

**UTAH JUDICIAL COUNCIL
TASK FORCE ON JUSTICE COURT REFORM**

Via Webex

**September 11, 2020
12:00 p.m. – 2:00 p.m.**

MEMBERS PARTICIPATING

Judge Paul Farr, Chair
Ms. Anna Rossi Anderson
Judge Brian Brower
Mr. Paul Burke
Ms. Kim Cordova
Senator Kirk Cullimore
Judge Brent Dunlap
Mr. Ron Gordon
Judge Roger Griffin
Representative Craig Hall
Judge Ryan Harris
Ms. Joanna Landau
Mr. Ryan Robinson
Ms. Ann Marie Taliaferro
Commissioner Jerry Taylor
Mr. Roger Tew

MEMBERS EXCUSED

Mr. George Sutton

STAFF PARTICIPATING

Mr. Michael Drechsel
Ms. Cathy Dupont
Ms. Amy Hernandez
Ms. Nancy Merrill
Mr. Jim Peters
Ms. Kim Zimmerman

GUESTS PARTICIPATING

Ms. Molly Davis
Judge Rick Romney
Ms. Jennifer Yim
Mr. Michael Zimmerman

MINUTES

1. Welcome and Approval of Minutes:

Judge Farr welcomed everyone to the meeting. He asked for approval of the minutes from the meeting held on August 14, 2020.

Motion: Judge Brower made a motion to approve the minutes from the meeting held on August 14, 2020. Anna Anderson seconded the motion. The motion passed unanimously.

2. Presentation to the Judiciary Interim Committee:

Judge Farr began by updating the Task Force on a presentation he made to the Judiciary Interim Committee on August 19. That committee is also interested in Justice

Court reform--particularly the de novo appeal process. There has even been discussion among its members of potential legislation. When it found out about the Task Force, it wanted to hear more about the work that it's doing. The Judiciary Interim Committee asked for regular reports from the Task Force in hopes that the two groups can work together if there are changes that are going to be made.

3. History of Circuit Courts:

One of the recommendations for justice court reform is transitioning to full-time judges. Because the circuit courts utilized full-time judges, Judge Farr wanted the Task Force to better understand them. Modeling the justice courts after that system would allow a single judge to serve multiple justice courts, which could create full-time judges without having to do away with part-time courts.

Michael Zimmerman joined the meeting to discuss the history of Utah's circuit courts. He was Chief Justice of the Supreme Court and served as Chair of the Judicial Council when the state's circuit courts were merged into the district courts, so he knows how they worked and why they were abandoned. In fact, he explained, it's because circuit courts were discontinued that there are so many justice courts today.

Circuit courts existed from 1978 to 1996 to handle misdemeanors in 12 different "circuits" throughout the state. As Mr. Tew remembers it, circuit courts were viewed as the "gold standard" when they were created. As time went on, however, it became apparent at some point that the system, as a whole, was rather inefficient. Caseloads were relatively light for the circuit courts, particularly in the rural areas, while the district courts were overworked. Yet neither court level had the jurisdiction to help the other. As such, circuit courts were ultimately merged into the district courts, and circuit court judges became district court judges. The process of combining the two court levels was not always smooth, as many of the district judges did not think that the circuit court judges were as good as the district court judges. Once differences were worked out and the system was functioning, local government started complaining that misdemeanor cases were not getting the attention they needed. And, in truth, district court judges did not want to hear the minor cases. To resolve this issue, the judiciary hired lawyers to serve as commissioners in the district court to handle minor offenses.

In 1995, a case was decided by the Utah Supreme Court that required further changes. It held that commissioners cannot exercise judicial power because that power resides in the judges who are appointed pursuant to the Constitution and not in the people who are hired by the court. As a result, commissioners all but disappeared from the district court and it wasn't long before local government was again pushing for judges who weren't disdainful of adjudicating misdemeanors. This need led to legislation resulting in the justice courts that now exist. Some of the perceptions that people have had with justice courts remain to the present day, including the following:

- Some justice courts have judges who may be underqualified.
- Some justice courts seem to be law enforcement oriented and revenue driven, particularly in the rural areas.
- Some justice courts lack independence because their judges serve in multiple courts, which means that it isn't really the judge who's running the court; it's the prosecutor or some other employee of the county or municipality.
- Some justice courts fund indigent defense services at levels that fall short of constitutional and statutory standards because paying at these levels removes all the "profit" from running a justice court.
- Some justice courts understand and follow the statutes governing bail and other practices better than others, which leads to a lack of uniformity from one court to another.

In Mr. Zimmerman's view, the issues with justice courts are ongoing and cyclical. In the urban areas, the issue is oftentimes the revenue that is expected from the court, while in the rural areas the issues are the lack of law trained judges and providing indigent defense. The circuit courts were *an* answer. Justice courts which were run more by the state judiciary than local government would start to look more like the old circuit courts. But whether that's *the* answer or even *an* answer is hard to say.

After Mr. Zimmerman answered questions posed by members of the Task Force, Judge Farr thanked him for sharing his experience and knowledge with regard to the circuit courts and for highlighting the issues that need to be addressed with the justice courts.

4. Recommendations from the Indigent Defense Commission:

Joanna Landau was asked to share her recommendations about justice court reform as the Director of the Indigent Defense Commission (IDC). The IDC was created as a result of a report prepared by the Sixth Amendment Center in 2015. That study found systemic deficiencies in how Utah provides legal representation to those who can't afford it, an obligation it has under the state and federal Constitutions. As Utah has delegated that responsibility to local government, the IDC helps cities and counties by providing grants and expertise. It works with them to provide counsel for justice courts as much or more as it does for other courts because the potential for jail time is just as real for misdemeanors as it is for felonies.

Ms. Landau presented a number of slides (attached) that provided some background on justice courts. She then reviewed the rules and laws that pertain to the appointment of counsel. In her experience, these laws are not uniformly adhered to in the justice courts. Appointment rates vary because justice courts are inconsistent at providing counsel at first appearance and waiver of counsel is not always made appropriately. In addition, recoupment practices are inconsistent across the state, especially in justice courts.

Finally, Ms. Landau proposed several reforms that would improve indigent defense in Utah's justice courts. In doing so, she recognizes that there's a tension between what justice court judges want and what local government will provide. Her suggestions include the following:

- Provide counsel at first appearances. Judges must appoint counsel at arraignments and try very hard not to allow pleas without the advice of counsel. Doing so will be less efficient, but it's consistent with the Constitution.
- Improve the recertification process so that the Judicial Council helps to provide an actual check on the overall consistency of indigent defense services in justice courts.
- Create and use standardized forms for justice courts to use for the appointment of counsel colloquy, waiver of counsel, entry of plea, etc.
- Issue a uniform statement on whether, when, how, and how much justice courts can or should recoup for their cities and counties for indigent defense expenses.

Members of the Task Force seemed generally supportive of the IDC's recommendations, but wondered what incentives could be provided to encourage counties and municipalities to do more. Cost is certainly one consideration, and the IDC can help with that, but scheduling is a factor as well. Getting counsel to appear at all the arraignments in sparsely populated areas will require some creative problem solving. But if counsel can be provided to indigent defendants as soon and as often as they should be, there will be less opposition to doing away with de novo appeals. And if the cost of providing counsel is explained to counties and municipalities, it would help them decide whether they really want a court or not.

Judge Farr thanked Ms. Landau for her excellent presentation. He believes the subject warrants further discussion. In the interest of time, that will have to occur at a future meeting.

5. Recommendations from the Judicial Performance Evaluation Commission:

Jennifer Yim, Executive Director of the Judicial Performance Evaluation Commission (JPEC), presented JPEC's perspective on the structure of justice courts. JPEC was established in 2008 by the Utah Legislature to independently evaluate the performance of judges for voters in Utah's uncontested retention elections. Utah is nationally recognized for the merit selection and retention process for judges; evaluations play an important role in judicial performance and improvement. JPEC works to educate voters and to provide feedback to help judges be the best that they can be.

Ms. Yim noted that the evaluation of justice courts is one of the biggest challenges JPEC has faced since it was created. Certainly there are more justice courts than all other courts combined, but their diversity is a complicating factor as well. Caseloads in the justice courts range from a few cases per year to those that are working more than

full time. The travel involved to observe a court, the extent to which a court is funded and the attorneys who appear in a given court all have an impact on how and whether JPEC can give the judges with the smallest caseloads a meaningful evaluation. As such, these factors have an impact on whether these judges can be the best judges possible. The question for this Task Force, then, is how small will those caseloads continue to be?

From JPEC's perspective, there are a lot of potential solutions to the challenges of justice courts. Ms. Yim suggested that the Task Force consider the following in its deliberations and the recommendations it advances to the Judicial Council:

- The structure that the Task Force ultimately recommends for justice courts should put incentives in place for judicial performance to be as strong as possible.
- That structure should provide transparent access so that the public and JPEC can see the work of all Utah judges; a judge should not be effectively hidden from sight just because the judge is hard to reach in terms of distance or the size of his or her caseload.
- When a judge has a court hearing, public proceedings should be available to anyone who wishes to participate. Webex may well have a place in the justice court system even after the pandemic subsides.
- Justice courts should provide for thorough and robust evaluations of judges, leaving no judge out.
- There should be no inequities in the evaluation process.
- Caseload should not dictate accountability. Right now, the larger a judge's caseload, the easier it is to be evaluated. There are more cases to consider and there are more people to survey. Allowing some judges to have dramatically smaller caseloads basically assures that they will not receive a similarly robust evaluation as those with larger caseloads.
- Justice court judges should be afforded the same type of feedback as all other judges. That means they should get feedback through appellate review, the Judicial Conduct Commission and JPEC. De novo review may limit and inhibit the improvement of the performance of judges who never get to know if their rulings were correct or not.
- Certification standards may need to be different if there continue to be caseload differentials among the justice courts. Smaller courts may need to be able to provide more in order to compensate for those differences.

Ms. Yim recognizes that everyone on the Task Force wants to see change in the justice courts because they all know that there are problems with them and those problems

affect everyone. She expressed appreciation for the time and effort that everyone is investing to make the system better. Ms. Yim answered several questions and Judge Farr thanked her for attending the meeting and her thoughtful input.

6. Other Business:

Mr. Peters is continuing to work on calculating the cost of operating justice courts throughout the state and he will present on that in a future meeting. He is also looking further into the statistics he presented previously on de novo appeals. Judge Farr will be sending out some structural models for the Task Force to be thinking about. And finally, for next month's meeting, Judge Farr indicated that Justice Himonas will be presenting on Online Dispute Resolution.

7. Adjourn:

There being no further business, the meeting adjourned at 2:00 p.m.

NEXT MEETING:

**October 23, 2020
Via Webex
12:00 p.m. – 2:00 p.m.**

The background features a large, faint seal of the Utah State Bar Commission. The seal is circular and contains a central shield with a scale of justice and a book. The shield is flanked by two figures holding a banner that reads "JUSTITIA OMNIBUS". The outer ring of the seal contains the text "INDIGENT" on the left and "COMMISSION" on the right. The entire seal is rendered in a dark, semi-transparent style.

**UTAH JUSTICE COURTS
&
UTAH INDIGENT DEFENSE**

Utah Justice Courts are busy!

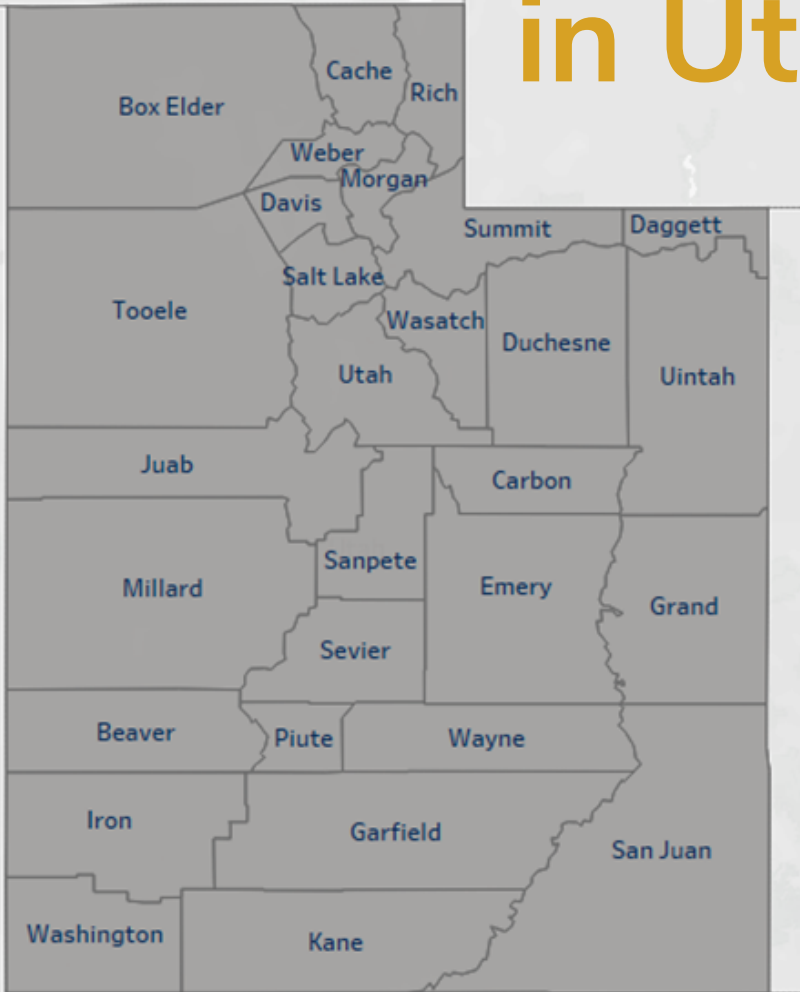
In FY20, 63,585 misdemeanor criminal cases filed in Justice Courts = 60% of Utah's total criminal cases



General Information

- Any local gov't can establish a justice court.
- Utah has:
 - ~247 cities/towns & 29 counties
 - ~124 Justice Courts
 - 81 Justice Court Judges (+2 vacancies)
 - 25 local jails & 2 state prisons.

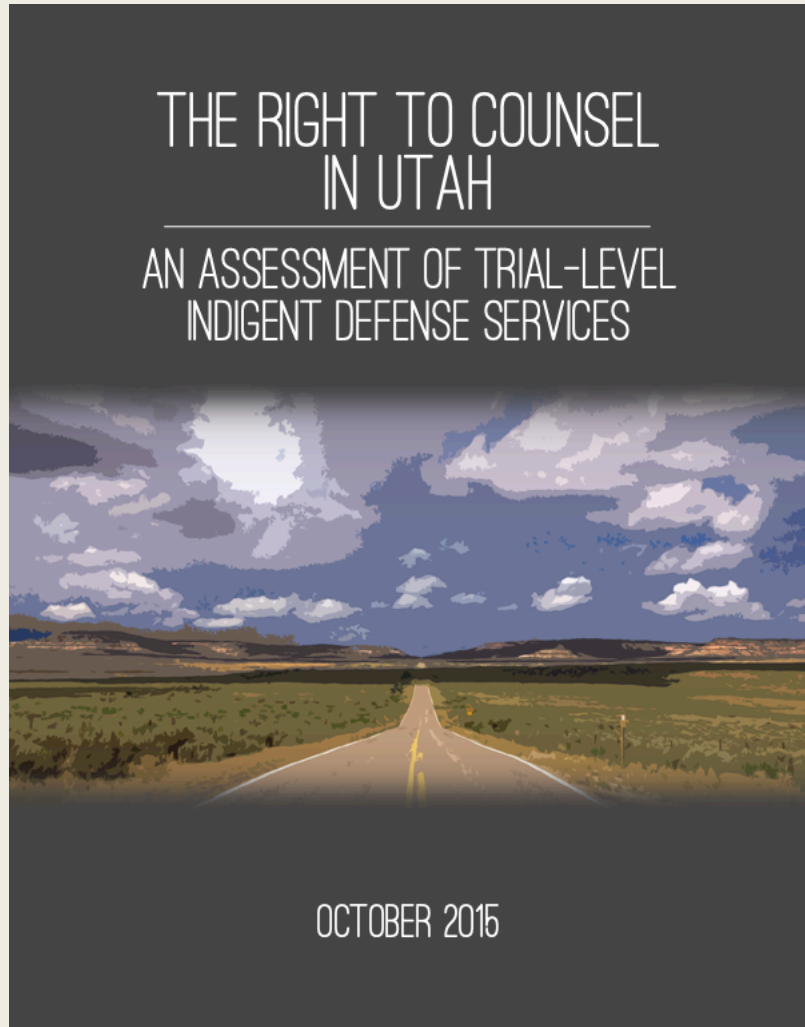
The Right to Counsel Matters in Utah's Justice Courts



- The ~81 Justice Court Judges in Utah:
 - Are not all law-trained, some have only a high school diploma or the equivalent.
 - Can send people to jail in 63,585 criminal cases.
 - For class B misdemeanors--a jail term up to 6 months, & on a class C--up to 90 days.

The right to counsel exists in any case where there is any risk of a loss of liberty—all misdemeanors.

The right to counsel and indigent defense are critical to the functioning of Utah's Justice Courts.



Utah's trial courts do not uniformly provide counsel at all critical stages of criminal cases as required by the U.S. Supreme Court, with many defendants – particularly those facing misdemeanor charges in justice courts – never speaking to an attorney.

Those defendants that do receive representation too often receive an attorney operating under multiple financial (and other) conflicts of interest arising from unfair contractual arrangements that disincentivize zealous representation.

The challenge of providing effective representation for each client can be exacerbated by excessive caseloads that reduce the time a lawyer can spend on an individual case.

And these appointed attorneys generally lack appropriate independence from undue state and local government interference in securing the necessary resources to put the state's case to the test.

The primary cause for the institutionalization of these practices is the lack of accountability inherent in the system.

Utah Indigent Defense Commission: Follow-Up Site Visit Report

By Elizabeth Ling & Suvi Hynynen Lambson, Center for Court Innovation
December 2019

The Utah Indigent Defense Commission (UIDC) is one of 14 recipient agencies of the Bureau of Justice Assistance's (BJA) Sixth Amendment Initiative strategic planning training and technical assistance (TTA) services. This TTA is provided by the Center for Court Innovation (Center) and pairs experienced practitioners with researchers to help sites develop and implement an action plan to improve adherence to Sixth Amendment protections in their jurisdiction.

CCI Follow-Up Report 2019

- Observations in Provo, Draper, Pleasant Grove, Clearfield, Alpine, & Salt Lake City Justice Courts.
- Observed some improvements in meeting 6th A obligations in these justice courts
- Concludes many of the constitutional concerns in 2015 reports persist:

Limited presence/access to defense attorneys at arraignment.

Prosecutors engage in plea negotiations with defendants who did not have an attorney.

Judges, not all law-trained, handle plea negotiations when neither a prosecutor or defense attorney was present in the courtroom.

Defendants were offered a plea before being offered an attorney or offered a choice between entering a plea that day or being appointed an attorney and returning to court on a later date.



**WHAT DO YOU KNOW
ABOUT THE RIGHT TO
COUNSEL IN ALL OF THESE
CRIMINAL CASES?**

WE HAVE A TEST



TODAY?

DIYLOL.COM

Who is eligible to be appointed counsel in Utah Justice Courts?

1. A person earning 151% of the Federal Poverty limit/year?
2. A person facing a Misdemeanor C traffic charge even if the judge pinky swears that jail will never ever ever be imposed?
3. Someone in court on an order to show cause for a criminal case?
4. All of the above?

Who is eligible to be appointed counsel in Utah Justice Courts?

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4. All of the above?

How to Appoint Counsel in Utah Justice Courts

Utah Code:

78B-22-201. Right to counsel.

78B-22-202. Determining indigency

78B-22-203. Order for indigent defense services (attorney & resources)

Utah Court Rules:

Rule 7. Right to counsel. If the defendant is present at the initial appearance without counsel, the court must determine if the defendant is capable of retaining the services of an attorney within a reasonable time. If the court determines the defendant has such resources, the court must allow the defendant a reasonable time and opportunity to retain and consult with counsel. If the court determines the defendant is indigent, the court must appoint counsel pursuant to Rule 8, unless the defendant knowingly and intelligently waives the right to counsel.

Rule 8. Right to counsel. A defendant charged with a public offense has the right to self-representation, and if indigent, has the right to court-appointed counsel if the defendant faces any possibility of the deprivation of liberty.

Simultaneously wordy & don't say enough – they're being rewritten...

**Wait, judges know all
this?**

Yes! And much more.

And you learned it in law school too!

6th A Right to counsel (R2C)

1963

Gideon v.
Wainwright

6thA R2C = fundamental right, applies to state felonies

1967

In re Gault

6th&14th R2C in juvenile delinquency proceedings

1972

Argersinger
v. Hamlin

R2C Misdemeanors w/ imprisonment (not just fine)

1981

Lassiter

R2C Parents in state-initiated child welfare cases

1985

Evitts v.
Lucey

R2C on Appeal

2002

Alabama
v.
Shelton

R2C in Misdemeanors with suspended jail sentence

2016

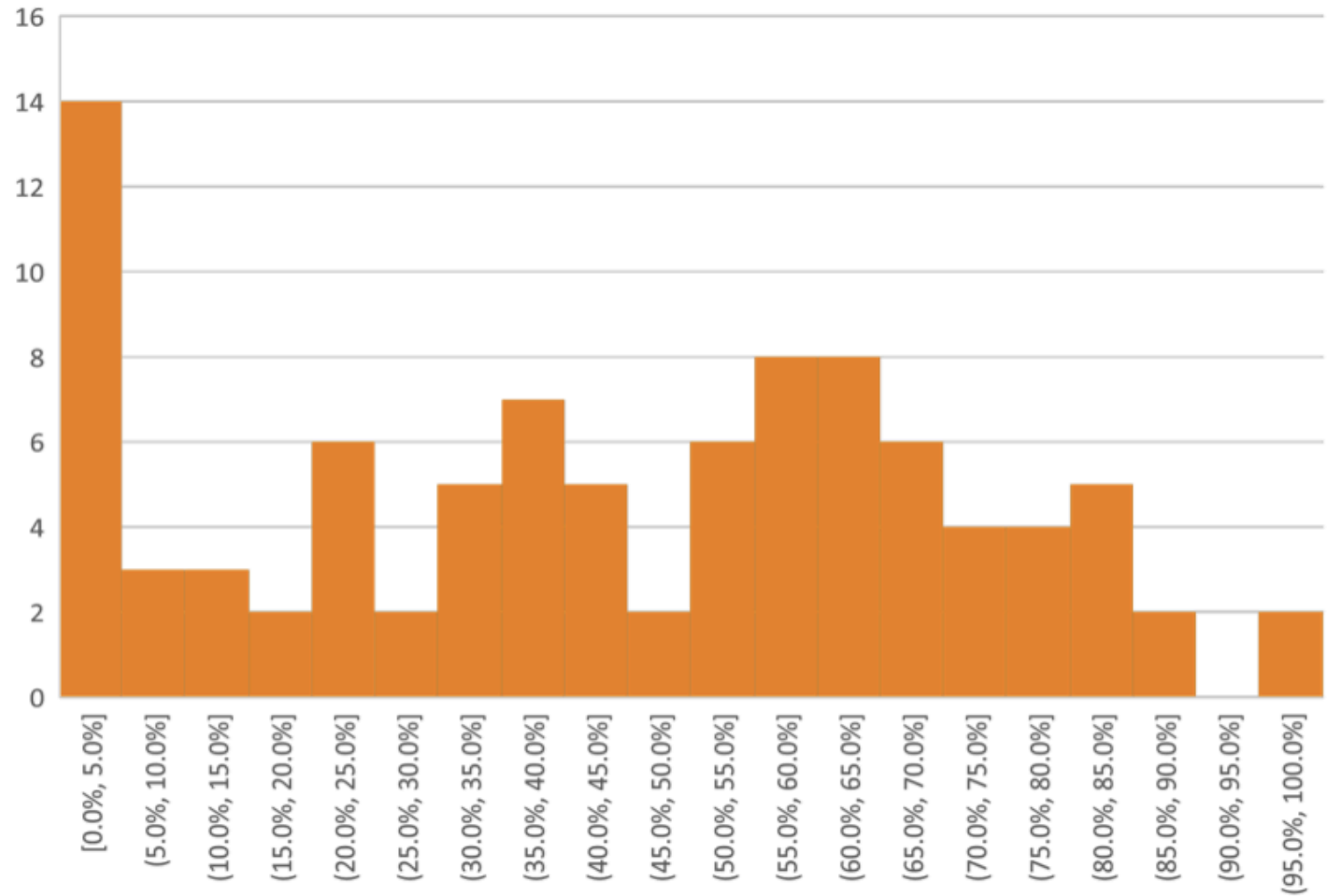
EKS/KAS

Utah SCT – R2C Parents in private termination cases

**So, the laws are clear
... right?**

**Then why are there so
many inconsistencies in
justice courts?**

Like Appointment Rates . . .



City Justice
Court
Indigent
Appointment
Rates

Counsel at First Appearance is inconsistent in Utah Justice Courts

The Supreme Court in Rothgery v Gillespie County, Texas, 554 US 191 (2008), made clear that the right to counsel attaches at arraignment. The Court stated “that the right to counsel guaranteed by the Sixth Amendment applies at first appearance before a judge at which a defendant is told of the formal accusations against him and restrictions are imposed on his liberty.”

Rule 11. (a) Right to Counsel. Upon arraignment, except for an infraction, a defendant shall be represented by counsel, unless the defendant waives counsel in open court. The defendant shall not be required to plead until the defendant has had a reasonable time to confer with counsel.

Waiver of Counsel is not always made appropriately in Justice Courts.

State v. Frampton, 737 P.2d 183, 187 (UT SCT)

“It has long been settled that the right to assistance of counsel is personal in nature and may be waived by a competent accused if the waiver is "knowingly and intelligently" made. Such waiver must of course be voluntary. . . . [I]t is the trial court's duty to determine if this waiver is a voluntary one which is knowingly and competently made.

In making this determination, the defendant ‘should be made aware of the dangers and disadvantages of, self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.’ ’ Generally, this information can only be elicited after penetrating questioning by the trial court. Therefore, a colloquy on the record between the court and the accused is the preferred method of ascertaining the validity of a waiver because it insures that defendants understand the risks of self-representation. Moreover, it is the most efficient means by which appeals may be limited.”

Justice Court

[SLCo / Justice Court / Court Forms](#)

Court Forms

[Waiver of Constitutional Rights](#) 

[Affidavit of Impecuniosity](#) 

[Waiver for the Right to Counsel](#) 



[Click here to waive your rights!](#)

Can we talk about recoupment?

What is Recoupment?

Recoupment is the practice of charging an INDIGENT individual for using an appointed defense attorney, to which they are entitled to at government expense.

Recoupment practices are inconsistent across the state, especially in justice courts.

Utah Code § 77-32a-107 & 108.

"Costs shall be limited to expenses specially incurred by the state or any political subdivision in investigating, searching for, apprehending, and prosecuting the defendant, **including attorney fees of counsel assigned to represent the defendant**, and investigators' fees."

"The court may not include in the judgment a sentence that a defendant pay costs unless the defendant is or will be able to pay them."

Fuller v. Oregon, 417 U.S. 40, 45 (1974) -- Recoupment ok, if:

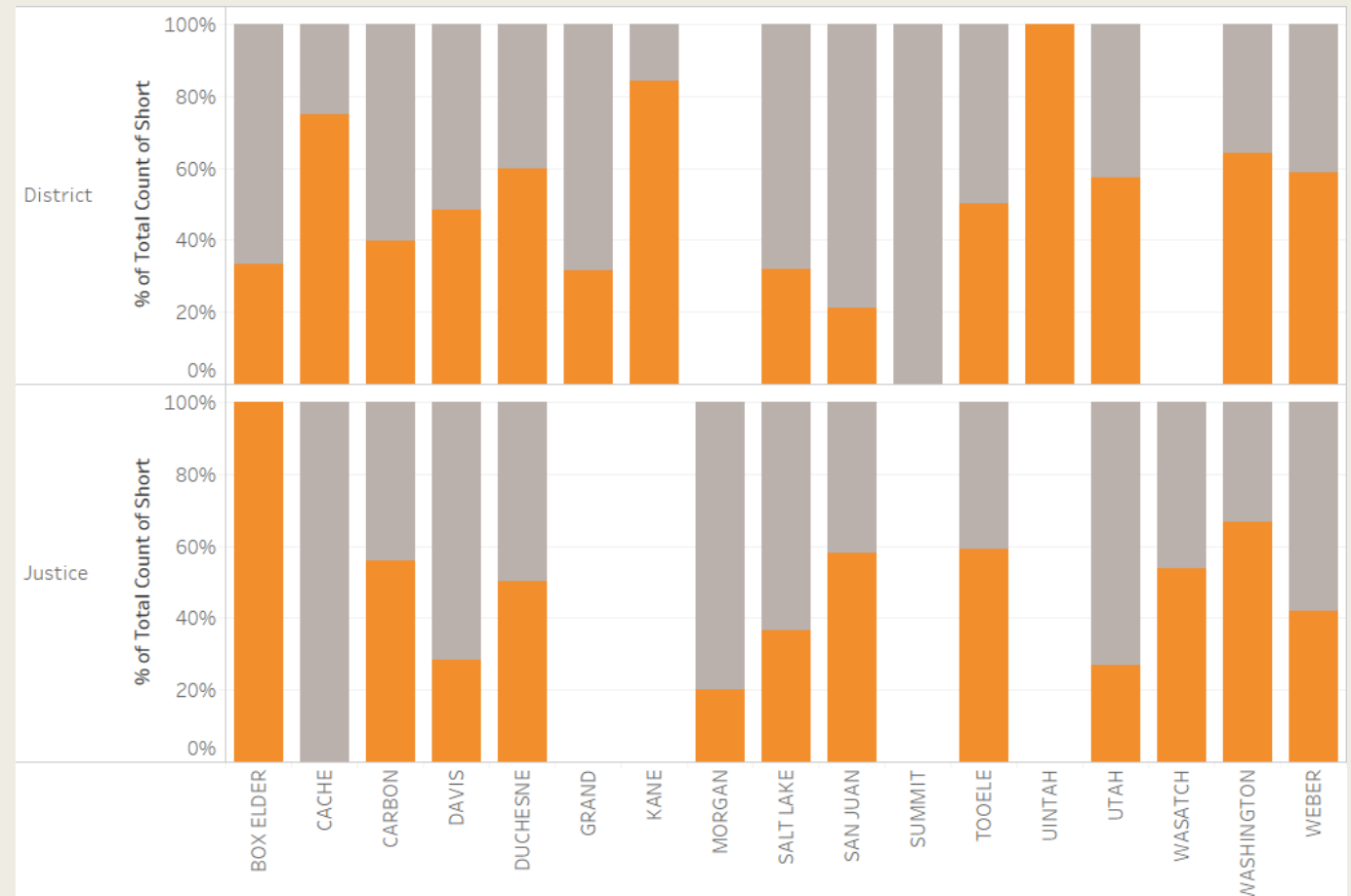
1. May Only Be Ordered After Conviction. A person who is "acquitted" or "whose trials end[s] in mistrial or dismissal," or whose conviction is "overturned upon appeal" cannot be required to pay.
2. Ability to pay. Courts can only require a convicted individual to pay recoupment if s/he has the ability to pay (after being found indigent and convicted of a crime).
3. Can't be coercive. No – "You'll owe a fee if you ask for counsel."
4. Remit. Defendants must be able to petition court at any time to remit recoupment fees, if it will cause "manifest hardship on the defendant or his immediate family."
5. Contempt. Defendant cannot "be held in contempt for failure to repay" if he did not intentionally refuse to pay or if he made a good faith effort to pay.

- Courts in 17 counties collect recoupment fees.
- Sometimes judges order it, some prosecutors & defenders ask for it, and some judges refuse to order it.
- 41% of recoupment fees imposed are not actually paid in full.
- All recouped fees go into the general fund of the local entity that has the court.

Median Recoupment Amount (FY19)

	District	Justice
BOX ELDER	\$300	\$150
CACHE	\$350	\$113
CARBON	\$250	\$200
DAVIS	\$175	\$100
DUCHESNE	\$500	\$100
GRAND	\$250	
KANE	\$500	
MORGAN		\$100
SALT LAKE	\$100	\$150
SAN JUAN	\$250	\$250
SUMMIT	\$225	
TOOELE	\$175	\$200
UINTAH	\$250	
UTAH	\$150	\$75
WASATCH		\$150
WASHINGTON	\$100	\$221
WEBER	\$250	\$50

Proportion of Recoupment Fees Not Fully Paid (FY 2019)



Who controls indigent defense in Utah's justice courts?

Justice Courts

- Scheduling hearings *arraignments*.
- Advising individuals about 6th A rights.
- Determining indigency/appointing counsel.
- Determine whether waivers of counsel and pleas are knowing and voluntary when no lawyer is present, or only prosecutor.
- Imposing (and how much) recoupment of public defender costs.
- Advising convicted individuals of the right to appeal.

*Court reforms are important to improving indigent defense services

Local Governments

- Adequately paying indigent defense providers & prosecutors to attend court.
- Independent hiring of defense providers.
- Independent oversight of defense providers.
- Appropriately contracting with defense providers and ensuring workload controls.
- Applying for Indigent Defense Commission grants/reporting to IDC (3 cities/18 counties).
- Compliance with Utah law regarding the provision of indigent defense (§78B-22)

Justice Court Reforms to Improve Indigent Defense

- **CAFA.** Counsel at first appearances. Judges must appoint counsel at arraignments & try very hard NOT to allow pleas without the advice of counsel. Yes this will be less efficient, and the constitution will thank you.
- **Recertification.** Improve the recertification process so that the courts help to provide an actual check on the overall consistency of indigent defense services in justice courts.
- **Uniform Forms.** Court forms on the appointment of counsel colloquy, waiver of counsel, entry of a plea.
- **Recoupment.** A uniform statement on whether, when, how, and how much justice courts can or should recoup funding for their cities and counties for indigent defense expenses.