of Appellate Procedure should replace current Rule 38B to create a state oversight board to certify appellate defense attorneys as qualified to represent indigent defendants on appeal. The board should be given power to restrict appellate criminal defense contracts to only those attorneys who the board certifies as qualified to represent indigent criminal defendants on appeal. The board should also have authority to establish performance standards, specify training requirements, and renew certifications periodically to ensure that attorneys maintain their qualifications and performance requirements.

2. The Committee should recommend that counties employ separate contracts for indigent criminal trial and appellate services. Appeals responsibilities could be handled through separate county agreements or through interlocal agreements between counties but should be structured in a way that recognizes the distinct differences in the work involved. Interlocal agreements and similar types of pooling resources are preferred deliver systems because they allow qualified attorneys to specialize in appellate work and to form groups of expert appellate practice attorneys. Combining resources into one regional office would reduce expenses, pool expertise, streamline workloads, and encourage attorneys to share information.

3. Counties should be encouraged to adopt model contracts for appellate work and those contracts should not discourage zealous representation of clients' interests. Counties should, therefore, be encouraged to avoid the use of fixed fee contracts that fail to address caseload limits, the complexity of individual cases, or attorney workloads. Instead, counties should be encouraged to use compensation structures that encourage effective representation and adequate investigative resources. The use of a single payment per case on appeal as opposed to a fixed fee contract for all cases regardless of workload may be an acceptable alternative if the payment adequately compensates qualified attorneys. Because complex cases with lengthy records or multiple issues may require significantly more resources than an average appeal, contracts should provide for additional compensation when needed.

4. The Utah Supreme Court should consider rescinding Rule 23B of the Rules of Appellate Procedure to support the process of appointing separate counsel for appeals. That rule allows an appellate attorney to seek a remand to pursue claims of ineffective assistance of trial counsel before the case proceeds to appeal. The rationale behind this rule is that ineffective assistance claims typically address evidence outside the existing case record. Therefore, when

appellate counsel identifies such claims, a remand is necessary to supplement the case record in the trial court and to allow the trial judge to rule on their merits. Once the record is supplemented and the judge rules on the claims, the case may then proceed to appeal where the appellate court can rule on the ineffective assistance claims as well as the other issues originally raised on appeal.

Although this procedure looked promising when conceived, the rule has proven to be unwieldy and difficult to implement in practice. Specifically, to establish ineffective assistance claims, appellate counsel needs resources to investigate the claims, interview witnesses, collect evidence, and contract with experts when needed. But, few appellate attorneys have those resources. More to the point, given the lack of separate funding for indigent appeals in most counties, no resources are available to appellate counsel to successfully use Rule 23B. As a result, the rule has proven to be ineffective.

The rule also may even create a trap for indigent defendants who tried but could not support relief under Rule 23B. Following a direct appeal from a conviction, criminal defendants may claim ineffective assistance of both trial and appellate counsel in a petition for post-conviction relief under Rule of Civil Procedure 65C and the Post-Conviction Remedies Act in Utah Code Annotated section 78B-9-101 (2010) et seq. But, petitioners may default post-conviction claims when specific claims have been raised and decided previously. As applied to Rule 23B, a post-conviction judge may treat a failed effort to raise ineffective assistance on direct appeal under that rule as grounds to default the claim. This ruling would apply even though the criminal defendant and appellate counsel lacked resources on appeal to investigate the claim. To avoid this trap, the Contracts Subcommittee recommends rescinding Rule 23B and to require ineffective assistance of trial counsel claims to be raised in post-conviction proceedings.

Indigent Defense Contracts Summary
December 2, 2009

Note: It appears that some contracts are still missing, some are out of date, and some are incomplete. The information included here is based on the contracts received.

County and Public Defender	Yearly Value	Courts	Conflicts	Who Decides Conflict Exists	Qualif.	Exclusions	Appeals	Office Cost	Defense Expenses	Other	Extra Compensation	Private Practice	Contract Signed By	Reports	Caseload Management
Beaver—1 contract															
Randall Allen	$50,000	Dist, Juv, Just	PD finds and pays for conflict counsel		Licensed		2 to Court of Appeals 3rd and following @ $1,000	PD			3rd and following appeal @ $1,000		Commiss.		
Box Elder															
Richards, Caine, Allen, & Pace	$166,429	Dist, Juv, Jus, Drug Court	PD finds and pays for conflict counsel	PD and Court	Licensed	Capital, municipal, juvenile not brought by state	Yes	PD	County when approved by court				Commiss.		
Cache—3 contracts															
David Perry 1st PD	$51,667	All crim.	Multiple contracts		In good standing		@ $50/hr.	PD	County when approved by court	Meet clients, appear at hearing, visit in jail, office in Cache County	$50/hr for appeals, trials more than 2 days, murder, involuntary commitment	Yes	County Exec.	Invoices to County	
Shannon Demler 2nd PD	$44,778	All crim.	Multiple contracts		In good standing		@ $50/hr.	PD	County when approved by court	Meet clients, appear at hearing, visit in jail, office in Cache County	$50/hr for appeals, trials more than 2 days, murder, involuntary commitment	Yes	County Exec.	Invoices to County	
Bryan Galloway 3rd PD	$44,778	All crim.	Multiple contracts		In good standing		@ $50/hr.	PD	County when approved by court	Meet clients, appear at hearing, visit in jail, office in Cache County	$50/hr for appeals, trials more than 2 days, murder, involuntary commitment	Yes	County Exec.	Invoices to County	
Carbon—3 contracts															
David Allred Primary PD	$61,992	Dist, Juv, Just, Mental Comp.	Multiple contracts and special fund to cover Allred's conflict costs	Court	Bar ethics	Capital	@$40/hr with max. of $5,000 each		County when approved by court	Have office, make self available	$40/hr for appeals		Commiss.		
Samuel Chiara Secondary PD	$120/hr.	Dist, Juv, Just	Conflict counsel to Primary PD County pays for additional counsel if both have conflict	Court	Bar ethics	Capital	max. of $5,000 each		County when approved by court	Have office, make self available			Commiss		
Heugley & Heugley Civil, Juvenile	$42,000	Parent defense	County pays	Court	Bar ethics				County when approved by court	Have office, make self available			Commiss		

County and Public Defender	Yearly Value	Courts	Conflicts	Who Decides Conflict Exists	Qualif.	Exclusions	Appeals	Office Cost	Defense Expenses	Other	Extra Compensation	Private Practice	Contract Signed By	Reports	Caseload Management
Davis—4 contracts															
Todd Utzinger Coordinator	$111,395	Dist, Just	Multiple contracts	Court	In good standing				County when approved by court	Coordinate, oversee other PD's, assign capital cases, have office in Davis County	May be requested for capital, murder, manslaughter, offenses w/ mandatory sentences		Commiss	Monthly to County Risk Management Com.	Meet with other PD's to review, track statistics
Ryan Bushnell	$70,246	Dist, Just	Multiple contracts	Court	In good standing				County when approved by court	Have office in Davis County, accept supervision by Primary PD	May be requested for capital, murder, manslaughter, offenses w/ mandatory sentences		Commiss		
Ronald Fujino	$45,321	Dist, Just	Multiple contracts	Court	In good standing				County when approved by court	Have office in Davis County, accept supervision by Primary PD	May be requested for capital, murder, manslaughter, offenses w/ mandatory sentences		Commiss		
Scott Wiggins Appeals		Court of Appeals, Supreme Court			In good standing				County when approved by court		May be requested for capital, murder, manslaughter, offenses w/ mandatory sentences		Commiss		
Duchesne—4 contracts															
MAD Law, Marea Doherty	$49,977	Dist. under main contract Justice and Juvenile at hourly rate	Multiple contracts	Court	In good standing	Capital	Filing notice of appeal	PD	County pays transcripts, expert witness PD pays investigatory expenses except in serious cases	Office in County, reside in County, appear in court	Justice and Juvenile cases @ $50 Travel costs		Commiss		Represent half of Distric court cases
Roland Uresk District court	$53,560	Dist. under main contract Juvenile at hourly rate	Multiple contracts	Court	In good standing	Capital	Filing notice of appeal	PD	County pays transcripts, expert witness PD pays investigatory expenses except in serious cases	Office in County, reside in County, appear in court	Juvenile cases @ $50 Travel costs		Commiss		Represent half of Distric court cases
Stephanie Miya	$51,500	Dist. under main contract Justice and Juvenile at hourly rate	Multiple contracts	Court	In good standing	Capital	Filing notice of appeal	PD	County pays transcripts, expert witness PD pays investigatory expenses except in serious cases	Office in County, reside in County, appear in court	Justice and Juvenile cases @ $50 Travel costs		Commiss		Represent half of Distric court cases
Roland Uresk Justice Court	$6,000	Just	Multiple contracts	Court	In good standing	Capital	Filing notice of appeal	PD	County pays transcripts, expert witness PD pays investigatory expenses	Office in County, reside in County, appear in court	Travel costs		Commiss		

County and Public Defender	Yearly Value	Courts	Conflicts	Who Decides Conflict Exists	Qualif.	Exclusions	Appeals	Office Cost	Defense Expenses	Other	Extra Compensation	Private Practice	Contract Signed By	Reports	Caseload Management
Emery—1 contract and 1 letter															
David Allred	$56,600	Dist, Just, Juv, mental competency	Multiple contracts but Allred finds and pays for 1st conflict and county for 2nd	Court	Bar standards	Capital	@$60/hr with max of $5,000 per appeal	PD	County when approved by court	Have office available to clients	Appeals to Court of Appeals and Supreme Court at $60/hr. with max of $5,000 per		Commiss.		
Christian Bryner and Jon Carpenter Conflict Letter only	$100/hr.		Provide conflict counsel										County Attorney		
Grand—2 contracts															
K. Andrew Fitzgerald Public Defender	$60,500	All	County finds and pays for conflict counsel	Court	Licensed	Capital	@$40/hr with max of $13,000 a year	County pays $1,000 a year		Be available to clients—office, telephone, jail visits, hearing—have office in Moab	Appeals to Court of Appeals and Supreme Court at $40/hr with max of $13,000 a year	Yes	Council	Every 6 months to County Administrator	
Joyce Guymon Smith Parental Defender	$33,000	Parent defense	County finds and pays for conflict counsel	Court	Licensed		@$40/hr with max of $7,000 a year	County pays $1,000 a year		Be available to clients—office, telephone, jail visits, hearing—have office in Moab Represent in mediations	Appeals to Court of Appeals and Supreme Court at $40/hr with max of $7,000 a year	Yes	Council	Every 6 months to County Administrator	
Iron—3 contracts															
William Leigh	$45,000	Juv Just Parent defense	Multiple contracts		Licensed		Separate contract for appeals but if other counsel not available may take at $750 per appeal		County pays after request to County Attorney	Serve as law library	$750 for appeals		Commiss		
Jack Burns	$70,000	Dist Involuntary. Commit	Multiple contracts		Licensed		Separate contract for appeals but if other counsel not available may take at $750 per appeal		County pays after request to County Attorney	Serve as law library	$750 for appeals		Commiss		County will attempt to equalize among contractors
Jeffrey Slack	$70,000	Dist Involuntary. Commit	Multiple contracts		Licensed		Separate contract for appeals but if other counsel not available may take at $750 per appeal		County pays after request to County Attorney	Serve as law library	$750 for appeals		Commiss		County will attempt to equalize among contractors
Juab—1 contract															
Milton Harmon	$75,000 (in 1997)	Dist, Just, Juv, DCFS	PD finds and pays for conflict counsel		Licensed	Capital	1st right of appeal, discretionary appeals included	PD pays	PD pays	Timely defense			Commiss.		
Kane—1 contract															
William Leigh	$50,000	Dist, Just, Juv	County pays but PD pays after 1st conflict		In good standing	Capital	@$750 per appeal to Court of Appeals	PD pays	County pays	Timely, visit jail weekly, be available, serve as law library, meet with clients prior to hearings	Appeals at $750 each		Commiss.	Report time and expenses upon request	

County and Public Defender	Yearly Value	Courts	Conflicts	Who Decides Conflict Exists	Qualif.	Exclusions	Appeals	Office Cost	Defense Expenses	Other	Extra Compensation	Private Practice	Contract Signed By	Reports	Caseload Management
Millard—1 contract															
James Slavens	$91,000	Dist, Just, Juv, Drug court, DCFS	PD finds and pays for conflict counsel		In good standing	Capital	1st right of appeal	PD pays	County when approved by court or county	Be available, have office in County, attend hearing			Commiss.	Quarterly to Commission	
Morgan—2 contracts															
Stephen Laker Contract expired in 2001	$12,000	Dist, Juv	County will find and pay for conflict counsel	Court	In good standing	Appeals		PD Pays	County pays for transportation of out of state witnesses—nothing else mentioned		$40,000 for capital cases plus $20,000 to pay for co-counsel	Yes	Council		If workload increases, renegotiate amount
Jonathan Pace For a specific appeal	$1,500 for this appeal				In good standing		Specific appeal				$1,500 for this appeal		Council		
Salt Lake—1 contract															
Salt Lake Legal Defenders Association	$9,546,380	Dist, Just, Court of Appeals, Supreme Court	LDA contracts for conflict counsel using conflict fund ($533,449)	Court	Professional standards		All appeals	PD pays	County pays for some, PD for others		$533,449 for conflict counsel fund	No	County Mayor	Quarterly reports on workload, FTE's, conflicts—not clear who gets reports	
Sevier County—2 contracts															
Mandy Larsen	$18,000	Just, Juv	PD finds and pays for conflict counsel	Court or PD		Capital	1st right of appeal	PD pays	County when approved by court or county	Timely	Travel outside of county		Commiss and County Attorney	Statement of time and expenses—not clear who gets reports	
Douglas Neeley	$60,000	Dist, habeas	PD finds and pays for conflict counsel	Court or PD		Capital	All appeals	PD pays	County when approved by court or county	Timely	Travel outside of county		Commiss and County Attorney	Statement of time and expenses—not clear who gets reports	
Summit—2 contracts Missing contract for other half of PD duties															
David Shapiro Half of PD duties	$80,000	All	Multiple contracts	PD		Agg. Murder	Negotiated with county separately	PD pays	County when approved by court		May negotiate separately for appeals		Commiss And County Attorney		Half of cases under this contract
Asa Kelley Back up PD	$70/hr	All	Acts as conflict counsel for other PD's			Agg. Murder, Appeals		PD pays	County when approved by court		$70/hr. for conflict services		County Manager		

County and Public Defender	Yearly Value	Courts	Conflicts	Who Decides Conflict Exists	Qualif.	Exclusions	Appeals	Office Cost	Defense Expenses	Other	Extra Compensation	Private Practice	Contract Signed By	Reports	Caseload Management
Tooele—3 contracts Missing contract for other half of district or justice court duties															
A. Chelsea Koch District PD	$48,000	Dist	Multiple contracts	Court	Licensed		County finds counsel	PD pays	County pays	Timely	$500/day for trials, may request more for 1st or 2nd degree homicide, $500 for CLE		Commiss		Half of District court cases
C. Danny Frazier Conflict	$75/hr	All	Acts as conflict counsel for other PD's	Court	Licensed						$75/hr. for conflict services		Commiss		
Jacob Linares Justice PD	$24,000	Just	Multiple contracts	Court	Licensed		County finds counsel	PD pays	County pays	Timely	May request more for 1st or 2nd degree homicide, $500 for CLE		Commiss		Half of Justice court cases
Wayne A. Freestone Juvenile PD	$48,000	Juv	Multiple contracts	Court	Licensed		County finds counsel	PD pays	County pays	Timely	May request more for 1st or 2nd degree homicide, $500 for CLE		Commiss		Half of Juvenile court cases
Uintah—2 contracts															
John Beaslin	$49,200	Dist	Multiple contracts	Court		Capital		PD pays	County pays				Commiss		Half of District court cases
Lance Dean	$123,000	Dist, Just, Juv, parental defense	Multiple contracts	Court		Capital		PD pays	County pays		$50/hr for parental defense		Commiss		Half of District court cases
Wasatch—2 contracts Don't have complete contract on Facemyer															
Dana Facemyer Primary PD Incomplete contract	$63,000	All	Multiple contracts	Court with written request to County Attorney	Licensed	Capital		PD pays			May request additional funds				
J. Edward Jones Conflict	$75/hr	All	Acts as conflict counsel for other PD's	Court	Licensed	Capital		PD pays	County pays when approved by court, statements to County Attorney		$75/hr for conflict services		County Manager and County Attorney	Monthly statements to County Attorney	
Washington—2 contracts Materials included two contracts with Douglas Terry & Assoc. Materials also included a resolution indicating that a long list of individuals were PD's															
Margaret Lindsey Appellate PD	$35,000	Dist, Court of Appeals, Supreme Court	Multiple contracts but PD may have to pay for conflict counsel if conflict arises from private practice	Court	Licensed			PD pays	County pays for 2 transcripts and printing briefs but PD pays for witnesses, investigation, etc.	Timely		Yes	Commiss and County Attorney		

County and Public Defender	Yearly Value	Courts	Conflicts	Who Decides Conflict Exists	Qualif.	Exclusions	Appeals	Office Cost	Defense Expenses	Other	Extra Compensation	Private Practice	Contract Signed By	Reports	Caseload Management
Washington continued															
Douglas Terry & Assoc. Lead PD	$67,800	All	Multiple contracts but PD may have to pay for conflict counsel if conflict arises from private practice	Court with notice to County Attorney	Licensed	Capital	1st appeal but not discretionary appeal	PD pays	County pays	Timely, coordinates with other PD's and approves their expenses, office in County		Yes	Commiss and County Attorney		PD manages all contracts and workloads—this contract takes 1/6 of criminal adult cases
Weber—1 contract															
Public Defenders Association of Weber County	$1,060,476	All	PDA contract with multiple attorneys from at least 3 separate firms	Court	Licensed, 3 death penalty qualified		15 appeals	PD pays	County pays for transcripts and reports PD pays other costs except extraordinary expert witness and investigation		May be negotiated for 16th and following appeal	Yes	Commiss	Itemized quarterly reports	Attempt to equalize with Court Attorney caseloads

B

PUBLIC DEFENDER AGREEMENT
APPELLATE SERVICES

This Agreement is made and executed in duplicate by and between _____ County, a body corporate and politic of the State of Utah, hereinafter referred to as "COUNTY," and _____, an attorney licensed and in good standing to practice law in the State of Utah, hereinafter referred to as "DEFENDER."

WITNESSETH

WHEREAS, Utah Code Ann. §77-32-301(1) requires Counties "[t]o provide counsel for each indigent who faces the substantial probability of the deprivation of the indigent's liberty" thus obligating the County to provide for the competent defense of indigent adults or juveniles in criminal cases in the courts; and

WHEREAS, the County may fulfill its statutory obligation through the appointment of qualified legal counsel who may provide the indigent legal services required by Utah Code Ann. §77-32-301 and §77-32-304; and

WHEREAS, DEFENDER is a qualified, trained and competent attorney, licensed and in good standing to practice law in the State of Utah and duly certified pursuant to Rule 38B of the Utah Rules of Appellate Procedures (Rule 38B), and is willing to enter into this agreement with the County to perform the necessary appellate legal services for indigent juvenile and adult defendants;

NOW THEREFORE, for and in consideration of the mutual promises and covenants contained herein, it is hereby agreed between the parties as follows:

Section 1. CONSIDERATION

1.1. COUNTY does hereby engage DEFENDER as appellate counsel to perform services recited and set forth herein and shall pay DEFENDER …

[Terms of Compensation]

[Option A- Fixed Fee]: In the absence of a centralized or regional pool of certified Appellate Defense Lawyers, fixed fee arrangements must consider and fairly compensate for the workload of DEFENDER and the complexity of the case(s).

[Option B – Hourly Fee]: In the absence of a centralized or regional pool of certified Appellate Defense Lawyers, hourly contracts must consider and fairly compensate for the workload of DEFENDER and the complexity of the case(s).

Under either option, or a hybrid of the two, compensation must be based on fair market value within the local jurisdiction(s).

Comment [KW1]: Terms will vary county to county based on populations and case loads. However, all contract awards must be based on applicants' qualifications, experience, and ability and must reflect fair market value for the local jurisdiction. Each RFP will include the requirement that DEFENDER be certified under Rule 38B.

Interlocal agreements for centralized or regional collaboration efforts are preferred and encouraged.

during the period of January 1, 20___, through December 31, 20___. This contract may be renewed from year to year as provided by law upon written agreement by both parties.

1.2. If not addressed above in section 1.1, COUNTY will pay the costs of all court fees, transcripts and expenses incurred in the printing of appellate briefs covered under the provisions of this contract submitted to the District Court, Court of Appeals, or Supreme Court of the State of Utah.

1.3 Except as provided below in sections 1.4, 2.6 and 3.8, DEFENDER shall be responsible for paying all other expenses necessary to perform the required services, including research, paralegal assistance, and legal clerks, etc., such costs being expressly included herein.

1.4 Upon a showing of critical need, DEFENDER may request additional funding for extraordinary unforeseen expenses which may arise during the term of this agreement.

1.5 It is specifically understood that DEFENDER will accept no other payment for work provided under this Agreement, other than that compensation provided in the Agreement under this Section. In the event a court orders restitution from any defendant for attorney fees and costs, all such restitution shall belong to the County.

Section 2. SERVICES

2.1 DEFENDER agrees to proceed with a first appeal as of right for any qualified indigent criminal defendants assigned to DEFENDER by a district court judge of _____ County, a justice of the Utah Court of Appeals, or a justice of the Utah Supreme Court, unless there is a conflict of interest as set forth below in section 4 of this AGREEMENT. Except as provided in Section 2.6 below, a first appeal of right shall not include other and discretionary appeals or discretionary writ proceedings. Attorney specifically does not have the duty or power, under this section, to represent an indigent defendant in any discretionary appeal or action for discretionary writ, other than in a meaningful first appeal of right to assure the indigent defendant an adequate opportunity to present his/her claims fairly in the context of the appellate process of the State of Utah.

2.2 DEFENDER shall devote the necessary time and resources to perform legal services required under guidelines and standards as set forth in the Utah Rules of Professional Responsibility, and other such regulations and statutes as shall govern the practice of law in the State of Utah together with such other regulations or statutory provisions to which they may be subject as a result of federal law. DEFENDER agrees to consult early on in the representation with trial counsel regarding potential issues and challenges that may be raised on appeal. DEFENDER agrees to maintain adequate and proper records of the representation for each assigned indigent defendant.

2.3 It is understood and agreed that accessibility to indigent defendants is an integral consideration in the making of this agreement. Therefore DEFENDER agrees to communicate with and be available and accessible to indigent clients as necessary for a competent defense. DEFENDER shall visit the client as soon as practicable after appointment but no less than fourteen (14) days from the date of appointment and further agrees to make reasonable efforts to visit indigent defendants who are incarcerated in Jail, admitted to a hospital or otherwise confined; to return telephone calls as soon as reasonably possible and to otherwise be reasonably accessible to all indigent defendants. DEFENDER will also keep the client informed by delivering timely to client copies of all court filings and pertinent correspondence and communications.

2.4 DEFENDER further agrees to promptly notify the court of any changes with regard to the indigent status of a defendant, which changes would affect the qualifying of the defendant for court-appointed counsel. DEFENDER also agrees to assist the courts and the County Attorney's Office in providing information necessary to recover costs pursuant to Utah Code Ann. §77-32-202(6).

2.5 DEFENDER agrees not to carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the client's interests in any respect, or may lead to the breach of professional obligations. Workload includes not only the number of cases, but also includes the seriousness of the cases, the number of charges involved in individual cases, and the time required to adequately represent each client.

2.6 DEFENDER will file petitions for writs of certiorari to the Utah Supreme Court when, in the DEFENDER'S judgment, such petitions satisfy the grounds for certiorari review detailed in the Utah Rule of Appellate Procedure 46 and DEFENDER determines that such a petition is warranted. DEFENDER will also respond to petitions for writs of certiorari that the prosecution files. If in DEFENDER's judgment, certiorari review to the United States Supreme Court may be necessitated, DEFENDER shall obtain letter opinions from not less than three independent Rule 38B certified Public Defenders supporting the filing of a writ and stating the rationale with appropriate citations to case law or other persuasive authority. DEFENDER and COUNTY thereafter agree to renegotiate the contract to include the filing of a writ of certiorari to the United State Supreme Court.

2.7 DEFENDER agrees to provide to COUNTY a copy of all appellate court rulings and decisions within fifteen (15) days of receipt.

Section 3. QUALIFICATIONS

3.1 By his signature below, DEFENDER certifies that he is a member in good standing of the Utah Bar and that he is competent in the criminal practice of law. DEFENDER further certifies that he shall at all times during the period of this contract, maintain his status as a member in good standing of the Utah Bar, and is Rule 38B certified.

3.2 DEFENDER certifies that he is a citizen of the United States or permanent resident alien.

3.3 DEFENDER shall maintain a bona fide office at which to conduct business which shall be made known to the clients served under this agreement.

3.4 DEFENDER Agrees to abide by all federal, state and local laws, to abide by the Rules of Professional Conduct and Standards of Professionalism and Civility.

3.5 DEFENDER agrees that he is not currently, nor shall be, party to any litigation which would place his licensing or standing with the Utah Bar in jeopardy.

3.6 DEFENDER shall, during the period of this Agreement, maintain professional malpractice insurance with at a minimum, limits of $100,000.00 per person and an aggregate of $300,000.00 per occurrence and provide to COUNTY evidence of the insurance. Additionally, DEFENDER agrees to hold COUNTY harmless from all damages, loss or injury it may suffer or be held liable for as a result of the conduct of DEFENDER or as a result of this Agreement.

3.7 In the event of any change of address, on-going conflict of interest, conflicting litigation or inability to practice law, the DEFENDER shall promptly notify COUNTY in writing of such change of status.

3.8 DEFENDER shall keep abreast of all current legal trends and to that end shall maintain sufficient continuing professional education credits during the period of this agreement. These trends include recent decisions of the United States Supreme Court, Utah Supreme Court, Utah Court of Appeals, and decisions from other courts that address novel or cutting-degree issues. To further encourage the continuing education of DEFENDER, the County shall pay for the DEFENDER's tuition costs at the equivalent of a one (1) day criminal law related continuing education program that constitutes up to eight (8) hours of Utah Bar approved Continuing Legal Education.

Section 4. CONFLICTS OF INTEREST

4.1 DEFENDER agrees to provide services herein with respect to each indigent person entitled thereto except in those cases as defined wherein a legal conflict of interest exists such as would prevent DEFENDER from providing undivided loyalty to the client as provided under Utah Code Ann. § 77-32-301(4). DEFENDER further agrees to use his/her best efforts to avoid any conflicts of interest which would divide loyalty of defense counsel to the client. The parties recognize, however, that conflicts may arise of sufficient magnitude that DEFENDER cannot properly represent the indigent defendant. A conflict of interest, such as would allow the parties to withdraw pursuant to this agreement, must be of such a nature as to be proscribed by case law, State statute, Rules of Criminal Procedure, or the Utah Rules of Professional Responsibility.

DEFENDER shall disclose to the client any possible conflicts of interest at the earliest possible moment and in sufficient detail to allow the client to appreciate the significance of the conflict. It is agreed by the parties that a conflict of interest does not include withdrawals occasioned by defendant's request for counsel of his choice or disagreements with or dislikes of DEFENDER.

4.2 DEFENDER shall not represent more than one defendant in the same criminal case unless there is full disclosure to the client, the client has an opportunity to consult with outside counsel, and a written waiver is executed by the client.

4.3 DEFENDER shall not use information against the indigent client that was obtained during a prior representation of the client.

4.2 In the event DEFENDER is disqualified from representing an indigent defendant, for any reason involving a known or knowable pre-existing conflict of interest conflict of interest, the misconduct of the Attorney or the filing of litigation in which DEFENDER is a party by any or all of the courts in which services are provided under this Agreement or by the Utah State Bar, then DEFENDER shall be responsible for costs incurred by COUNTY in providing substitute counsel for indigent defendants.

Section 5. ASSIGNMENT

5.1 DEFENDER may not assign or transfer his/her performances of the agreement, any interest therein, or claim thereunder without the prior written approval of COUNTY.

Section 6. INDEPENDENT CONTRACTOR

6.1 DEFENDER agrees to perform services herein as an Independent Contractor and shall not be considered an agent, representative or employee of COUNTY or entitled to any employee benefits as a COUNTY employee as the result of the execution of this agreement nor is this contract intended to create such a relationship. It is further understood by the parties that all compensation provided hereunder shall not include deductions for FICA, Federal and State income tax and shall not include retirement benefits, health benefits, holiday pay leave or any other fringe benefit of COUNTY.

Section 7. TERMINATION

This agreement may be terminated upon the following events:

7.1 *Breach.* In the event that either party hereto shall deem the other to be in breach of any provision hereof, the party claiming the existence of the breach on the other's part shall notify the other in writing of such breach. The breaching party shall have fifteen (15) days in which to commence all actions necessary to cure the breach and shall notify the complaining party in writing of the actions taken to cure the breach. In the event the actions reasonably necessary to cure the breach

are not commenced in a timely manner, the complaining party may terminate this agreement.

7.2 *Voluntary Termination.* Either party may terminate this agreement based on good cause and not solely because of financial savings, effective or aggressive lawyering, political or personal connections, etc. upon the delivery of written notice to the other party ninety (90) days prior to the termination provided the rights of the indigent defendant(s) remain unaffected.

7.3 *Misconduct.* In the event any disciplinary action is taken by the Utah State Bar against the Attorney, this contract may be immediately terminated without notice.

7.4 *Transition.* In the event of termination, DEFENDER agrees to cooperate with his successors including the filing of all necessary pleadings for withdrawal and to deliver all applicable files, information and materials to the successor.

Section 8. NOTICE

8.1 Any notice required by this agreement shall be given in writing addressed to the following unless otherwise designated in writing.

FOR THE COUNTY:

_____ County Clerk
[Address]

with a copy to:

_____ County Attorney
[Address]

FOR THE DEFENDER:

_____
[Address]

Section 9. DEFAULT

9.1 If either party defaults in the performance of the agreement or any of its covenants, terms, conditions, or provisions, the defaulting party shall pay all costs and expenses including a reasonable attorney's fee, which may arise or accrue from enforcing the Agreement or from pursuing any remedy provided by law.

Section 10. GOVERNING LAW

10.1 This agreement shall be governed by the laws of the State of Utah.

Section 11 DISCRIMINATION

11.1 DEFENDER assures that s/he will comply with the Americans with Disabilities Act (ADA), and Title VI of the Civil Rights Act of 1964 and that no person shall, on the grounds of race, creed, color, sex, sexual orientation, marital status, disability, or national origin, be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under this agreement.

Section 12. PRIVATE PRACTICE

I2.1 Nothing in this agreement shall prohibit DEFENDER from representing private clients so long as the representation of private clients does not interfere with or create a conflict of interest in the representation of indigent defendants.

Section 13. TERM OF AGREEMENT

13.1 DEFENDER agree to continue to provide representation for all cases until completion should that case extend beyond December 3l, 20___. All amendments or extensions hereof shall reset the term of the extension period in the amount and conditions agreed upon herein, provided however, that upon failure of the parties to agree upon compensation or the terms of said agreement, this contract shall expire and be of no further effect.

Section 14. ENTIRE AGREEMENT

14.1 The parties agree that this Agreement constitutes their entire Agreement and any changes or modifications must by agreed to in writing by both parties and approved by the County Legislative Body in a public meeting.

IN WITNESS WHEREOF, the COUNTY and DEFENDER duly executed this Agreement at _____, State of Utah, the day and year first above written.

COUNTY

_____
[Title:]

DEFENDER

_____
[Name]

State of Utah)
) ss:
County of _____)

Subscribed and sworn to before me this _____ day of _____, 20____.

_____
Notary Public

C

APPEAL TRACKING SUBCOMMITTEE

The appeal tracking subcommittee collected data for appeals initiated in each county for the years 2003 to 2008, and created a chart listing felony filings, felony guilt determinations, and appeal dispositions. The chart is organized into several categories. The "Felony Filings" category identifies the number of felonies charged in the county per year, the "felony guilty" details dispositions either through a judicial determination of guilt or a guilty plea. The "Defaults" category identifies cases where an appeal was started but not completed due to failure to prefect the appeal (i.e., failure to file a docketing statement or a brief). The "Voluntary Dismissals" category identifies cases where the appeal was initiated and then withdrawn. The "Summary Dismissal" and "Summary Disposition" categories identify cases that did not go to full briefing or review of the merits but were otherwise resolved in the appellate process. And the remaining categories identify cases that presumably were briefed and then "Affirmed," "Reversed," or resolved "Per Curiam." The chart does not reflect those instances when an appealable issue was raised in the trial court but an appeal was not perfected, and it does not reflect whether attorneys have informed defendants of the right to appeal. The initial information was provided by Mary Westby at the Utah Court of Appeals. The appeal tracking subcommittee took the data and compiled the chart that is attached.

The purpose of gathering appeal data was to attempt to determine if any trends or problems could be detected by review and summary of the data. Unfortunately, there are limited conclusions that can be drawn from the data review. The data should be evaluated in light of the information gathered and summarized by the other subcommittees.

Perhaps the most useful data is contained in the categories of default, voluntary dismissal, summary dismissal, and summary disposition. In each category, something has occurred in the appellate process to prematurely halt or terminate the appeal. When a case is defaulted, we can generally assume that the appellant failed to complete or comply with procedural or substantive requirements to perfect the appeal (e.g., filing an untimely notice of appeal, failure to file a docketing statement, failure to request transcripts, not filing a brief, or filing a deficient brief). The reasons for voluntary dismissals, summary dismissals, and summary dispositions are more difficult to define because of the various reasons underlying the disposition.

Utah Data Summary.

In Utah, the statewide average for cases appealed from felony dispositions is 1.4%. San Juan County has the highest percentage of cases appealed at 4.9%, Grand is second at 3.2%, while four counties–Daggett, Piute, Sanpete, and Wayne–have no appeals in the six year period. Not surprisingly, Salt Lake County(1.3% appeal rate), the state's largest county, has the highest number of appeals at 267,[1] while the next three largest counties, Utah(2.4% appeal rate), Weber(1.7% appeal rate), and Davis(1.5% appeal rate) have the second, third, and fourth largest numbers of appeals at 251 (Utah County) and 172 (Weber County), 117 (Davis County). There are several rural counties that had ten or fewer appeals over the six year period.[2]

The state average for defaults is 22.52% in all counties. Morgan County has the highest default rate at 50%, but only had two appeals in the six year period. San Juan County, which has the highest percentage of cases appealed also had the lowest default rate at 9% (22 appeals), while Salt Lake County, with the largest number of appeals (267) had a relatively low default rate of 12%. This is compared to the other urban counties, Utah, Weber and Davis Counties which had default rates of 40%(Utah County), 16%(Weber County) and 32%(Davis County). Eleven rural counties had default rates above the state average: Beaver (33%), Carbon(38%), Duchesne(26%), Iron(26%), Juab(27%), Morgan (50%), Sevier(30%), Summit(30%), Tooele(33%), Uintah(38%), and Washington (32%), while nine rural counties had default rates below the state average: Box Elder(15%), Cache(16%), Emery(0%), Garfield(0%), Grand(19%), Kane(20%), Millard(11%), Rich(0%),and Wasatch (10%). Four counties had no appeals during the six year period: Daggett, Piute, Sanpete, and Wayne.

---

[1] Appeal numbers for 2004 and 2005 where not available. Therefore those years were not included in the data.

[2] Those counties are: Beaver (9), Daggett (0), Emery(5), Garfield(1), Kane(5), Millard (9), Morgan(2), Piute(0), Rich(1), Sanpete(0), Sevier (10), Summit(10), Wasatch(10), Wayne(0).

COUNTY	YEAR	FELONY FILINGS	FELONY GUILTY	PERCENT	DEFAULTS	VOL DISM	SUMM DISM	SUMM DISP	ACQUITTAL	REVERSED	PC QUASH	ACQUITTAL	PERCENT
BEAVER	2003	194	157	0.809278351	1	0	0	0	0	0	0	1	0.0063694268
BEAVER	2004	170	131	0.770588235	0	2	0	0	0	0	0	2	0.0152671756
BEAVER	2005	151	116	0.768211921	0	0	0	0	1	0	1	2	0.0172413793
BEAVER	2006	133	113	0.84962406	0	0	0	0	0	1	0	1	0.0088495575
BEAVER	2007	118	89	0.754237288	1	0	0	0	0	0	1	2	0.0224719101
BEAVER	2008	58	29	0.5	1	0	0	0	0	0	0	1	0.0344827586
TOTAL		**824**	**635**	**0.770631068**	**3**	**2**	**0**	**0**	**1**	**1**	**2**	**9**	0.0141732283
					33%								
BOX ELDER	2003	295	211	0.715254237	1	1	1	2	0	1	0	6	0.028436019
BOX ELDER	2004	336	245	0.729166667	0	1	0	1	3	0	3	8	0.0326530612
BOX ELDER	2005	334	232	0.694610778	0	0	0	0	1	0	0	1	0.0043103448
BOX ELDER	2006	380	284	0.747368421	1	1	1	0	2	0	1	6	0.0211267606
BOX ELDER	2007	231	196	0.848484848	1	1	0	1	0	0	1	4	0.0204081633
BOX ELDER	2008	246	131	0.532520325	1	0	0	0	0	0	0	1	0.0076335878
TOTAL		**1822**	**1299**	**0.712952799**	**4**	**4**	**2**	**4**	**6**	**1**	**5**	**26**	0.0200153965
					15%								
CACHE	2003	683	474	0.693997072	1	0	0	0	1	1	1	4	0.0084388186
CACHE	2004	599	408	0.681135225	1	1	5	0	0	0	0	7	0.0171568627
CACHE	2005	620	441	0.711290323	2	1	0	1	3	0	3	10	0.022675737
CACHE	2006	692	525	0.75867052	2	0	1	0	3	1	1	8	0.0152380952
CACHE	2007	719	540	0.751043115	0	1	0	1	1	0	0	3	0.0055555556
CACHE	2008	618	362	0.585760518	0	3	0	0	0	0	1	4	0.0110497238
TOTAL		**3931**	**2750**	**0.69956754**	**6**	**6**	**6**	**2**	**8**	**2**	**6**	**36**	0.0130909091
					16%								
CARBON	2003	327	233	0.712538226	1	1	0	0	0	0	0	2	0.008583691
CARBON	2004	441	301	0.682539683	0	2	0	0	1	1	1	5	0.0166112957
CARBON	2005	272	218	0.801470588	0	1	0	1	0	0	0	2	0.0091743119
CARBON	2006	300	233	0.776666667	1	1	0	0	2	0	1	5	0.0214592275
CARBON	2007	255	199	0.780392157	6	1	0	0	0	0	0	7	0.0351758794
CARBON	2008	243	145	0.596707819	0	0	0	0	0	0	0	0	0
TOTAL		**1838**	**1329**	**0.723068553**	**8**	**6**	**0**	**1**	**3**	**1**	**2**	**21**	0.0158013544
					38%								
DAGGETT	2003	8	8	1	0	0	0	0	0	0	0	0	0
DAGGETT	2004	13	10	0.769230769	0	0	0	0	0	0	0	0	0
DAGGETT	2005	29	21	0.724137931	0	0	0	0	0	0	0	0	0
DAGGETT	2006	16	11	0.6875	0	0	0	0	0	0	0	0	0
DAGGETT	2007	15	12	0.8	0	0	0	0	0	0	0	0	0
DAGGETT	2008	3	UNK		0	0	0	0	0	0	0	0	
TOTAL		**84**	**62**	**0.738095238**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	0
					NA								
DAVIS	2003	1777	1324	0.745075971	9	4	2	1	3	2	1	22	0.0166163142
DAVIS	2004	1864	1398	0.75	8	9	0	0	5	0	3	25	0.0178826896
DAVIS	2005	1689	1260	0.746003552	10	3	0	5	5	1	5	29	0.023015873
DAVIS	2006	1580	1197	0.757594937	6	6	0	1	3	1	3	20	0.0167084378
DAVIS	2007	1787	1388	0.776720761	4	5	0	1	2	1	2	15	0.0108069164
DAVIS	2008	1482	817	0.551282051	1	2	0	1	0	0	2	6	0.0073439412
TOTAL		**10179**	**7384**	**0.72541507**	**38**	**29**	**2**	**9**	**18**	**5**	**16**	**117**	0.0158450704
					32%								
DUCHESNE	2003	246	196	0.796747967	3	1	0	3	1	0	1	9	0.0459183673
DUCHESNE	2004	225	167	0.742222222	0	0	0	0	1	0	1	2	0.0119760479
DUCHESNE	2005	210	163	0.776190476	1	0	0	2	0	2	1	6	0.036809816
DUCHESNE	2006	272	222	0.816176471	0	0	0	0	2	0	0	2	0.009009009
DUCHESNE	2007	279	213	0.76344086	1	0	0	3	1	0	0	5	0.0234741784
DUCHESNE	2008	293	117	0.399317406	2	0	0	0	0	0	0	2	0.0170940171
TOTAL		**1525**	**1078**	**0.706885246**	**7**	**1**	**0**	**8**	**5**	**2**	**3**	**26**	0.0241187384
					26%								

COUNTY	YEAR	FILINGS	CLOSED	PERCENT	DEFAULTS	K/O	DISM	SUMM DISM	SUMM DISP	AFFIRMED	REVERSED	DURAV	ADJUDG	DEFAULT
EMERY	2003	150	109	0.726666667	0	0	0	1	0	0	0	1	0.0091743119	
EMERY	2004	123	91	0.739837398	0	0	0	0	0	1	0	1	0.010989011	
EMERY	2005	105	80	0.761904762	0	0	0	0	0	1	1	2	0.025	
EMERY	2006	90	79	0.877777778	0	0	0	1	0	0	0	1	0.0126582278	
EMERY	2007	90	82	0.911111111	0	0	0	0	0	0	0	0	0	
EMERY	2008	73	34	0.465753425	0	0	0	0	0	0	0	0	0	
TOTAL		**631**	**475**	**0.752773376**	**0**	**0**	**0**	**2**	**0**	**2**	**1**	**5**	0.0105263158	
					0%									
GARFIELD	2003	34	25	0.735294118	0	0	0	0	0	0	0	0	0	
GARFIELD	2004	40	34	0.85	0	0	0	0	0	0	0	0	0	
GARFIELD	2005	24	19	0.791666667	0	0	0	0	0	0	0	0	0	
GARFIELD	2006	41	32	0.780487805	0	0	0	0	0	0	0	0	0	
GARFIELD	2007	76	65	0.855263158	0	0	0	0	0	0	0	0	0	
GARFIELD	2008	35	24	0.685714286	0	0	0	1	0	0	0	1	0.0416666667	
TOTAL		**250**	**199**	**0.796**	**0**	**0**	**0**	**1**	**0**	**0**	**0**	**1**	0.0050251256	
					NA									
GRAND	2003	226	176	0.778761062	0	2	0	1	2	2	1	8	0.0454545455	
GRAND	2004	154	120	0.779220779	1	2	0	0	0	0	0	3	0.025	
GRAND	2005	103	81	0.786407767	1	0	0	0	3	0	0	4	0.049382716	
GRAND	2006	119	93	0.781512605	2	0	0	0	1	0	0	3	0.0322580645	
GRAND	2007	118	104	0.881355932	0	1	0	1	0	0	1	3	0.0288461538	
GRAND	2008	101	72	0.712871287	0	0	0	0	0	0	0	0	0	
TOTAL		**821**	**646**	**0.786845311**	**4**	**5**	**0**	**2**	**6**	**2**	**2**	**21**	0.0325077399	
					19%									
IRON	2003	366	252	0.68852459	4	1	0	0	2	0	1	8	0.0317460317	
IRON	2004	369	292	0.791327913	2	2	0	2	3	0	1	10	0.0342465753	
IRON	2005	441	339	0.768707483	4	0	0	0	4	0	5	13	0.0383480826	
IRON	2006	443	373	0.841986456	1	0	0	1	4	0	3	9	0.0241286863	
IRON	2007	508	399	0.785433071	1	0	0	0	1	0	1	3	0.007518797	
IRON	2008	455	172	0.378021978	0	0	0	2	0	0	0	2	0.011627907	
TOTAL		**2582**	**1827**	**0.707591015**	**12**	**3**	**0**	**5**	**14**	**0**	**11**	**45**	0.0246305419	
					26%									
JUAB	2003	161	137	0.850931677	0	0	0	0	1	1	0	2	0.0145985401	
JUAB	2004	145	125	0.862068966	3	0	0	0	2	1	0	6	0.048	
JUAB	2005	162	142	0.87654321	0	0	0	0	0	1	0	1	0.0070422535	
JUAB	2006	158	117	0.740506329	0	0	0	0	0	0	0	0	0	
JUAB	2007	178	149	0.837078652	0	0	0	0	0	0	1	1	0.0067114094	
JUAB	2008	154	89	0.577922078	0	1	0	0	0	0	0	1	0.0112359551	
TOTAL		**958**	**759**	**0.792275574**	**3**	**1**	**0**	**0**	**3**	**3**	**1**	**11**	0.0144927536	
					27%									
KANE	2003	82	66	0.804878049	1	0	0	0	0	1	0	2	0.0303030303	
KANE	2004	89	71	0.797752809	0	0	0	0	0	0	0	0	0	
KANE	2005	83	58	0.698795181	0	0	0	0	0	0	1	1	0.0172413793	
KANE	2006	89	69	0.775280899	0	0	0	0	0	0	0	0	0	
KANE	2007	107	73	0.682242991	0	1	0	0	1	0	0	2	0.0273972603	
KANE	2008	116	53	0.456896552	0	0	0	0	0	0	0	0	0	
TOTAL		**566**	**390**	**0.689045936**	**1**	**1**	**0**	**0**	**1**	**1**	**1**	**5**	0.0128205128	
					20%									
MILLARD	2003	157	117	0.74522293	0	0	0	0	1	1	0	2	0.0170940171	
MILLARD	2004	209	152	0.727272727	0	0	0	0	1	0	0	1	0.0065789474	
MILLARD	2005	174	140	0.804597701	0	0	0	2	0	0	0	2	0.0142857143	
MILLARD	2006	195	147	0.753846154	0	0	0	0	0	0	1	1	0.0068027211	
MILLARD	2007	140	108	0.771428571	1	0	0	1	0	0	1	3	0.0277777778	
MILLARD	2008	134	78	0.582089552	0	0	0	0	0	0	0	0	0	
TOTAL		**1009**	**742**	**0.735381566**	**1**	**0**	**0**	**3**	**2**	**1**	**2**	**9**	0.0121293801	
					11%									

COUNTY	YEAR	FILINGS	GUILTY	DEFENDANTS	DEFAULTS	VOLUNTARY	SUMMARY	SUMMARY DISP	AFFIRMED	REVERSED	REMAND	ALL CASES	
MORGAN	2003	40	32	0.8	0	0	0	0	0	0	0	0	0
MORGAN	2004	36	35	0.972222222	0	0	0	0	0	0	0	0	0
MORGAN	2005	35	27	0.771428571	0	0	0	0	0	0	0	0	0
MORGAN	2006	37	26	0.702702703	1	1	0	0	0	0	0	2	0.0769230769
MORGAN	2007	36	24	0.666666667	0	0	0	0	0	0	0	0	0
MORGAN	2008	29	14	0.482758621	0	0	0	0	0	0	0	0	0
TOTAL		**213**	**158**	**0.741784038**	**1**	**1**	**0**	**0**	**0**	**0**	**0**	**2**	0.0126582278
					50%								
PIUTE	2003	21	16	0.761904762	0	0	0	0	0	0	0	0	0
PIUTE	2004	6	4	0.666666667	0	0	0	0	0	0	0	0	0
PIUTE	2005	9	5	0.555555556	0	0	0	0	0	0	0	0	0
PIUTE	2006	10	10	1	0	0	0	0	0	0	0	0	0
PIUTE	2007	9	7	0.777777778	0	0	0	0	0	0	0	0	0
PIUTE	2008	10	6	0.6	0	0	0	0	0	0	0	0	0
TOTAL		**65**	**48**	**0.738461538**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	0
					NA								
RICH	2003	8	7	0.875	0	0	0	0	0	0	0	0	0
RICH	2004	8	8	1	0	0	0	0	0	0	0	0	0
RICH	2005	8	7	0.875	0	0	0	0	0	0	0	0	0
RICH	2006	12	11	0.916666667	0	0	0	0	0	0	1	1	0.0909090909
RICH	2007	10	9	0.9	0	0	0	0	0	0	0	0	0
RICH	2008	11	3	0.272727273	0	0	0	0	0	0	0	0	0
TOTAL		**57**	**45**	**0.789473684**	**0**	**0**	**0**	**0**	**0**	**0**	**1**	**1**	0.0222222222
					0%								
SALT LAKE	2003	9242	5650	0.611339537	10	11	0	16	41	12	2	92	0.0162831858
SALT LAKE	2004	8908	5501	0.6175348	0	0	0	0	0	0	0	0	0
SALT LAKE	2005	8696	5445	0.626149954	0	0	0	0	0	0	0	0	0
SALT LAKE	2006	8255	5234	0.634039976	9	21	0	8	21	10	6	75	0.0143293848
SALT LAKE	2007	9118	5919	0.649155517	12	8	1	9	15	5	9	59	0.0099679
SALT LAKE	2008	8352	3351	0.401221264	3	9	0	6	11	6	6	41	0.0122351537
TOTAL		**52571**	**31100**	**0.59158091**	**34**	**49**	**1**	**39**	**88**	**33**	**23**	**267**	0.008585209
					12%								
SAN JUAN	2003	89	63	0.707865169	1	0	0	0	2	2	0	5	0.0793650794
SAN JUAN	2004	103	84	0.815533981	0	0	0	1	2	1	1	5	0.0595238095
SAN JUAN	2005	101	86	0.851485149	1	0	0	2	3	0	2	8	0.0930232558
SAN JUAN	2006	112	99	0.883928571	0	0	0	0	3	0	0	3	0.0303030303
SAN JUAN	2007	78	67	0.858974359	0	1	0	0	0	0	0	1	0.0149253731
SAN JUAN	2008	75	48	0.64	0	0	0	0	0	0	0	0	0
TOTAL		**558**	**447**	**0.801075269**	**2**	**1**	**0**	**3**	**10**	**3**	**3**	**22**	0.0492170022
					9%								
SANPETE	2003	139	109	0.784172662	0	0	0	0	0	0	0	0	0
SANPETE	2004	219	166	0.757990868	0	0	0	0	0	0	0	0	0
SANPETE	2005	132	109	0.825757576	0	0	0	0	0	0	0	0	0
SANPETE	2006	184	146	0.793478261	0	0	0	0	0	0	0	0	0
SANPETE	2007	116	76	0.655172414	0	0	0	0	0	0	0	0	0
SANPETE	2008	130	71	0.546153846	0	0	0	0	0	0	0	0	0
TOTAL		**920**	**677**	**0.735869565**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	0
					NA								
SEVIER	2003	298	217	0.728187919	0	0	0	1	0	0	1	2	0.0092165899
SEVIER	2004	429	340	0.792540793	1	0	0	0	0	0	0	1	0.0029411765
SEVIER	2005	336	257	0.764880952	0	0	0	0	0	0	0	0	0
SEVIER	2006	231	200	0.865800866	1	0	0	0	0	0	0	1	0.005
SEVIER	2007	245	192	0.783673469	1	1	0	0	0	0	1	3	0.015625
SEVIER	2008	187	123	0.657754011	0	0	0	2	0	0	1	3	0.0243902439
TOTAL		**1726**	**1329**	**0.769988413**	**3**	**1**	**0**	**3**	**0**	**0**	**3**	**10**	0.0075244545
					30%								

COUNTY	YEAR	FILINGS	GUILTY	PERCENT	DEFAULTS	VOL DISM	SUMM DISM	SUMM DISM	AFFIRMED	REVERSED	GRANT	OTHER	
SUMMIT	2003	216	172	0.796296296	0	1	0	0	2	1	0	4	0.023255814
SUMMIT	2004	190	153	0.805263158	1	0	0	1	0	0	0	2	0.0130718954
SUMMIT	2005	248	186	0.75	1	0	0	1	0	0	0	2	0.0107526882
SUMMIT	2006	273	202	0.73992674	1	0	0	0	1	0	0	2	0.0099009901
SUMMIT	2007	270	202	0.748148148	0	0	0	0	0	0	0	0	0
SUMMIT	2008	222	128	0.576576577	0	0	0	0	0	0	0	0	0
TOTAL		**1419**	**1043**	**0.735024665**	**3**	**1**	**0**	**2**	**3**	**1**	**0**	**10**	0.0095877277
					30%								
TOOELE	2003	390	191	0.48974359	2	0	0	1	0	0	0	3	0.0157068063
TOOELE	2004	349	177	0.507163324	3	1	0	0	1	1	0	6	0.0338983051
TOOELE	2005	407	227	0.557739558	0	1	0	0	0	0	1	2	0.008810572
TOOELE	2006	467	236	0.505353319	0	0	0	0	3	0	0	3	0.0127118644
TOOELE	2007	405	257	0.634567901	0	0	0	0	1	0	0	1	0.0038910506
TOOELE	2008	373	182	0.487935657	0	0	0	0	0	0	0	0	0
TOTAL		**2391**	**1270**	**0.531158511**	**5**	**2**	**0**	**1**	**5**	**1**	**1**	**15**	0.0118110236
					33%								
UINTAH	2003	337	256	0.759643917	4	0	0	1	2	0	0	7	0.02734375
UINTAH	2004	430	327	0.760465116	2	0	0	0	3	2	0	7	0.0214067278
UINTAH	2005	426	325	0.762910798	0	0	0	1	1	1	0	3	0.0092307692
UINTAH	2006	387	290	0.749354005	2	0	0	0	1	0	1	4	0.0137931034
UINTAH	2007	475	362	0.762105263	3	1	0	2	0	0	0	6	0.0165745856
UINTAH	2008	385	200	0.519480519	1	2	0	1	0	0	0	4	0.02
TOTAL		**2440**	**1760**	**0.721311475**	**12**	**3**	**0**	**5**	**7**	**3**	**1**	**31**	0.0176136364
					38%								
UTAH	2003	2117	1574	0.74350496	19	3	0	10	9	2	2	45	0.0285895807
UTAH	2004	2374	1778	0.748946925	21	8	0	3	5	3	5	45	0.0253093363
UTAH	2005	2447	1725	0.70494483	18	1	1	6	10	5	4	45	0.0260869565
UTAH	2006	2415	1715	0.710144928	17	7	0	5	17	3	0	49	0.0285714286
UTAH	2007	3276	2146	0.655067155	17	5	0	5	12	2	0	41	0.0191053122
UTAH	2008	2963	1331	0.449206885	9	3	0	4	10	0	0	26	0.0195341848
TOTAL		**15592**	**10269**	**0.658606978**	**101**	**27**	**1**	**33**	**63**	**15**	**11**	**251**	0.0244424968
					40%								
WASATCH	2003	179	151	0.843575419	0	0	0	0	2	0	0	2	0.0132450331
WASATCH	2004	120	107	0.891666667	0	0	0	0	1	0	1	2	0.0186915888
WASATCH	2005	142	111	0.781690141	0	0	0	0	2	0	0	2	0.018018018
WASATCH	2006	127	97	0.763779528	0	1	0	0	1	0	0	2	0.0206185567
WASATCH	2007	147	123	0.836734694	1	0	0	0	0	0	0	1	0.0081300813
WASATCH	2008	104	58	0.557692308	0	1	0	0	0	0	0	1	0.0172413793
TOTAL		**819**	**647**	**0.78998779**	**1**	**2**	**0**	**0**	**6**	**0**	**1**	**10**	0.0154559505
					10%								
WASHINGTON	2003	991	649	0.654894046	0	1	0	3	4	0	0	8	0.0123266564
WASHINGTON	2004	1185	786	0.663291139	2	5	0	0	2	1	1	11	0.0139949109
WASHINGTON	2005	1421	991	0.6973962	2	3	0	0	3	1	0	9	0.0090817356
WASHINGTON	2006	1272	882	0.693396226	0	7	0	0	6	1	4	18	0.0204081633
WASHINGTON	2007	1384	864	0.624277457	3	4	0	2	0	0	1	10	0.0115740741
WASHINGTON	2008	1272	451	0.354559748	4	0	1	0	0	0	1	6	0.0133037694
TOTAL		**7525**	**4623**	**0.614352159**	**11**	**20**	**1**	**5**	**15**	**3**	**7**	**62**	0.0134112048
					32%								
WAYNE	2003	14	9	0.642857143	0	0	0	0	0	0	0	0	0
WAYNE	2004	11	8	0.727272727	0	0	0	0	0	0	0	0	0
WAYNE	2005	3	2	0.666666667	0	0	0	0	0	0	0	0	0
WAYNE	2006	12	11	0.916666667	0	0	0	0	0	0	0	0	0
WAYNE	2007	10	5	0.5	0	0	0	0	0	0	0	0	0
WAYNE	2008	8	5	0.625	0	0	0	0	0	0	0	0	0
TOTAL		**58**	**40**	**0.689655172**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	**0**	0
					NA								

COUNTY	YEAR	FILINGS	GUILTY	PERCENT	DEFAULTS	VOL DISM	INVOL DISM	SUMM DISM	SEMI-FINAL	AFFIRMED	REVERSED	PER CURIAM	APPEALS	PERCENT
WEBER	2003	2335	1908	0.817130621	5	3	0	4	16	5	3	36	0.0188679245	
WEBER	2004	2285	1910	0.835886214	9	2	0	6	7	2	5	31	0.0162303665	
WEBER	2005	2169	1816	0.83725219	2	2	1	4	14	1	9	33	0.0181718062	
WEBER	2006	2035	1664	0.817690418	5	2	0	5	11	2	10	35	0.0210336538	
WEBER	2007	1859	1513	0.813878429	2	0	0	4	14	3	4	27	0.0178453404	
WEBER	2008	1604	977	0.609102244	5	1	0	4	0	0	0	10	0.0102354145	
TOTAL		**12287**	**9788**	**0.796614308**	**28**	**10**	**1**	**27**	**62**	**13**	**31**	**172**	0.0175725378	
					16%									

D

BRIEFING SUBCOMMITTEE REPORT

I. Background

This subcommittee was assigned the task of reviewing appellate briefs to evaluate the quality of the briefs. The subcommittee's four members reviewed briefs from seventy-six appeals filed between 2003 and 2008. The court of appeals issued decisions in each case after full briefing. All cases had appointed counsel. The cases were pulled from the broadest selection of counties possible; some counties had no qualifying appeals.

The defense briefs were scored. A score sheet was developed assigning point values to various briefing criteria derived from rule 24 of the Utah Rules of Appellate Procedure, including formatting and substantive requirements. The total possible score was 100 points. The scoring was limited to the appellate briefs and their compliance with requirements. Scores were not intended to indicate anything about the quality of lawyering on appeal more generally, such as whether counsel appropriately identified issues for appeal.

Although any such evaluation is inherently subjective, some patterns emerge from the data on the reviewed briefs. First, it appears that the subcommittee members were fairly consistent in scoring the briefs--i.e., there were no "easy graders." Second, there were several highly rated briefs. Third, the subcommittee identified some areas of concern in some counties.

II. Trends in the Numbers

In an effort to get current and relevant data, the task force initially targeted appeals between 2005 and 2008. However, it became apparent that the selected time period was too narrow and would yield no briefs for review in many counties. Accordingly, the time period was extended back to 2003, which enabled review of appeals from a few additional counties.

However, even reaching further back, the subcommittee noted that eight counties produced no appeals eligible for review. Two counties simply had no appeals at all during that time frame. The other six counties did not have appeals that fit the parameters of having appointed counsel on appeal and full briefing. Many of the appeals from those counties were pursued either pro se or by retained attorneys. Some of those appeals were dismissed before briefing.

The quality of the briefs in this review was broad. Scores ranged from a high of 100 to a low of 28. Briefs from six counties averaged under 70. The averages for these six counties were 38, 45, 56, 58, 58, and 61. In five of the six counties, no single brief had a score of 70 or higher. Notwithstanding the rather narrow scope of the review, scores in this range suggested real deficiency.

The subcommittee's working hypothesis prior to the review was that counties with higher populations would generally have higher brief scores, indicating better representation. On the

whole, the brief scores supported this hypothesis, with a few exceptions. Salt Lake County, the most populous in the state, had consistently high quality briefs with no brief scoring below 91. However, Cache County, with the fifth largest population in the state, had an average brief score of only 58. A pleasant surprise was that four counties with populations under fifteen thousand--Kane, Grand, Duchesne, and San Juan--had average scores of 75 or better.

Overall, the subcommittee found significant disparity among counties in the quality of appellate briefs filed on behalf of indigent defendants. The geographic distribution of low scores or no briefs to review raises a question about the availability of qualified appellate attorneys in the south central area of the state. In addition, some low-scoring counties had a single attorney doing all their indigent appeals. This data suggests that appellate representation could be improved by a statewide system that would increase all counties' access to a pool of qualified appellate attorneys. This could be accomplished by a statewide appellate defender office or a statewide hiring pool of pre-qualified appellate attorneys.

An addendum is included with additional information. First is a compilation of comments on the briefs written by members of the subcommittee. The comments are varied--there was no single format, nor were there comments on every briefed reviewed. Also included are a series of charts organizing the scores in different ways. One chart is by brief scores lowest to highest, one is by population lowest to highest, and one is by judicial district.

Compiled Brief Comments from Subcommittee Review 2010

Score 100: First rate

Score 99: Superb brief in very close case w/able opposing counsel resulted in reversal.

Score 96: Impressive Brief

Score 96: The statement of facts told an interesting story. The result was affirmance, but via a lengthy opinion addressing the issues on the merits. A footnote stated "we are sympathetic to [Defendant's] claim."

Score 94: Superb challenge to the sufficiency of evidence of rape, followed by an attack on a defense-favorable "earnest resistance" instruction

Score 91: Good shot at a difficult sufficiency challenge.

Score 89: Too much detail in statement of facts--important facts got lost in the process. The argument dealt well with lack of preservation of the issue, arguing plain error and exceptional circumstances.

Score 88: Nice touch with preservation statement; argued plain error alternatively in case court of appeals didn't buy preservation, which was thin.

Score 88: No argument addressed to one count although the brief sought reversal of both.

Score 86: Brief challenged the conviction because the record failed to contain the jury selection process. The brief was seven pages long. According to the statement of the case, the defendant was convicted of manslaughter after a five-day trial. He was sentenced in January 2001. He filed a pro se notice of appeal in February 2001. The court dismissed the appeal when no docketing statement was filed. The defendant filed post-conviction proceedings in 2002 to reinstate the appeal. The motion was granted in 2006 and the appeal was filed in 2007. [The brief argued for retrial based on the lack of record after a pre-briefing motion asserting the same argument had been denied by the court of appeals.]

Score 83: Bulk of ineffective assistance of counsel argument is generic and brief--precious little analysis tied to this case.

Score 82: No marshaling of evidence in challenging sufficiency of evidence for one count; no effort to demonstrate prejudice on one of four issues.

Score 78: Brief raised a sufficiency issue. While defense counsel discussed the standard for marshaling, he failed to marshal the evidence. The brief did not cite to the record in the argument portion; and it did not discuss specific facts in the context of the law.

Score 77: The brief challenged trial counsel's decision to present evidence at trial of defendant's prior convictions and trial counsel's failure to object to hearsay. The 23-page argument section contained 2 citations to the record. The court ruled that due to invited error, plain error was inapplicable. Moreover, the defendant failed on appeal to identify the statements that qualified as hearsay, and the confrontation-clause issue was inadequately briefed.

Score 77: The brief raised a jury instruction issue and an issue under Rule 609. The brief did not discuss preservation. It did not address the issues in the context of plain error or IAC. The State argued that issues on appeal were unpreserved or invited error. Defense counsel filed no reply brief. The court declined to address the issues because they were waived.

Score 76: Very short, but the brief identifies a potentially meritorious issue and cites the main controlling case.

Score 75: The brief raised six issues on appeal. The defendant filed a pro se notice of appeal after conviction on two second-degree felony offenses. Some issues were addressed in the context of plain error since defendant represented himself at trial. An issue dealing with the sufficiency of the evidence identified the marshaling standard. However, defense counsel on appeal did not marshal the evidence.

Score 75: Simple issue asserted but the two paragraph argument was too succinct, especially given that one case relied on was wide of the mark. There was no summary of the argument, which may be largely excused since the argument itself was two paragraphs.

Score 75: The argument had odd repeated references to "Mr. ____ asserts" or "Mr. _____ insists." This made it seem like counsel wasn't buying it.

Score 74: The memorandum decision on this case points out the complete failure to demonstrate prejudice on an ineffective assistance of counsel claim, even assuming trial counsel screwed up.

Score 73: Stream of consciousness argument; court of appeals disposed of defendant's main argument without treating a potentially dispositive argument.

Score 73: Statement of facts was 19 pages long, disjointed, and too detailed to follow. Argument failed to address prejudice other than in conclusory terms. Result was summary affirmance for failure to establish prejudice.

Score 70: Argument very weak.

Score 69: Ineffectiveness raise for the first time on appeal--no 23B motion--inadequate record.

Score 68: fully analyzed and rejected claim

Score 68: The brief raised a sufficiency issue. The jurisdictional statement cited to a provision for the public service commission. The argument portion of the brief contained two citations to the record. It contained no marshaling of the evidence, no discussion of the facts in the context of the law, no reference to the relevant criminal statute or elements, and no analysis of the law on constructive possession. Although the State pointed out the deficiencies, defense counsel filed no reply brief.

Score 67: 8 pages of facts regarding a bloody murder that don't relate to any appellate issue [challenge jury instruction and sentencing]

Score 66: The brief failed to contain a proper jurisdictional statement, and raised issues concerning a redundant jury instruction and a report introduced at trial by defense counsel. The argument section contained exclamation points.

Score 62: Several sections of the brief were marginal, but the argument was good. The result was a reversal of the conviction.

Score 61: Argument rambling. Court decides case largely on briefing problems. The decision notes the failure to argue plain error or exceptional circumstances with respect to an unpreserved argument; notes failure to argue the issue listed in the brief; and says yet a third issue will not be considered because inadequately briefed.

Score 58: This is a consent search case in which the defense brief never discusses consent. It highlights bad facts but never weaves them into a coherent argument.

Score 56: Grammar problems throughout made the brief difficult to follow; the argument was really hard to follow. The argument was confusing and seemingly at odds with the statement of issues, and relied on definitions from an inapplicable section of the code.

Score 48: The appeal was from a conditional guilty plea reserving a search and seizure issue. Several key facts relevant to the issue were not addressed in the brief. The argument relied on cases that should have been updated. Also, the brief raised an issue about the officer's qualifications as an expert witness; however, that issue was not reserved as part of the conditional plea.

Score 47: The brief challenged evidence presented at the preliminary hearing, requested a new trial due to the discovery of new evidence, challenged the order of "other" criminal trials, and challenged hearsay evidence. The argument section contained several pages of factual background with sparse citations to the record. Also, the brief failed to identify the newly

discovered evidence, and it failed to cite to relevant authority for the argument concerning the order of the other criminal trials. The court declined to address issues due to inadequate briefing.

Score 40: The brief argued for withdrawal of a plea. It was two pages long and failed to contain record citations. The court ruled the brief lacked "meaningful analysis." The dissent stated that counsel should be sanctioned.

Score 40: The issues presented section was unintelligible. The standard of review was close to unintelligible. The argument improved to inept. The case was resolved in a per curiam decision: "Because of the inadequacy of Defendant's brief, we affirm."

Score 39: The brief failed to cite to jurisdictional statutes; failed to reference determinative statutes, rules or provisions; contained no summary of the argument; and included no addenda. The brief identified nine issues, including jurisdiction, sufficiency of the evidence, the admissibility of pre-Miranda statements and other evidence, jury selection, IAC, and arguments raised "outside the undersigned's ethical obligations." It identified one overall standard of review for the issues: correctness. The State identified several flaws in briefing, including, inadequate briefing, failure to marshal, failure to raise plain error or IAC for issues that were not preserved, and failure on appeal to make reference to the trial court ruling. The court of appeals identified similar deficiencies and ruled the evidence was sufficient for the convictions.

Score 36: The brief had poor grammar, the wrong standard of review, no preservation statement or course of proceedings, and a disjointed statement of facts. The argument had no discussion of prejudice and no cases cited. The memorandum decision noted the failure to show prejudice and noted the "absurdity of argument."
Score 28: This was a sexual abuse of a child case in which the argument was two pages long and half of that was a lengthy statute citation. It was a clear disservice to the client.

Average Brief Scores Lowest to Highest

County (District)	Population	no. briefs reviewed	Average Score
Millard (4th)	12,405	3	38
Juab (4th)	8238	3	45
Rich (1st)	1961	1	56
Beaver (5th)	6005	2	58
Cache (1st)	91,391	3	58
Uintah (8th)	25,224	4	61
Iron (5th)	33,779	4	70
Tooele (3rd)	40,735	4	71
Duchesne (8th)	14,371	4	75
Grand (7th)	8485	4	76
Wasatch (4th)	15,215	4	77
Box Elder	42,745	4	78
Carbon (7th)	20,422	4	80
Weber (2nd)	196,533	5	82
San Juan (7th)	14,413	4	83
Utah (4th)	368,536	4	84
Davis (2nd)	238,994	5	86
Kane (6th)	6046	2	88
Summit (3rd)	29,736	2	88
Washington (5th)	90,354	4	92
Salt Lake County	898,412	6	95
Daggett (8th)	921	0	
Emery (7th)	10,860	0	
Garfield (6th)	4735	0	
Morgan (2nd)	7129	0	
Piute (6th)	1435	0	
Sanpete (6th)	22,763	0	
Sevier (6th)	18,842	0	
Wayne	2509	0	

Brief Scores Smallest Pop to Highest

County	Population	no. briefs reviewed	Average Score
Daggett	921	0	
Piute	1435	0	
Rich	1961	1	56
Wayne	2509	0	
Garfield	4735	0	
Beaver	6005	2	58
Kane	6046	2	88
Morgan	7129	0	
Juab	8238	3	45
Grand	8485	4	76
Emery	10,860	0	
Millard	12,405	3	38
Duchesne	14,371	4	75
San Juan	14,413	4	83
Wasatch	15,215	4	77
Sevier	18,842	0	
Carbon	20,422	4	80
Sanpete	22,763	0	
Uintah	25,224	4	61
Summit	29,736	2	88
Iron	33,779	4	70
Tooele	40,735	4	71
Box Elder	42,745	4	78
Washington	90,354	4	92
Cache	91,391	3	58
Weber	196,533	5	82
Davis	238,994	5	86
Utah	368,536	4	84
Salt Lake	898,412	6	95

Brief Scores by Judicial District

First Judicial District

County	Population (2000)	Number of Briefs Reviewed	Average Score	Notes
Box Elder	42,745	4	78	range 67-87
Cache	91,391	3	58	range 47-68 single atty
Rich	1,961	1	56	

Second Judicial District

County	Population (2000)	Number of Briefs Reviewed	Average Score	Notes
Davis	238,994	5	86	range 74-91 single atty
Morgan	7,129	0		
Weber	196,533	5	82	range 75-88

Third Judicial District

County	Population (2000)	Number of Briefs Reviewed	Average Score	Notes
Summit	29,736	2	88	2 2003 apps range 86-90
Salt Lake	898,412	6	95	range 91-99
Tooele	40,735	4	71	range 50-92 one atty w/3 briefs 50,69,72 one atty 92

Fourth Judicial District

County	Population (2000)	Number of Briefs Reviewed	Average Score	Notes
Juab	8,238	3	45	range 39-57 one atty 57 one 39, 40
Millard	12,405	3	38	range 28-50 single atty
Utah	368,536	4	84	range 70-94 3 attys
Wasatch	15,215	4	77	range 65-88 4 attys

Fifth Judicial District

County	Population (2000)	Number of Briefs Reviewed	Average Score	Notes
Beaver	6,005	2	58	range 40-75 single atty
Iron	33,779	4	70	range 61-76
Washington	90,354	4	92	range 88-96 single atty

Sixth Judicial District

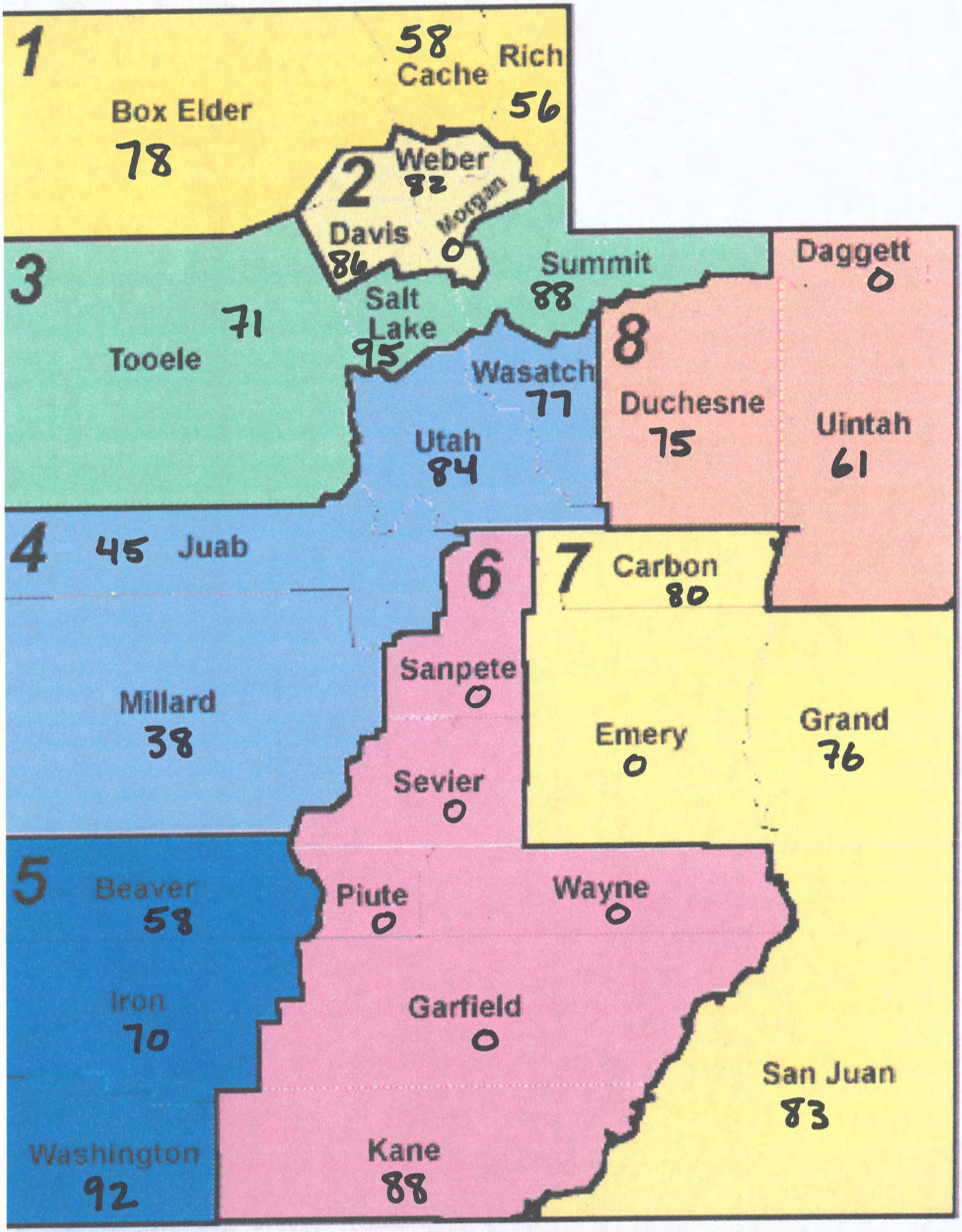
County	Population (2000)	Number of Briefs Reviewed	Average Score	Notes
Garfied	4,735	0		
Kane	6,046	2	88	range 85-91 2 attys
Piute	1,435	0		no appeals
Sanpete	22,763	0		
Sevier	18,842	0		
Wayne	2,509	0		

Seventh Judicial District

County	Population (2000)	Number of Briefs Reviewed	Average Score	Notes
Carbon	20,422	4	80	range 55-96 2 attys one low score dragged down avg.
Emery	10,860	0		
Grand	8,485	4	76	range 67-89 2 attys
San Juan	14,413	4	83	range 75-100, 4 attys

Eighth Judicial District

County	Population (2000)	Number of Briefs Reviewed	Average Score	Notes
Daggett	921	0		no appeals
Duchesne	14,371	4	75	range 58-89 one atty
Uintah	25,224	4	61	range 48-66 3 attys


1
Box Elder
78
Cache
58
Rich
56
2
Weber
82
Davis
86
Morgan
0
3
Tooele
71
Salt Lake
95
Summit
88
Daggett
0
8
Duchesne
75
Uintah
61
Wasatch
77
Utah
84
4
45
Juab
Millard
38
6
Sanpete
0
Sevier
0
7
Carbon
80
Emery
0
Grand
76
5
Beaver
58
Iron
70
Washington
92
Piute
0
Wayne
0
Garfield
0
Kane
88
San Juan
83

E

Rule 38B. Eligibility requirements for appointed appellate counsel.

(a) In all appeals where a party is entitled to appointed counsel, only an attorney on the roster described in this rule may represent such a party before either the Utah Supreme Court or the Utah Court of Appeals. The determination of eligibility for the roster shall be made by the Indigent Appellate Counsel Committee.

(b) Committee Composition

The Utah Judicial Council shall establish a standing Committee known as the Indigent Appellate Counsel Committee ("Committee"). The Committee shall consist of: one designee of the Office of the Attorney General, one active or retired trial court judge designated by the Board of District Court Judges, one active or retired appellate court judge designated by the Board of Appellate Court Judges, one private civil appellate attorney designated by the Appellate Section of the Utah State Bar, two county attorneys designated by the Utah County and District Attorneys Association, two criminal defense appellate attorneys designated by the Utah Association of Criminal Defense Lawyers, and General Counsel of the Administrative Office of the Courts.

(c) Committee Structure and Operation

(c)(1) The Committee will be chaired by the General Counsel of the Administrative Office of the Courts, which shall staff the Committee.

(c)(2) A quorum of the Committee shall be a minimum of seven of the nine members.

(c)(3) The Committee shall establish an application process for those seeking to be placed on the roster of eligible attorneys. The application process will require attorneys to submit information from which the Committee can determine the attorney's eligibility for inclusion on the roster. The process will also require submission of such writing samples and briefs that the Committee determines are necessary to determine the quality of the attorney's written advocacy.

(c)(4) The Committee may form subcommittees to perform assigned tasks and make recommendations to the Committee. The subcommittees may include persons who are not members of the Committee. Members of subcommittees shall be bound by the same rules of

confidentiality that apply to members of the Committee.

(c)(5) The Committee shall be responsible for approving appellate practice CLE programs that will satisfy the eligibility requirements for inclusion on the roster.

(d) Eligibility Criteria

(d)(1) Each applicant shall satisfy the following criteria to be considered for inclusion on the roster:

(d)(1)(A) membership in the Utah State Bar,

(d)(1)(B) 12 hours of Committee approved appellate practice CLE within the past two years,

(d)(1)(C) has not been the subject of an order issued by either appellate court imposing sanctions against counsel, discharging counsel, or taking other equivalent action against counsel because of counsel's substandard performance before either appellate court,

(d)(1)(D) a passing score on the briefs submitted to the Committee, and

(d)(1)(E) Committee approval based on the criteria in paragraph (e)(3).

(e) Process for determining membership on the roster

(e)(1) The process of the Committee for determining membership on the roster should include the following:

(e)(1)(A) The Committee shall develop a questionnaire for Committee members to disclose to other Committee members their relationships to applicants.

(e)(1)(B) The Committee shall develop a questionnaire for applicants to submit detailed information about their relationships with each Committee member.

(e)(1)(C) The Committee shall develop an application form that requires each applicant to:

(e)(1)(C)(i) provide proof of Bar membership,

(e)(1)(C)(ii) list the approved CLE classes that the applicant has attended, and

(e)(1)(C)(iii) address the criteria described in paragraph (e)(3).

(e)(1)(D) Each applicant shall submit the minimum number of appellate briefs as set by

the Committee, and shall include a certification that the applicant was primarily responsible for drafting the briefs.

(e)(1)(E) Each applicant shall submit verification from the appellate courts that the applicant has not been the subject of an order issued by either appellate court imposing sanctions against counsel, discharging counsel, or taking other equivalent action against counsel because of counsel's substandard performance before either appellate court.

(e)(2) The Committee shall establish a brief-grading subcommittee or subcommittees. The Committee shall establish procedures for the subcommittee(s) which shall include the following:

(e)(2)(A) The process must insure that those on the subcommittee(s) will not know the identity of those whose briefs they grade. If a subcommittee member recognizes a brief and knows the identity of the person who drafted the brief, the subcommittee member shall be disqualified from reviewing that brief.

(e)(2)(B) The process shall include a method for subcommittee members to score briefs based on criteria established by the Committee.

(e)(2)(C) All scores assigned to briefs by the subcommittee(s) shall be recorded. The Committee shall maintain the scoring sheets and make them available to Committee members on request. Scores shall otherwise remain confidential within the Committee.

(e)(2)(D) A passing score shall be above a percentage fixed by the Committee. The standard shall be applied uniformly to all briefs graded by the subcommittee(s).

(e)(3) The Committee shall consider the following additional criteria in determining whether to place a name on the roster:

(e)(3)(A) the extent to which the attorney has sufficient time and administrative support to adequately represent the party and a willingness to commit those resources to the representation of the defendant,

(e)(3)(B) the extent to which the attorney has engaged in the active practice of criminal law,

(e)(3)(C) the ethics, diligence, competency, and general capability of the attorney, and

(e)(3)(D) any other factor that may be relevant to determining that counsel will fairly, efficiently, and effectively provide representation.

(e)(4) The Committee shall provide the applicant with written notice of its decision. If the Committee denies the application, the Committee shall explain the basis for its decision.

(f) An applicant who has been denied inclusion on the roster may file a request for reconsideration.
(f)(1) The request for reconsideration must be delivered to the Committee no later than 20 days after the date of the Committee's written notice.
(f)(2) Upon receiving a request for reconsideration, the Committee shall schedule a meeting to reconsider the application. The applicant may attend the meeting and make a statement and present information as to why the decision should be reversed.
(f)(3) The meeting shall be held no later than 45 days after the Committee receives the request for reconsideration. The Committee shall issue its decision within ten days after the meeting. The Committee's decision is final.
(f)(4) If an application is denied, the applicant may not reapply until at least one year has passed from the date of the Committee's final decision.

(g) The Committee shall remove an attorney from the roster if the attorney becomes subject to an appellate court order that imposes sanctions against the attorney, discharges the attorney, or takes other equivalent action against the attorney because of the attorney's substandard performance before either appellate court.

(h) Redetermination of eligibility for roster
(h)(1) Once an attorney has been placed on the roster by the Committee, the attorney's eligibility for the roster shall be redetermined every two years.
(h)(2) The Committee and the attorney shall follow the same processes and criteria established for inclusion on the roster.

F

Rule 23B Subcommittee

Recommendation:

- Repeal URAP 23B (tweak pending)
- Add a subpart to URCivP 65C (post-conviction rule)
- Urge Task Force to create a mechanism to encourage lawyers to accept post-conviction pro bono appointments and to provide training
- Subcommittee is of the opinion that a criminal defendant could move for remand even without rule 23B, but relief would be more difficult to obtain

Rationale:

- Utah is one of a small minority of states with a remand rule; such rules have "failed to curb the problem of trial attorney ineffectiveness." Eve Brensike Primus, "Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims," 92 Cornell L. Rev. 679 (2007).
- Rule 23B was designed to afford criminal defendants an evidentiary hearing at public expense to challenge the constitutional effectiveness of their trial counsel (death row inmates are entitled to appointed counsel on post-conviction).
- Since 1994, 199 23B motions have been filed in 191 cases; 40 were granted (20%)
- Subcommittee estimates that fewer than 1% of all criminal appeals have resulted in a new trial based on a 23B remand
- Rule 23B exposes the appellate attorney to future ineffectiveness claims
- Adequate 23B investigations are often futile, yet may consume a disproportionate share of scarce appellate resources
- Successful 23B investigations require resources that appellate attorneys often lack, such as subpoena power, investigators, and experts
- 23B investigations make briefing more difficult by interrupting briefing and diverting the appellate attorney's time and resources
- Some appellate attorneys lack the trial skills to conduct an evidentiary hearing if one is granted
- Attorneys have declined to bid on LDA's appellate conflict contract because of the burdens imposed by rule 23B
- LDA has declined to bid on capital cases from other counties because of the burdens imposed by rule 23B

Benefits vs. burdens of rule 23B:

- A tiny percentage of criminal defendants win new trial based on their trial counsel's ineffectiveness.
- 23B motions drain scarce appellate resources and rarely succeed.
- Competent appellate attorneys are being discouraged from bidding on appellate public defender contracts by the burdens of 23B, including exposure to ineffectiveness claims, the expense of investigators and experts, and the need to adequately conduct an evidentiary hearing in the unlikely event remand is granted

G

MECHANICS AND IMPLEMENTATION OPTIONS

Under the Indigent Defense Act (IDA), Utah counties have the responsibility to provide indigent criminal defendants with competent representation at trial and on appeal. UCA §77-32-301. The Indigent Appellate and Post-Conviction Representation Study Committee has identified the need to consider different options and mechanics for implementation of representation that take into consideration the varying demographics and economic restrictions that exist in Utah.

A subcommittee consisting of members of the defense bar and prosecution met to strategize on the different possible mechanisms to improve indigent representation on appeal. The members identified four general categories of mechanisms, but those mechanisms are not the exclusive means of providing services. They represent options based on current economic and political restrictions. Each has benefits and restrictions that may need to be refined. [Note: all options would be implemented with the understanding that Rule 23B will be repealed; an appeal board will select qualified appellate lawyers pursuant to modifications to Rule 38B; uniform contracts will be in place specifying obligations to trial counsel and appellate counsel; and judges, prosecutors, and defense attorneys will be trained on relevant appellate procedures and other issues.] The options in no particular order are as follows:

1. Under the first option, each county would contract with members of the Bar, who are qualified to represent indigent criminal defendants on appeal. Counties historically have relied on contracts for indigent defense representation, but based on the changes noted above, the contract system should see improvements in the quality of representation.

2. Under the second option, counties would organize by judicial district or geographical region, entering into an agreement to share attorney resources. Such an arrangement may allow smaller counties to contribute a minimum annual amount (i.e., $3,000 to $5,000) to cover the costs of the few appeals that may be processed from time to time. For example, the counties in the Fifth District – Beaver, Iron, and Washington – would pool funds and rely in part on the resources and benefits of Washington County and its larger defense bar membership. In another example, Wasatch, Summit, and Morgan Counties would pool their funds with the larger counties in their regions for more qualified resources (i.e., Morgan would contract with Weber County; Wasatch would work with Utah County; and Summit would contract with Salt Lake County).

   If a smaller county experienced a spike in the number of appeals for a given year requiring financing beyond the annual contribution, the resource-sharing agreement could require either an increase in the annual contribution or a sufficient and consistent annual payment to cover contingencies and to provide for predictability in budgeting. If the contribution pool operated as a self-insurance plan, an increase in the number of appeals for a given year may be

offset by a decrease in appeals for another year, without disrupting the quality of representation, financing, or the plan.

3. Under the third option, counties would organize and fund a central or administrative office in Salt Lake County with regional satellite offices, similar to the State Guardian Ad Litem model. This option would allow the main office or the administrator to centralize and oversee training, quality control, and caseload allocation on a statewide level. In addition, the location of satellite offices throughout the State would allow for local control, while attorneys in the regional offices would receive some level of support, training, and oversight from the administrative office.

4. Under the fourth option, counties would pool resources for a single centralized office in Salt Lake County, located at Salt Lake Legal Defender Association. SLLDA currently provides representation for Salt Lake County's indigent defendants at trial and on appeal. In addition, it provides representation to defendants in Salt Lake City Justice Court in a separate division on a separate budget. Counties interested in an appellate-contract arrangement with SLLDA would pool resources for a small group of full-time appellate attorneys and support staff to be located in a separate division (with a separate budget) at SLLDA. The advantages to the counties would be the benefit of a central appellate office – likely at a cost less than the cost for a more formal statewide appellate office – as well as the aid of seasoned appellate attorneys from the SLLDA appellate division in a "next-door" proximity. This option would provide the assurance of competent representation with relatively few complications and relatively low start-up costs. The cost for this approach may be $350,000 at a minimum annually (2010 dollars), for three or four appellate attorneys and staff, processing 55 to 100 appeals filed each year.

   Obvious concerns with this option are the disparate number of filings that the smaller counties would generate compared to the larger counties. One suggested means of providing "fair" cost sharing for this model would be to include a financial calculation based each year on the population size of each participating county. For example: Box Elder County would pay less than Davis County based solely on the classification of the county by the Legislature. The counties would pay into a self-insurance plan to ensure appellate services when needed.

   An alternative to the centralized office with SLLDA is the option of a statewide office funded by counties pooling resources or funded by the State. The State currently prosecutes felony appeals through the Attorney General's Office and budget. The A.G.'s statewide office ensures consistency, training, and adequate funding for representation. A statewide office for defendants on appeal would ensure some of the same benefits realized by the State, including oversight, training, quality control, financial parity with State prosecutors, control with

workload allocation (parity with the A.G.'s office in the number of briefs filed per attorney per year), and competent representation on appeal.

Finally, the counties could individually pick different mechanisms. That is to say the counties of Northern Utah may organize under a regional office, while counties in Southern Utah may elect to contract with individual defense attorneys.

The significant fact remains that the counties recognize their responsibility of representation owed convicted defendants. During a statewide county council meeting held in July (in Cedar City), eighteen (18) counties agreed that with the aid and direction of elected County Attorneys, one version or another of the above mechanics could be implemented in Utah to provide representation for indigent defendants on appeal.