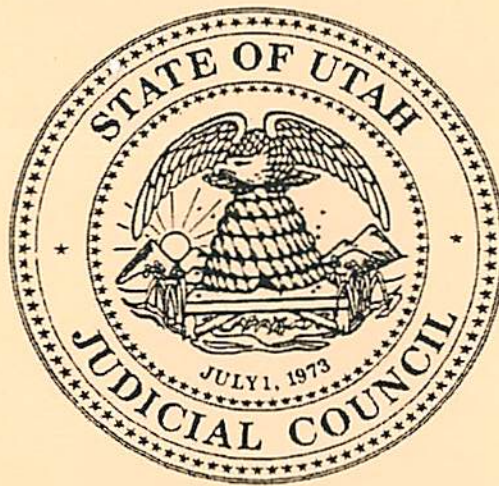


# FINAL REPORT

Judicial Council  
Study Committee on Appellate Representation  
of Indigent Criminal Defendants



January 6, 2011

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## 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<sup>1</sup> 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

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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.

## **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

## **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.<sup>2</sup>

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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

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)<sup>3</sup> 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

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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.

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, UCDA, 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.

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.<sup>4</sup> 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

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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.



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 UCDAAs 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 UCDAAs 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

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.<sup>5</sup>

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.

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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.

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.

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.

## **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.

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

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

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



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
<b>Beaver—1 contract</b>															
Randall Allen	\$50,000	Dist, Juv, Just	PD finds and pays for conflict counsel		Licensed		2 to Court of Appeals 3 <sup>rd</sup> and following @ \$1,000	PD			3 <sup>rd</sup> and following appeal @ \$1,000		Commiss.		
<b>Box Elder</b>															
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.		
<b>Cache—3 contracts</b>															
David Perry 1 <sup>st</sup> 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 2 <sup>nd</sup> 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 3 <sup>rd</sup> 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	
<b>Carbon—3 contracts</b>															
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
<b>Davis—4 contracts</b>															
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		
<b>Duchesne—4 contracts</b>															
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
<b>Emery—1 contract and 1 letter</b>															
David Alred	\$56,600	Dist. Just. Juv. mental competency	Multiple contracts but Alred finds and pays for 1 <sup>st</sup> conflict and county for 2 <sup>nd</sup>	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		
<b>Grand—2 contracts</b>															
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	
<b>Iron—3 contracts</b>															
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
<b>Juab—1 contract</b>															
Milton Harmon	\$75,000 (in 1997)	Dist. Just. Juv. DCFS	PD finds and pays for conflict counsel		Licensed	Capital	1 <sup>st</sup> right of appeal, discretionary appeals included	PD pays	PD pays	Timely defense			Commiss.		
<b>Kane—1 contract</b>															
William Leigh	\$50,000	Dist. Just. Juv	County pays but PD pays after 1 <sup>st</sup> 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
<b>Millard—1 contract</b>															
James Slavens	\$91,000	Dist, Just, Juv, Drug court, DCFS	PD finds and pays for conflict counsel		In good standing	Capital	1 <sup>st</sup> right of appeal	PD pays	County when approved by court or county	Be available, have office in County, attend hearing			Commiss.	Quarterly to Commission	
<b>Morgan—2 contracts</b>															
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		
<b>Salt Lake—1 contract</b>															
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	Professionals 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	
<b>Sevier County—2 contracts</b>															
Mandy Larsen	\$18,000	Just, Juv	PD finds and pays for conflict counsel	Court or PD		Capital	1 <sup>st</sup> 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	
<b>Summit—2 contracts Missing contract for other half of PD duties</b>															
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 case 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
<b>Tooele—3 contracts</b> 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 1 <sup>st</sup> or 2 <sup>nd</sup> 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 1 <sup>st</sup> or 2 <sup>nd</sup> 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 1 <sup>st</sup> or 2 <sup>nd</sup> degree homicide, \$500 for CLE		Commiss		Half of Juvenile court cases
<b>Uintah—2 contracts</b>															
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
<b>Wasatch—2 contracts</b> 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	
<b>Washington—2 contracts</b> 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	1 <sup>st</sup> 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	\$1,080,476	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 16 <sup>th</sup> and following appeal	Yes	Commiss	Itemized quarterly reports	Attempt to equalize with Court Attorney caseloads

**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.

- 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.



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

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

12.1 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 31, 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 be 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

DEFENDER

\_\_\_\_\_  
[Title:]

\_\_\_\_\_  
[Name]

State of Utah        )  
                          ) ss:  
County of \_\_\_\_\_ )

Subscribed and sworn to before me this \_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_.

\_\_\_\_\_  
Notary Public

## 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 perfect 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.













## 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

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 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

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 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

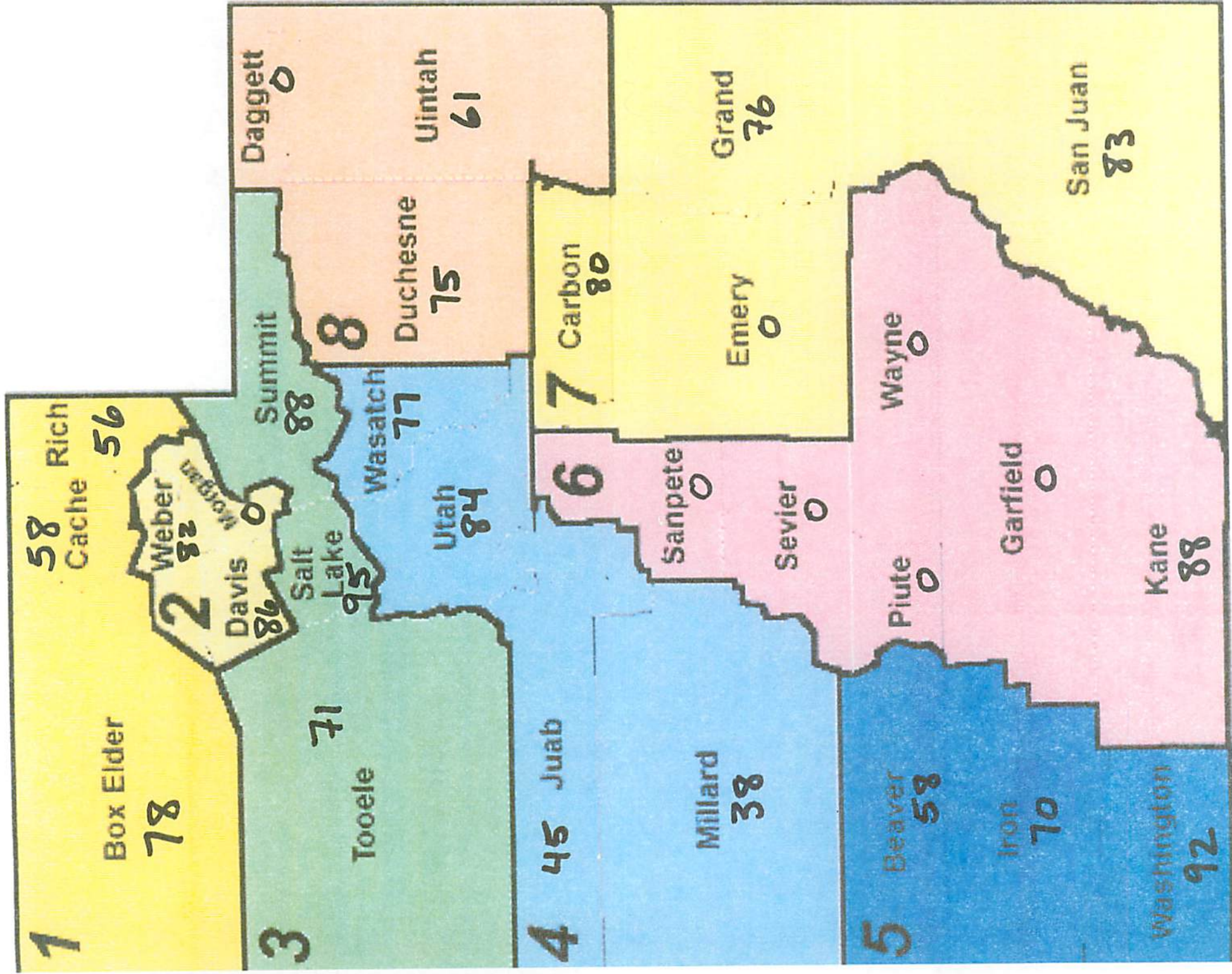
County	Population (2000)	Number of Briefs Reviewed	Average Score	Notes
Summit	29,736	2	88	2 2003 apps range 86-90
Salt Lake	898,412	6	95	range 91-99
Tooele	40,735	4	71	range 50-92 one atty w/3 briefs 50,69,72 one atty 92

**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



**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



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.

## 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

## **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

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.