

# THE RIGHT TO COUNSEL IN NEW HAMPSHIRE

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Evaluation of Trial-Level Indigent Defense Representation  
in Adult Criminal and Juvenile Delinquency Cases



October 2022



SIXTH  
AMENDMENT  
CENTER

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

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

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# Executive Summary

Providing the Sixth Amendment right to effective counsel is an obligation of the states under the due process clause of the Fourteenth Amendment.<sup>1</sup> The State of New Hampshire has vested in the New Hampshire Judicial Council (judicial council) the entirety of the state's Fourteenth Amendment obligation to ensure effective Sixth Amendment services. However, inadequate funding and systemic deficiencies prevent the judicial council from meeting the state's constitutional obligations under the Sixth and Fourteenth Amendments.

New Hampshire has many well-qualified, skilled, and passionate defense attorneys providing representation all across the state. However, those attorneys are placed in an untenable situation in which they are asked to carry excessive caseloads while being undercompensated. As more experienced attorneys leave the system, the remaining attorneys are forced to take on even more cases, causing a cycle of greater frustration and burnout, and indigent defendants wait longer and longer to have an attorney assigned to represent. The onset of a worldwide pandemic exacerbated these issues.

Moreover, the judicial council has only three staff members to try to annually ensure effective representation of approximately 39,000 cases of indigent defendants heard in 42 trial court locations before 58 judges, while contemporaneously trying to find attorneys willing to take cases for inadequate compensation. That is an impossible task for even the most dedicated of employees.

Chapter I details the origins and methodology of this evaluation. The judicial council requested the U.S. Department of Justice, Bureau of Justice Assistance (BJA) to evaluate the indigent representation services provided through the judicial council in adult criminal and juvenile delinquency cases in the trial courts. BJA authorized the Sixth Amendment Center, in cooperation with Seattle University School of Law, to objectively evaluate New Hampshire's indigent defense services through a combination of legal research, data collection and analysis, interviews with justice system stakeholders, and courtroom observations.

Chapter II describes the courts, prosecutors, and indigent defense system that together make up New Hampshire's justice system. New Hampshire is the only state in the country that contracts with a single private, non-profit law firm to serve as the statewide public defender office. Whenever the New Hampshire Public Defender office (NHPD) declares that it is unavailable in a specific case, the Conflict Case Administrator Office (CCAO, operated and administered by the NHPD) works with the judicial council's executive director to reassign the case to either a private attorney contracted with the judicial council to provide representation in a limited number

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<sup>1</sup> Gideon v. Wainwright, 372 U.S. 335, 343-45 (1963).

of appointed cases and known as “contract counsel” or a private attorney paid an hourly rate and known as “assigned counsel.”

Chapters III through VII evaluate the indigent representation system as it is implemented throughout the trial-level courts of New Hampshire. Collectively, these chapters show that New Hampshire’s indigent defense system is inadequately funded and lacks the structural safeguards necessary to ensure the provision of effective assistance of counsel to every indigent defendant, as required by the federal and state constitutions, allowing for the possibility of both actual and constructive denial of the right to effective assistance of counsel to at least some indigent defendants.

As detailed in these chapters, the judicial council is not adequately funded or staffed and thus cannot obtain the data or reports necessary to know whether and when indigent defendants who are constitutionally entitled to public counsel are in fact receiving an attorney or whether there is a sufficient number of attorneys with sufficient time and resources to provide effective assistance of counsel to every indigent defendant. As a result of inadequate funding and insufficient staffing for the judicial council, the taxpayers and policymakers in New Hampshire do not know on an ongoing basis how many attorneys are actually required and provided to represent indigent defendants in all the trial court locations in the state. They do not know on an ongoing basis how much funding is actually required and spent on the necessary fiscal components of representing indigent defendants. All of this information is necessary for policymakers and justice system stakeholders to understand in order to plan for the future needs of New Hampshire’s indigent defense system and ensure effective representation to each indigent defendant.

The limited available caseload data provided by the NHPD shows that, under conservatively applied national caseload limits, the NHPD required 116.09 full-time equivalent (FTE) attorneys to handle only the number of cases newly assigned to the NHPD during FY 2021 (not including cases assigned in previous years that remained open), plus an additional 11.61 FTE supervising attorneys, for a total attorney staff of 127.7 FTE attorneys. This is before taking into consideration the additional number of attorneys that are necessary to fulfill all other workload demands made on the time of the NHPD attorneys.

The National Advisory Commission (NAC) caseload limits require that an FTE attorney devote 100% of their time to directly representing clients, while NHPD staff attorneys have significant workload demands beyond their representation of indigent defendants. These workload demands reduce the amount of time that the NHPD staff attorneys have available to devote to the cases of the indigent defendants whom they are assigned to represent. As a result, a greater number of NHPD attorneys is required under national standards.

Additionally, for a trial-level caseload that requires 127.7 FTE attorneys under the NAC standards, national standards require that the NHPD must also have at least:

- 31.9 FTE legal secretaries/assistants (one full-time legal secretary/assistant for every four FTE attorneys);
- 42.6 FTE investigators (one full-time investigator for every three FTE attorneys); and

- 42.6 FTE social service caseworkers (one full-time social service caseworker for every three FTE attorneys).

For cases in which the NHPD is unavailable, the limited available caseload data provided by the judicial council shows that, under conservatively applied national caseload limits, 20.10 FTE attorneys are required to handle only the number of cases newly assigned to contract counsel attorneys and/or assigned counsel attorneys during FY 2021 (not including cases assigned in previous years that remained open). To whatever extent the contract counsel attorneys and assigned counsel attorneys devote professional hours to duties other than the New Hampshire indigent defendants they are assigned by the judicial council to represent, then more FTE attorneys are required.

For a trial-level caseload that requires 20.10 FTE attorneys under the NAC standards, national standards require that, to assist those attorneys, there must also be at least:

- 2 FTE attorney supervisors (one full-time supervisor for every 10 FTE attorneys);
- 5 FTE legal secretaries/assistants (one full-time legal secretary/assistant for every four FTE attorneys);
- 6.7 FTE investigators (one full-time investigator for every three FTE attorneys); and
- 6.7 FTE social service caseworkers (one full-time social service caseworker for every three FTE attorneys).

Where these support resources are not available, an attorney requires more time to perform the work that would otherwise be performed by these personnel, and so more FTE attorneys are required.

In *United States v. Cronin*, the U.S. Supreme Court said: “an indispensable element of the effective performance of [defense counsel’s] responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation.”<sup>2</sup> On the same day in *Strickland v. Washington*, the Court declared that “independence of counsel” is “constitutionally protected,” and “[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.”<sup>3</sup> Heeding these admonitions from the Court, national standards call for independence of the defense function. The first of the *ABA Ten Principles of a Public Defense Delivery System* explains that, in a properly constituted system, “[t]he public defense function, including the selection, funding, and payment of defense counsel, is independent,” and the indigent defense system and the attorneys it provides must be “independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel.”<sup>4</sup>

Despite these prohibitions under national standards, the judicial council lacks sufficient independence from the judicial and political branches of government. Both judges and prosecutors serve on the judicial council that is responsible for administering the entirety of New

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<sup>2</sup> *United States v. Cronin*, 466 U.S. 648, 656 n. 17 (1984) (quoting *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979)).

<sup>3</sup> *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

<sup>4</sup> AMERICAN BAR ASS’N, *ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM*, principle 1 and cmt. (2002).

Hampshire's indigent defense delivery system and for ensuring its quality and cost effectiveness. Additionally, many members of the judicial council have conflicts of interest between their role in overseeing the provision of the right to counsel and their role as a judge or prosecutor, while other members of the judicial council may themselves benefit financially from decisions they participate in making.<sup>5</sup> Furthermore, the provision of indigent defense is not the judicial council's only duty, so from the outset the judicial council as a whole has divided loyalties imposed on it by state law.

The judicial council's lack of independence and conflicts of interest are not solved by the existence of either the judicial council's indigent defense subcommittee or the NHPD's board of directors. The judicial council's indigent defense subcommittee was voluntarily created by the judicial council and can just as easily be disbanded at any time, because its existence is not mandated by law. While the members of the subcommittee have traditionally been people with knowledge of criminal defense, nothing beyond the goodwill of the judicial council ensures that this tradition will continue or that the subcommittee will continue to exist.

All indigent defense system attorneys in New Hampshire are wholly dependent on decisions made by the judicial council for their continued engagement as indigent defense system attorneys and for the resources necessary to provide effective representation to their appointed clients. Yet the judicial council perpetuates methods of compensating private attorneys in conflict cases that pit the personal financial interests of the appointed attorneys against the constitutional legal interests of the indigent defendants whom they are assigned to represent. And the judicial council has not sought from the legislature the statutory changes necessary to eliminate these conflicts between appointed attorneys and their clients.

Chapter VIII summarizes the above findings and makes the following recommendations, acknowledging that the New Hampshire Judicial Council must immediately be provided adequate funding to increase the number of attorneys willing to be appointed to represent indigent defendants and to provide sufficient judicial council staff to collect the data necessary to properly forecast future needs, while the New Hampshire Legislature works to implement the structural safeguards necessary to ensure effective assistance of counsel to each indigent defendant.

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<sup>5</sup> As explained in chapters II and V, it is not always a financial benefit – it may in fact be a financial loss – for a member of the judicial council to serve as a contract counsel and/or assigned counsel. Members of the judicial council often feel an obligation to accept appointments to represent indigent defendants because of their commitment to indigent defense, because of the lack of sufficient attorneys available for appointment, and to bring to bear their expertise on behalf of indigent defendants and as mentors to other appointed attorneys.

**RECOMMENDATION 1: The State of New Hampshire should statutorily ban the use of fixed fee contracts that create financial disincentives to or otherwise interfere with appointed attorneys providing effective advocacy on behalf of indigent defendants' legal interests.**

The flat fee per case contracts currently used in New Hampshire to compensate the NHPD's subcontractor attorneys and the judicial council's contract counsel attorneys, and the capped hourly rates currently used to compensate assigned counsel attorneys, both cause conflicts of interest between the indigent defense attorney's financial self-interest and the legal interests of the indigent defendant they are assigned to represent. New Hampshire should follow the lead of other states that have banned these practices. For example, in Idaho, the terms of any contract with a private attorney to represent an indigent person "shall not include any pricing structure that charges or pays a single fixed fee for the services and expenses of the attorney."<sup>6</sup>

According to rules adopted by the New Hampshire Supreme Court, assigned counsel attorneys are paid \$60 per hour for most felonies and all misdemeanors. All national standards and a significant number of state courts require that "counsel should be paid a reasonable fee in addition to actual overhead and expenses."<sup>7</sup> To ensure that private attorneys appointed to represent indigent defendants are adequately compensated, New Hampshire will need to determine the typical cost of necessary overhead for an indigent defense system attorney and the amount of the fee that attorney should earn in addition to the cost of overhead. Many states provide a basis for comparison. For example, the South Dakota Supreme Court set public counsel compensation hourly rates at \$67 per hour in 2000. To ensure that attorneys are perpetually paid both a reasonable fee and overhead, the court also mandated that "court-appointed attorney fees will increase annually in an amount equal to the cost-of-living increase that state employees receive each year from the legislature." Assigned counsel compensation in South Dakota stands at \$99 per hour in 2021.<sup>8</sup> New Hampshire has a higher cost of living than South Dakota, so New Hampshire would have to pay \$103.25 per hour to be equivalent to South Dakota's rate.<sup>9</sup>

Banning flat-fee contracts and moving to a private attorney system paying a reasonable hourly rate plus overhead will make it more difficult to predict and contain costs. For this reason, some governments have funded alternate public defender offices for conflict representation. There will always be a need for private attorneys in tertiary and other conflict situations but funding an alternate public defender office will offer New Hampshire policymakers more predictability with funding while increasing oversight and supervision.

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<sup>6</sup> IDAHO CODE § 19-859 (2021).

<sup>7</sup> AMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, principle 8 cmt. (2002).

<sup>8</sup> Letter from South Dakota State Court Administrator to State Bar of South Dakota (Nov. 13, 2020), <https://uj.s.sd.gov/uploads/docs/2021CourtAppointedAttorneyFees.pdf>.

<sup>9</sup> The cost of living in Concord, New Hampshire is 4.3% higher than in Sioux Falls, South Dakota. See *Attorney/Lawyer Cost of Living Concord, New Hampshire vs. Sioux Falls, South Dakota*, NUMBEO, [https://www.numbeo.com/cost-of-living/compare\\_cities.jsp?country1=United+States&country2=United+States&city1=Sioux+Falls%2C+SD&city2=Concord%2C+NH](https://www.numbeo.com/cost-of-living/compare_cities.jsp?country1=United+States&country2=United+States&city1=Sioux+Falls%2C+SD&city2=Concord%2C+NH) (last visited Nov. 27, 2021).

**RECOMMENDATION 2: The New Hampshire Judicial Council should immediately be given adequate funding to significantly increase staff dedicated to overseeing indigent defense services.**

Although New Hampshire has historically given its judicial council broad authority over the statewide indigent defense system, the judicial council has never had more than three full-time staff at any time during the past 40 years – a number of staff that is wholly insufficient to effectively monitor and administer the provision of the right to counsel for all indigent defendants.

The State of New Hampshire must provide adequate funding and staff to the judicial council, so that the judicial council can: carry out the state’s fiduciary duty to taxpayers to oversee the indigent defense system; and collect, analyze, and report necessary data to allow New Hampshire policymakers to know the number of cases of indigent defendants likely to require an appointed attorney each year, the amount of time necessary to provide effective assistance of counsel in each indigent defendant’s case, the number of attorneys and support staff necessary to provide effective assistance of counsel to each indigent defendant, and the amount of funding required and spent for each necessary fiscal component of representing indigent defendants.

The State of New Hampshire should appropriate state funding for the judicial council to hire a sufficient number of professional staff devoted full-time to training, compliance, finance, information technology, and research and data analysis. Most statewide indigent defense systems have a substantially larger staff than the three employees historically allotted to the judicial council to manage New Hampshire’s indigent defense system. At minimum, the judicial council should have at least the following 14 positions (although New Hampshire policymakers may choose to title roles or align their responsibilities differently than suggested here) and additional administrative support based on work required and available time:

- one executive director;
- three deputy directors: one for the trial-level public defender program; one for the trial-level conflict counsel; and one for the appellate-level;
- each deputy director should have at least two assistants (for a total of six): one for adult representation and one for juvenile representation (or alternatively, one for criminal representation and one for civil representation);
- one director of training;
- one director of administration and human resources;
- one director of information technology; and
- one director of finance and accounting.

**RECOMMENDATION 3: The State of New Hampshire should statutorily vest the authority to provide and oversee all indigent defense services in a state-level independent public defense commission.**

As discussed throughout this report, New Hampshire’s judicial council has responsibilities that, while important, often conflict with the State of New Hampshire’s constitutional obligation



to ensure effective Sixth Amendment right to counsel services for indigent defendants. Compounding the lack of independence, individual members of the judicial council may derive personal financial benefit from decisions made by the judicial council on which they serve. To overcome the lack of independence and the divided loyalties that underlie and cause most of the problems identified in this evaluation, New Hampshire must either: reconfigure the existing judicial council to ensure its independence and remove from it the responsibility for matters other than the indigent defense system; or remove from the judicial council the responsibility for the state's indigent defense system and establish a new state-level independent public defense commission.

The commission should be made up of members selected by diverse appointing authorities, so that no single branch of government has the ability to usurp power over or exert outsized influence over the delivery of public defense services. The most straightforward way for New Hampshire to ensure this balance on its public defender commission is to give an equal number of member appointments to the executive, legislative, and judicial branches of government.

Many jurisdictions include one or more voices on their commission from communities affected by the indigent defense function, such as a layperson former client or, to ensure that the commission reflects the demographic makeup of the community, often by including members appointed by each of the state's minority bar associations. States have also found that giving appointments to the deans of accredited law schools can create nexuses that help the indigent defense commission (for example, law schools can help with drafting standards, providing training facilities, etc.). Some jurisdictions select members from the urban, suburban, and rural geographical areas of the state, while some jurisdictions focus on appointing members with backgrounds and expertise in relevant fields, such as finance or forensics or adolescent development. To fill out any remaining appointments, governments often give responsibility for one or two positions to the state bar association. Appointments by non-governmental organizations generally must be confirmed by an official of some branch of state government.

In constructing its independent public defense commission, New Hampshire should follow the lead of the increasing number of states that prohibit voting members of the commission from being a sitting judge, a current prosecuting attorney, a current law enforcement employee, or a person currently paid to provide public defense services (or any employee of any person in those roles).

**RECOMMENDATION 4: The State of New Hampshire should empower the state-level independent public defense commission to decide the most effective method or combination of methods to provide indigent defense services and to promulgate and enforce statewide standards applicable to all indigent defense attorneys, with all decisions to be made in compliance with U.S. Supreme Court case law and national standards.**

The methods used in New Hampshire to provide the right to counsel for indigent people were established by the legislature between 1977 and 1988, requiring a contract of no longer than two years with one or more private entities to serve as the public defender program and

allowing the contracted entities to subcontract for services, and allowing for conflict cases the options of contracting private attorneys or appointing private attorneys on a case-by-case basis or contracting with one or more private entities to serve as an alternate public defender program. These statutory mandates have tied the hands of the judicial council, in many ways preventing it from modernizing and adapting the state's indigent defense system to keep pace with developments in the state's broader criminal and juvenile justice systems, in case law, in technology, in changing populations, and in societal understanding of the most effective and efficient means of providing the right to counsel. The state-level independent public defense commission should have the power to implement whatever method or combination of methods it determines is most likely to ensure the provision of effective representation of each indigent defendant throughout the state and that complies with U.S. Supreme Court case law and national standards.

The state-level independent commission must consider whether one or more governmental public defender offices could more effectively and efficiently ensure the provision of the right to counsel to indigent defendants than the existing system of the state compensating only private attorneys to represent indigent defendants. Over the decades since *Gideon v. Wainwright* was decided, New Hampshire policymakers have expressed reluctance to add indigent defense attorneys to the state government payroll, which would be necessary if the independent public defense commission determines the right to counsel is most effectively ensured by hiring governmentally-employed public attorneys. But the State of New Hampshire must move forward to exercise greater oversight of the entirety of its indigent defense system in order to address the myriad deficiencies identified in this evaluation, and in doing so the state may find itself held responsible to pay and provide benefits for the private attorneys in the indigent defense system in the same manner that it would be responsible if they were public employees.<sup>10</sup>

No matter what methods are chosen to secure the attorneys who are appointed to represent indigent defendants, the state-level independent public defense commission must be statutorily required to promulgate and enforce binding standards applicable to all indigent defense system attorneys. For example, both Louisiana and Michigan statutorily require their commissions to promulgate and enforce mandatory statewide standards for, among other things: attorney qualifications; attorney performance; attorney supervision; time sufficiency; continuity of services, whereby the same attorney provides representation from appointment through disposition; client communications; and data collection.

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<sup>10</sup> Under the laws of many states and the federal government, the question of whether a person labeled an independent contractor by a state should in fact properly be classified as an employee is decided by courts applying multi-factor tests that examine the actual working relationship of the contracting parties. In the context of a nonprofit public defense contractor employee seeking to receive government employee benefits, the Washington Supreme Court noted that “government can and should exact high standards of performance from its independent contractors. Prudent financial controls and careful oversight of contract compliance does not render a contractor an agency of the government.” *Dolan v. King County*, 258 P.3d 20, 30 (Wash. 2012). Ultimately, the Washington Supreme Court held that, under the facts of the case before it, “the county has exerted such a right of control over the defender organizations as to make them agencies of the county” and the “employees of the defender organizations are employees of the county” entitled to be enrolled in the government’s retirement system. *Dolan v. King County*, 258 P.3d 20, 31 (Wash. 2012).

In particular, the New Hampshire public defense commission must have authority to ensure attorneys have sufficient time to effectively advocate for their appointed clients. The commission should be authorized to create workload standards that require attorneys to track their time against specific performance criteria to garner a more accurate projection of what it actually takes to handle each component of a client's advocacy needs, based on each type of case – a far more accurate method of measuring (and thereby controlling) workload than any other available. More than that, tracking time enables policymakers to tie specific variables (such as “time meeting with the client in person”) not only to specific case outcomes and dispositions, but also to systemic outcomes (like recidivism rates, or the rate of former clients now employed and contributing to the tax base).

**RECOMMENDATION 5: The state-level independent public defense commission should have an office of indigent defense services to carry out the day-to-day duties of the commission, headed by an executive director attorney selected by the commission and with adequate permanent staff to fulfill the commission's constitutional and statutory duties to ensure effective assistance of counsel to each indigent defendant.**

As directed by national standards, the state-level independent public defense commission should have statutory authority to select a senior attorney to serve as executive director of the office of indigent defense services, chosen “on the basis of a non-partisan, merit procedure which ensures the selection of a person with the best available administrative and legal talent, regardless of political party affiliation, contributions, or other irrelevant criteria.” The executive director should be hired by the commission for a fixed term that is subject to renewal and should not be removed from office absent good cause shown through due process. To ensure that the indigent defense system has a voice equal to that of other justice system participants, the executive director of the commission's office of indigent defense services should be made a permanent member of those statewide bodies in New Hampshire that are convened to consider and improve justice system policies, such as the judicial council. At minimum, a New Hampshire public defense commission's office of indigent defense services should reflect the staffing roles contained in Recommendation 2.

# **THE RIGHT TO COUNSEL IN NEW HAMPSHIRE**

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in Adult Criminal and Juvenile Delinquency Cases

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# Chapter I

## The right to counsel and this evaluation

The Sixth Amendment to the United States Constitution states that in “all criminal prosecutions” the accused shall enjoy the right, among others, to “have the Assistance of Counsel for his defence.”<sup>1</sup> In 1963, the U.S. Supreme Court declared it an “obvious truth” that anyone accused of a crime who cannot afford the cost of a lawyer “cannot be assured a fair trial unless counsel is provided for him.”<sup>2</sup>

Since *Gideon v. Wainwright*, the Sixth Amendment right to counsel means every person who is accused of a crime is entitled to have an attorney provided at government expense to defend them in all federal and state courts whenever that person is facing the potential loss of their liberty and is unable to afford their own attorney.<sup>3</sup> Moreover, the appointed lawyer needs to be more than merely a warm body with a bar card.<sup>4</sup> The attorney must also be effective,<sup>5</sup> subjecting the prosecution’s case to “the crucible of meaningful adversarial testing.”<sup>6</sup>

The U.S. Supreme Court has expressly held that the Sixth Amendment requires the appointment of counsel for those who cannot afford to hire their own attorney, upon their request, in not only felonies, but also when facing the possibility of jail time in misdemeanors and on direct appeals.<sup>7</sup> Indigent children in delinquency proceedings, no less than adults in criminal courts, are entitled to appointed counsel when facing the loss of their liberty.<sup>8</sup>

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<sup>1</sup> U.S. CONST. amend. VI.

<sup>2</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

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

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

<sup>5</sup> *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (“It has long been recognized that the right to counsel is the right to the effective assistance of counsel.”). To be effective, an attorney must be reasonably competent, providing to the particular defendant in the particular case the assistance demanded of attorneys in criminal cases under prevailing professional norms, such as those “reflected in American Bar Association standards and the like.” *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984).

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

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

<sup>8</sup> *In re Gault*, 387 U.S. 1 (1967). “[I]t would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase ‘due process.’ Under our Constitution, the condition of being a boy does not justify a kangaroo court.” *Id.* at 27-28. “A proceeding where the issue is whether the child will be found to be ‘delinquent’ and subjected to the loss of his liberty for years is comparable in seriousness to a felony

Every state in the nation must have a system for providing an attorney to represent each indigent defendant who is charged with a crime and faces the possible loss of their liberty. Beginning in 1977, New Hampshire became one of the few states in the entire country where the state both provides all of the funding for its indigent defense system and has a state-level agency that is responsible for overseeing and administering the indigent defense system. This consolidation of the indigent defense system at the state level stands in stark contrast to other aspects of New Hampshire's system of governance, where most decision-making is a deeply intertwined collaborative process involving state, county, and municipal policymakers.

## A. The right to counsel in New Hampshire

The New Hampshire constitution guarantees that “. . . [e]very person held to answer in any crime or offense punishable by deprivation of liberty shall have the right to counsel at the expense of the state if need is shown; this right he is at liberty to waive, but only after the matter has been thoroughly explained by the court.”<sup>9</sup> In criminal proceedings,<sup>10</sup> indigent adults charged with a felony or a class A misdemeanor are statutorily entitled to have counsel appointed to represent them, unless they waive the right to appointed counsel,<sup>11</sup> from “initial appearance before the court at every stage of the proceedings until the entry of final judgment.”<sup>12</sup> Although a person charged with a class B misdemeanor cannot be sentenced to jail, they can be detained without bail pending trial and counsel must be appointed to represent any indigent person during the

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prosecution. The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child ‘requires the guiding hand of counsel at every step in the proceedings against him.’ . . . [T]he assistance of counsel is essential for purposes of waiver proceedings, [and] we hold now that it is equally essential for the determination of delinquency, carrying with it the awesome prospect of incarceration in a state institution until the juveniles reaches the age of 21.” *Id.* at 36.

<sup>9</sup> N.H. CONST. pt. I, art. 15.

<sup>10</sup> All offenses in New Hampshire are either a felony, a misdemeanor, or a violation. N.H. REV. STAT. ANN. § 625:9 (2019). Felonies and misdemeanors are considered to be crimes, while violations do not constitute a crime. N.H. REV. STAT. ANN. § 625:9(II) (2019). All felonies and Class A misdemeanors are punishable by loss of liberty. N.H. REV. STAT. ANN. § 625:9(III), (IV)(a) (2019). Class B misdemeanors and violations do not carry loss of liberty as a possible punishment. N.H. REV. STAT. ANN. § 625:9(IV)(b) (2019) (class B misdemeanor); N.H. REV. STAT. ANN. § 625:9(V) (2019) (violation). The primary difference between a class B misdemeanor and a violation is that the misdemeanor is classified as a crime while the violation is not a crime. N.H. REV. STAT. ANN. § 625:9(II) (2019).

A felony is an offense that carries a maximum penalty of “imprisonment in excess of one year.” N.H. REV. STAT. ANN. § 625:9(III) (2019). There are three classifications of felonies: murder; class A felony – maximum penalty is imprisonment in excess of seven years; and class B felony – maximum penalty is imprisonment in excess of one year and up to seven years. N.H. REV. STAT. ANN. § 625:9(III) (2019). Effective May 30, 2019, New Hampshire no longer has the death penalty as a possible punishment. *See* N.H. REV. STAT. ANN. § 630:1(III) (2019). New Hampshire House Bill 455 was passed by the legislature on April 25, 2019, vetoed by the governor on May 3, 2019, and veto overridden on May 30, 2019 taking immediate effect. It changed the penalty for capital murder from “may be punished by death” to “shall be sentenced to imprisonment for life without the possibility for parole.” Act of Apr. 25, 2019, 2019 N.H. Legis. Serv. ch. 42 (HB455, relative to the penalty for capital murder).

A class A misdemeanor carries a maximum penalty of imprisonment up to (but not more than) one year. N.H. REV. STAT. ANN. § 625:9(IV)(a) (2019).

<sup>11</sup> N.H. REV. STAT. ANN. § 604-A:2(I) (2019).

<sup>12</sup> N.H. REV. STAT. ANN. § 604-A:3 (2019). *See also* N.H. R. CRIM. PROC. 5.

detention hearing.<sup>13</sup> In delinquency proceedings,<sup>14</sup> indigent children are statutorily entitled to have counsel appointed to represent them, unless they waive the right to appointed counsel.<sup>15</sup>

“States are free to provide greater protections in their criminal justice system than the Federal Constitution requires,”<sup>16</sup> but they cannot provide less. Though the federal Constitution does not require it,<sup>17</sup> New Hampshire statutorily guarantees appointed counsel to indigent defendants in some later stages of a criminal or delinquency case<sup>18</sup> and to indigent parties in certain civil proceedings.<sup>19</sup>

<sup>13</sup> N.H. REV. STAT. ANN. § 597:2(IX) (2019).

<sup>14</sup> Delinquency proceedings allege the commission of an offense by a child (under the age of 18): (i) that “would be a felony or misdemeanor . . . if committed by an adult;” or (ii) that is possession of up to 3/4 oz. marijuana or up to 5 grams hashish resulting in the child needing “counseling, supervision, treatment, or rehabilitation.” N.H. REV. STAT. ANN. §§ 169-B:1, 169-B:2(IV), 318-B:2-c (2019). If adjudicated delinquent (other than for certain delineated offenses), a child can be committed to custody until the age of 18, and in certain circumstances until the age of 21. N.H. REV. STAT. ANN. §§ 169-B:4(IV), 169-B:19(I)(j), 169-B:19 (III), 169-B:19(III-a) (2019).

<sup>15</sup> N.H. REV. STAT. ANN. § 169-B:12(I) (2019).

<sup>16</sup> *California v. Ramos*, 463 U.S. 992, 1014 (1983). *See, e.g., Oregon v. Hass*, 420 U.S. 714, 719 (1975); *Cooper v. California*, 386 U.S. 58, 62 (1967).

<sup>17</sup> *Murray v. Giarratano*, 492 U.S. 1, 10 (1989); *Pennsylvania v. Finley*, 481 U.S. 551, 555-57 (1987); *Ross v. Moffitt*, 417 U.S. 600, 610-12, 617-18 (1974).

<sup>18</sup> Including:

- Adult probation violation proceedings. *Stapleford v. Perrin*, 122 N.H. 1083, 1088 (1982); N.H. R. CRIM. P. 30(a) (as amended through Mar. 10, 2020).
- Adult parole violation proceedings. *Stapleford v. Perrin*, 122 N.H. 1083, 1088 (1982); N.H. CODE ADMIN. R. ANN. Par 501.04(b)(5), (c) (effective Apr. 7, 2017). *See also* N.H. R. CRIM. P. 29(k)(18) (as amended through Mar. 10, 2020) (indigent defendant’s right to appointed counsel at a sentencing review hearing).
- Certain post-disposition proceedings in delinquency cases, without regard to indigency. N.H. REV. STAT. ANN. §§ 169-B:31, 169-B:31-c(I), 621:19(I), 170-H:10-a(I) (2019).

<sup>19</sup> Including:

- Certain stages & types of involuntary commitment/treatment cases. N.H. REV. STAT. ANN. §§ 135:17-a(VI), 135-C:22, 135-C:23, 135-C:30, 135-C:31(I), 135-C:43(I), 135-E:3, 135-E:5, 135-E:9(I), 135-E:11(III), 135-E:12(II), 135-E:23, 171-A:24, 171-B:10, 622:52, 651:8-b(II) (2019); N.H. SUP. CT. R. 32-A(1) (amended effective Jan. 1, 2020); N.H. CODE ADMIN. R. ANN. He-M 310.05(j) (effective Apr. 25, 2015); N.H. CODE ADMIN. R. ANN. He-M 528.08(e) (effective July 1, 2016); N.H. CODE ADMIN. R. ANN. He-M 611.07(a), (d) (effective July 25, 2017); N.H. CODE ADMIN. R. ANN. He-M 611.07(e) (effective July 25, 2017).
- Certain stages of involuntary guardianship cases. *In re Guardianship of Williams*, 986 A.2d 559, 567 (N.H. 2009); N.H. REV. STAT. ANN. §§ 464-A:6, 464-A:25(I)(a)(3) (2019); N.H. SUP. CT. R. 32-A(1) (amended effective Jan. 1, 2020).
- A child, without regard to indigency, in a children in need of services (CHINS) case. N.H. REV. STAT. ANN. § 169-D:12 (2019); N.H. CIR. CT. FAM. DIV. R. 3.4 (as amended through Mar. 10, 2020).
- A parent alleged to have neglected and/or abused their child. N.H. REV. STAT. ANN. § 169-C:10(II)(a) (2019).
- A parent in a termination of parental rights case. *See* N.H. REV. STAT. ANN. § 170-C:10 (2019); N.H. SUP. CT. R. 32-A(1) (amended effective Jan. 1, 2020).
- Pregnant minors, without regard to indigency, in parental notification of abortion proceedings. N.H. REV. STAT. ANN. § 132:34(II) (2019); N.H. SUP. CT. R. 32-B(1) (as amended through Mar. 10, 2020); N.H. SUPER. CT. R. 54(c) (as amended through Mar. 10, 2020); N.H. SUPER. CT. R. 54(g)(1), (2), (3) (as amended through Mar. 10, 2020).

The scope of this evaluation is limited to the provision of counsel in the New Hampshire trial courts in adult criminal and juvenile delinquency cases. Throughout New Hampshire, the indigent defense system established by the state must provide representation when appointed in all the types of cases for which New Hampshire provides a right to counsel.<sup>20</sup> As a result, the same indigent defense system lawyers who are appointed to represent adults and children in criminal and delinquency proceedings in the trial courts are also appointed in the appellate courts and to represent some adults and children in some civil matters at both trial and appeal.

## B. A brief history of providing the right to counsel in New Hampshire

In 1963, the U.S. Supreme Court said in *Gideon v. Wainwright* that providing the Sixth Amendment right to effective assistance of counsel for the indigent accused in state courts is an obligation of the states under the due process clause of the Fourteenth Amendment.<sup>21</sup> Every state in the nation must have a system for providing an attorney to represent each indigent defendant who is charged with a crime and faces the possible loss of their liberty. Because the “responsibility to provide defense services rests with the state,” national standards as summarized in the *ABA Ten Principles of a Public Defense Delivery System* unequivocally declare “there should be state funding and a statewide structure responsible for ensuring uniform quality statewide.”<sup>22</sup>

**New Hampshire Judicial Council.** In 1946, almost two decades before *Gideon*, the New Hampshire legislature created the New Hampshire Judicial Council and made it responsible for “continuously studying and surveying the administration of justice and the organization, procedures, and operations of all of New Hampshire’s courts.”<sup>23</sup> As the judicial council states: “Through several happy accidents, the responsibility for overseeing the delivery of defendant

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<sup>20</sup> N.H. REV. STAT. ANN. § 494:3 (2019). See NEW HAMPSHIRE JUDICIAL COUNCIL, 22ND BIENNIAL REPORT JULY 1, 2011 – JUNE 30, 2013, at 6-7 (Mar. 2014).

<sup>21</sup> *Gideon v. Wainwright*, 372 U.S. 335, 343-45 (1963).

<sup>22</sup> AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, principle 2 cmt. (2002).

<sup>23</sup> NEW HAMPSHIRE JUDICIAL COUNCIL, 22ND BIENNIAL REPORT JULY 1, 2011 – JUNE 30, 2013, at 9 (Mar. 2014). The responsibilities of the judicial council have fluctuated significantly since its creation, and many of the responsibilities it previously had have moved to other bodies. As the judicial council explained in its March 2014 biennial report:

While the Judicial Council’s statutory membership gave the heads of each court the occasion to meet on a regular basis, this purpose is now satisfied by the regular meetings of the Judicial Branch’s Administrative Council, and by the natural advantages derived from the proximity of the Administrative Council members’ offices to each other’s. While the Judicial Council enjoyed a preeminent role in recommending improvements to the delivery and administration of justice, this responsibility is now carried out by the Judicial Branch’s Administrative Council. While the Judicial Council played an important role in collecting, organizing and disseminating statistical information about the courts, now it is the Administrative Office of the Courts that is responsible for disseminating, (and which has more direct access to), the statistical data concerning the Judicial Branch. While the Judicial Council played an important role in recommending to the Legislature certain statutes designed to improve the administration of the courts and the delivery of justice, that role is now filled by the Judicial Branch itself, which utilizes the services of a General Counsel to represent the interests of the Courts before the New Hampshire Legislature.

NEW HAMPSHIRE JUDICIAL COUNCIL, 22ND BIENNIAL REPORT JULY 1, 2011 – JUNE 30, 2013, at 10 (Mar. 2014).

representation in New Hampshire’s indigent-defense delivery scheme has fallen to the Judicial Council.”<sup>24</sup>

**Assigned counsel private attorneys.** Historically in New Hampshire, local judges were responsible for appointing private attorneys to represent indigent people on a case-by-case basis.<sup>25</sup> Beginning in 1965, the legislature made the judicial council responsible for paying the attorney fees and the case-related expenses in the cases where the courts appointed counsel and ordered payment.<sup>26</sup>

**The contract public defender program private attorneys.** In 1977, the legislature statutorily created a “public defender program” to be implemented over time in all 10 counties, charged the judicial council to contract every two years with an organization to serve as the public defender, and made the judicial council responsible for supervising the public defender program.<sup>27</sup> From 1977 to 1986, New Hampshire Legal Assistance operated the public defender program.<sup>28</sup> In 1986, the judicial council for the first time contracted the newly-formed non-profit New Hampshire Public Defender law firm to operate the state’s public defender program,<sup>29</sup> and the New Hampshire Public Defender has been awarded a contract every two years ever since.

**Contract counsel private attorneys.** In 1985, the legislature authorized the judicial council to contract with “private attorneys to provide representation in conflict cases that cannot be handled by the Public Defender Program because of professional conduct requirements.”<sup>30</sup> “The contract attorney system was established . . . to serve as a backstop to the Public Defender, to provide predictability of costs and to reduce the State’s reliance on the costly Assigned Counsel system.”<sup>31</sup>

**Alternate public defender program.** Since 1988, the judicial council has had statutory authority, with approval of the governor and council, to additionally contract with an “alternate public defender program” to provide indigent representation when the primary public defender program has a conflict or is otherwise unable to be appointed.<sup>32</sup> The judicial council has never been funded to do so.

<sup>24</sup> NEW HAMPSHIRE JUDICIAL COUNCIL, 22ND BIENNIAL REPORT JULY 1, 2011 – JUNE 30, 2013, at 6 (Mar. 2014).

<sup>25</sup> See, e.g., N.H. REV. LAWS 1942, ch. 428, § 2.

<sup>26</sup> NEW HAMPSHIRE JUDICIAL COUNCIL, 22ND BIENNIAL REPORT JULY 1, 2011 – JUNE 30, 2013, at 9 (Mar. 2014). See N.H. REV. STAT. ANN. § 604-A:2(II) (2019) (any qualified attorney); N.H. REV. STAT. ANN. §§ 604-B:5, 604-B:6 (2019) (assigned counsel); N.H. SUP. CT. R. 47 (assigned counsel); N.H. SUP. CT. R. 48 (assigned counsel in juvenile delinquency cases).

<sup>27</sup> NEW HAMPSHIRE JUDICIAL COUNCIL, 22ND BIENNIAL REPORT JULY 1, 2011 – JUNE 30, 2013, at 9 (Mar. 2014). See N.H. REV. STAT. ANN. §§ 604-B:1, 604-B:4, 604-B:5 (2019).

<sup>28</sup> NEW HAMPSHIRE JUDICIAL COUNCIL, 22ND BIENNIAL REPORT JULY 1, 2011 – JUNE 30, 2013, at 9 (Mar. 2014). See “Articles of Agreement of New Hampshire Public Defender” (May 6, 1985).

<sup>29</sup> NEW HAMPSHIRE JUDICIAL COUNCIL, 22ND BIENNIAL REPORT JULY 1, 2011 – JUNE 30, 2013, at 9 (Mar. 2014).

<sup>30</sup> NEW HAMPSHIRE JUDICIAL COUNCIL, 22ND BIENNIAL REPORT JULY 1, 2011 – JUNE 30, 2013, at 6 (Mar. 2014). See N.H. REV. STAT. ANN. § 604-A:2-b (2019).

<sup>31</sup> NEW HAMPSHIRE JUDICIAL COUNCIL, 22ND BIENNIAL REPORT JULY 1, 2011 – JUNE 30, 2013, at 6 (Mar. 2014).

<sup>32</sup> See N.H. REV. STAT. ANN. § 604-B:8 (2019).

**Present day.** Today, the entire New Hampshire indigent defense system is provided and funded by the state through and overseen by the New Hampshire Judicial Council.<sup>33</sup> Out of the state’s appropriations to the judicial council, the judicial council is responsible for paying the compensation to every appointed attorney and for “investigative, expert and other services and expenses, including process to compel the attendance of witnesses,” whenever a court finds those expenses to be “necessary for an adequate defense before the courts of this state.”<sup>34</sup>

The judicial council uses a three-part system of private attorneys to provide the right to counsel in adult criminal and juvenile delinquency cases, in every case where the courts appoint counsel:

- a two-year contract with the non-profit New Hampshire Public Defender law firm to serve as the state’s “public defender program;”
- a series of one-year contracts with individual private attorneys, for-profit private law firms, and a law school, referred to as “contract counsel,” to be available for assignment (in non-homicide cases) when the New Hampshire Public Defender has a conflict or is otherwise unavailable; and
- case-by-case appointments of individual private attorneys, referred to as “assigned counsel,” who accept assignments to cases when the New Hampshire Public Defender is unavailable and there is no available contract counsel.

New Hampshire is the only state in the country that contracts with a single private law firm, rather than establishing a government office, to serve as the statewide public defender office. There is nothing in U.S. Supreme Court caselaw or national standards that mandates whether a jurisdiction should use private attorneys or governmentally-employed attorneys or both to provide the constitutional right to counsel. What matters is that whatever system(s) a jurisdiction puts in place to provide the right to counsel must be capable of and actually implementing the requirements of U.S. Supreme Court caselaw and national standards. The extent to which New Hampshire fulfills these requirements is discussed throughout this report.

## C. This evaluation

The New Hampshire Judicial Council is statutorily required to “administer the indigent defense delivery system and ensure its quality and cost effectiveness . . .”<sup>35</sup> Toward that end, the judicial council sought a statewide study to evaluate the provision of trial-level right to counsel services to adults and children accused of violating state and local laws that carry potential loss of liberty as punishment. In January 2020, the U.S. Department of Justice, Bureau of Justice Assistance, approved funding for the Sixth Amendment Center, in partnership with the Defender Initiative at Seattle University School of Law, to conduct this evaluation, and on January 31, 2020, the New Hampshire Judicial Council unanimously authorized this study.

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<sup>33</sup> N.H. REV. STAT. ANN. §§ 494:3, 604-A:1 (2019). *See* NEW HAMPSHIRE JUDICIAL COUNCIL, 22ND BIENNIAL REPORT JULY 1, 2011 – JUNE 30, 2013, at 6-7 (Mar. 2014).

<sup>34</sup> N.H. REV. STAT. ANN. § 604-A:1 (2019).

<sup>35</sup> N.H. REV. STAT. ANN. § 494:3(VI) (2019).

Just days before this evaluation was authorized, the coronavirus was detected in the U.S., and the circumstances of the pandemic required the Sixth Amendment Center to conduct some aspects of this evaluation in a manner different than that normally employed. Most significantly, the pandemic prevented in-person travel to New Hampshire.

**Methodology.** The Sixth Amendment Center independently and objectively evaluates indigent representation systems. This evaluation has been carried out through four basic components.

*Legal research and analysis.* Every state in the country has its own substantive and procedural law – through its constitution, statutes, rules, regulations, and case law – that operates differently than that of every other state. In addition, counties and cities, as well as the courts located within them, often have their own governing laws, rules, and policies. The Sixth Amendment Center independently researched the relevant law of New Hampshire and analyzed its internal interactions and its interactions with federal law and national standards, in order to understand and explain the workings of the indigent representation system.

*Data collection and analysis.* Information about how a jurisdiction provides right to counsel services exists in a variety of forms, from statistical information to policies and procedures. The New Hampshire Judicial Council, the Administrative Office of the Courts, the New Hampshire Public Defender, and many individuals provided to and aided the Sixth Amendment Center in obtaining necessary information. The Sixth Amendment Center obtained and analyzed extensive amounts of hard copy and electronic information from both state and local sources.

*Court observations.* Right to counsel services in any jurisdiction involve interactions among at least three critical processes: (1) the process individuals experience as their cases advance from accusation through disposition; (2) the process the appointed attorney experiences while representing each person at the various stages of a case; and (3) the substantive laws and procedural rules that govern the justice system in which indigent representation is provided. Although court proceedings could not be observed in-person, the Sixth Amendment Center was able to observe some proceedings in both the superior court and the circuit court as they were held by video conference and teleconference during the pandemic.

*Interviews.* No individual component of the justice system operates in a vacuum. Rather, the policy decisions of one component necessarily affect another. Because of this, the Sixth Amendment Center conducted interviews orally and in writing with a broad cross-section of stakeholders from every county, including judges, court administrators and clerks, bail commissioners, prosecutors, defense attorneys, corrections officials, community organizations, and the staffs and boards of the New Hampshire Judicial Council and the New Hampshire Public Defender.

**Assessment criteria.** The Sixth Amendment Center uses Sixth Amendment case law and national standards for right to counsel services as the uniform baseline measure for providing attorneys to indigent people, along with the requirements of local and federal laws. The criteria used to assess the effectiveness of indigent defense systems and the attorneys who work within

them come primarily from two U.S. Supreme Court cases that were decided on the same day: *United States v. Cronic*<sup>36</sup> and *Strickland v. Washington*.<sup>37</sup> *Strickland* looks at a case after it is final, to determine retrospectively whether the lawyer provided ineffective assistance of counsel, applying the two-pronged test of whether the appointed lawyer's actions were unreasonable and prejudiced the outcome of the case. *Cronic* explains that, if certain systemic factors are present (or necessary factors are absent) at the outset of a case, then a court should presume that ineffective assistance of counsel will occur.

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

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

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

<sup>a</sup> AMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (Feb. 2002), available at [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_tenprinciplesbooklet.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf).

<sup>36</sup> 466 U.S. 648 (1984).

<sup>37</sup> 466 U.S. 668 (1984).



## The coronavirus pandemic & New Hampshire's justice system

Just as this evaluation was being authorized, the coronavirus pandemic struck the United States and worldwide. As is now familiar to all, the novel coronavirus that causes the covid-19 disease was first detected in late-December 2019 in Wuhan, Hubei Province, China.<sup>a</sup> The first U.S. case was confirmed on January 21, 2020, in Washington state.<sup>b</sup> On March 11, 2020, the World Health Organization officially declared the coronavirus outbreak a pandemic.<sup>c</sup> On March 13, 2020, the U.S. president declared a nationwide emergency.<sup>d</sup>

With six confirmed cases in New Hampshire, Governor Christopher Sununu formally declared a state of emergency in New Hampshire on March 13, 2020 in order to mitigate the spread of the coronavirus.<sup>e</sup> Less than two weeks later and just days after the first coronavirus-related death in New Hampshire, the governor issued a statewide “stay at home” order, requiring individuals to remain in their homes other than for essential activities, closing all non-essential businesses and operations, and prohibiting gatherings of more than ten people.<sup>f</sup> Between March of 2020 and the release of this report, with the number of tests, cases, deaths, and vaccine administrations being reported daily, New Hampshire (like the rest of the world) has frequently adjusted what people are allowed and disallowed to do within the state.<sup>g</sup>

Following the governor's state of emergency declaration, the Supreme Court of New Hampshire issued an order on March 16, 2020 that suspended in-person court proceedings (with limited exceptions) in all circuit and superior court locations in the state and authorized all judges and court clerks to “limit in-person courtroom contact as much as possible by utilizing available technologies, including alternative means of filing, teleconferencing, email, and video conferencing.”<sup>h</sup> In conjunction with the governor's statewide “stay at home order,” the Supreme Court of New Hampshire issued two separate orders – a March 27, 2020 order to the circuit court and a March 28, 2020 order to the superior court – that restricted physical public access into all courthouses in the state, suspended all in-person jury trials and grand jury proceedings, and authorized the courts to conduct certain hearings by video or telephone.<sup>i</sup>

Between March of 2020 and the release of this report, the Supreme Court of New Hampshire has issued multiple orders relative to the evolving needs due to the novel coronavirus.<sup>j</sup> As of May 18, 2021, all court clerks' offices are again open to the public, and “[e]ach court . . . shall continue to work toward a greater expansion of in-person proceedings, with the goal of achieving the full resumption of in-person operations as soon as possible.”<sup>k</sup>

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

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

<sup>c</sup> *WHO Director-General's opening remarks at the media briefing on COVID-19 – 11 March 2020*, WORLD HEALTH ORGANIZATION (Mar. 11, 2020).

<sup>d</sup> *President Donald J. Trump directs FEMA support under emergency declaration for COVID-19*, FEMA (Mar. 13, 2020).

<sup>e</sup> New Hampshire Exec. Order 2020-04 (Mar. 13, 2020).

<sup>f</sup> New Hampshire Emergency Order #16 (Mar. 26, 2020); New Hampshire Emergency Order #17 (Mar. 26, 2020).

<sup>g</sup> Between March 2020 and April 16, 2021, the governor extended the state of emergency 21 times and issued 90 emergency orders in response to covid-19. See NEW HAMPSHIRE GOVERNOR CHRIS SUNUNU COVID-19 EMERGENCY ORDERS, <https://www.governor.nh.gov/news-and-media/covid-19-emergency-orders-2020>.

<sup>h</sup> Order, Order Suspending In-Person Court Proceedings, Supreme Court of New Hampshire (N.H. Mar. 16, 2020).

<sup>i</sup> Order, Renewed and Amended Order Suspending In-Person Court Proceedings Related to New Hampshire Superior Court and Restricting Public Access to Courthouses, Supreme Court of New Hampshire (N.H. Mar. 28, 2020); Order, Renewed and Amended Order Suspending In-Person Court Proceedings Related to New Hampshire Circuit Court and Restricting Public Access to Courthouses, Supreme Court of New Hampshire (N.H. Mar. 27, 2020).

<sup>j</sup> *Important Information About the Judicial Branch Response to Covid-19 – Latest Orders*, NEW HAMPSHIRE JUDICIAL BRANCH, <https://www.courts.state.nh.us/aoc/corona-covid-19.html#orders>.

<sup>k</sup> Order, Twentieth Renewed and Amended Emergency Order Governing Operations of New Hampshire courts and Supreme Court Committees (N.H. May 14, 2021).

## This evaluation and the coronavirus pandemic

This report evaluates the provision of the Sixth Amendment right to counsel in New Hampshire based on the laws and procedures of the justice system when there is not a pandemic. Throughout this report, wherever there have been changes put in place in New Hampshire because of the pandemic, we strive to identify those.

The pandemic procedures in place during much of the evaluation period and at the time of this report's release are, at least for now, considered to be temporary. Nobody knows how long the pandemic will go on and how the temporary pandemic procedures will change as the justice system learns and adapts. Nobody can know,

today, how much of the temporary changes made to criminal and juvenile procedures during the pandemic may be permanently adopted into state law and court rules.

The fiscal and caseload data included in this report, for the most part, encompasses New Hampshire's data during FY 2019 through FY 2021, the three-year period of July 1, 2018 through June 30, 2021. It is reasonable for justice system policymakers to expect both fiscal resources and attorney workloads to be dramatically affected for so long as the pandemic continues and quite likely for some number of years following its conclusion.

## Chapter II

# The New Hampshire justice system

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

The trial-level right to counsel in New Hampshire is carried out in the superior court and circuit court. Decisions about the number and type of criminal and delinquency cases in the trial courts are made by law enforcement officers as they make arrests and by prosecutors as they institute prosecution. The indigent defense system in New Hampshire has no control over the number of cases for which counsel must be provided, and each indigent defense system attorney must effectively represent each and every person to whom they are appointed.

The operations of New Hampshire's justice system occur through a combination of decision-making and funding by the state, counties, and municipalities. Variations at the state, county, and local levels mean that one aspect or another of the justice system changes frequently, and they also make it difficult to provide a snapshot in time of the entirety of the criminal and delinquency systems.

For example, each geographic unit of government can operate on a different fiscal year than others; the state uses a fiscal year of July 1 through June 30, while counties by default operate on a calendar year but can choose to use the same fiscal year as the state.<sup>a</sup> For comparative purposes, all descriptive information in this chapter is provided where possible for the state's fiscal year of FY 2021 (July 1, 2020 through June 30, 2021).

<sup>a</sup> N.H. REV. STAT. ANN. § 9:13 (2019) (state); N.H. REV. STAT. ANN. §§ 31:94, 31:94-a, 31:94-b, 31:94-c (2019) (counties).

## A. The courts and judges

There are three levels of courts in New Hampshire:<sup>38</sup>

- the supreme court, for discretionary review and most appeals;
- the superior court, for trial-level jury cases, including de novo jury trials in class A misdemeanors on appeal from the circuit court - district division; and
- the circuit court, for trial-level non-jury cases. The circuit court comprises three divisions:
  - the district division, for misdemeanors and violations (among other things);
  - the family division, for juvenile delinquency (among other things); and
  - the probate division (not relevant to this evaluation).

<sup>38</sup> N.H. CONST. pt. II, art. 72-a; N.H. REV. STAT. ANN. ch. 490 (2019) (supreme court). N.H. CONST. pt. II, art. 72-a; N.H. REV. STAT. ANN. ch. 491 (2019) (superior court). N.H. REV. STAT. ANN. ch. 490-F (2019) (circuit court).

All justices and judges throughout the state are appointed by the governor and council, with either the governor or the council having the power to prevent an appointment.<sup>39</sup> The term of all judicial appointments is “during good behavior,”<sup>40</sup> except mandatory retirement at age 70 causes an automatic judicial vacancy.<sup>41</sup> The salaries of all justices and judges are set by the legislature.<sup>42</sup> The state funds all court facilities and operations.<sup>43</sup>

**Brief history of recent changes in the New Hampshire court system.** New Hampshire’s court system has changed in significant ways over the past decade. Two court system changes are particularly relevant to this evaluation. Although both of the specific changes discussed here have been fully implemented throughout the state for a number of years, criminal justice system stakeholders are still adapting and often refer to these as “new ways” of doing things.

*Creation of circuit court.* The legislature established the circuit court, with its three divisions, effective July 1, 2011.<sup>44</sup> Prior to that, there was no such thing as a circuit court, but there were separate district courts (some with judicial branch family divisions) and probate courts whose jurisdiction was consolidated into the circuit court,<sup>45</sup> and there were also justice of the peace courts and municipal courts that are now entirely eliminated.

*“Felonies First” program.* Between January 1, 2016 and October 1, 2017, the “Felonies First” program was implemented in all superior court and circuit court - district division locations.<sup>46</sup> Where previously all criminal cases had begun in the circuit court, now felonies (and directly-related misdemeanors and violations) are directly filed into and are within the exclusive jurisdiction of the superior court.<sup>47</sup> (Taking effect on January 1, 2024, the circuit court - district

<sup>39</sup> N.H. CONST. pt. II, arts. 46, 47.

<sup>40</sup> N.H. CONST. pt. I, art. 35; N.H. CONST. pt. II, art. 73.

<sup>41</sup> N.H. REV. STAT. ANN. § 493:2 (2019).

<sup>42</sup> N.H. CONST. pt. II, art. 59; N.H. REV. STAT. ANN. §§ 491-A:1, 491-A:3, 491-A:4 (2019).

<sup>43</sup> N.H. REV. STAT. ANN. § 490-B:3 (2019). The judicial branch includes in its budget request the funding needed for court facilities and operations. N.H. REV. STAT. ANN. § 490-B:5 (2019).

<sup>44</sup> See generally N.H. REV. STAT. ANN. ch. 490-F (2019).

<sup>45</sup> N.H. REV. STAT. ANN. § 490-F:3 (2019).

<sup>46</sup> N.H. REV. STAT. ANN. § 592-B:2 (2019); Order (N.H. Oct. 17, 2016) (implementation of the “Felonies First” project). The dates of implementation in each county are:

Cheshire County Superior Court	January 1, 2016
Strafford County Superior Court	January 1, 2016
Belknap County Superior Court	July 1, 2016
Merrimack County Superior Court	January 1, 2017
Carroll County Superior Court	April 1, 2017
Coos County Superior Court	April 1, 2017
Grafton County Superior Court	April 1, 2017
Hillsborough County Superior Court - Northern Division	September 1, 2017
Hillsborough County Superior Court - Southern Division	September 1, 2017
Rockingham County Superior Court	October 1, 2017
Sullivan County Superior Court	October 1, 2017

N.H. REV. STAT. ANN. § 592-B:2 (2019); Order (N.H. Oct. 17, 2016) (implementation of the “Felonies First” project).

<sup>47</sup> N.H. REV. STAT. ANN. §§ 592-B:1, 592-B:2 (2019). Offenses alleged to have occurred prior to the date of

division will again have jurisdiction over felony complaints prior to their being bound over to the superior court.<sup>48</sup> This in essence repeals the “Felonies First” program, such that the circuit court, rather than the superior court, will conduct arraignments and preliminary examinations on felony complaints.) On the same date the program was implemented in each superior court location, the newly adopted *Rules of Criminal Procedure* also took effect in the superior court and its related circuit court - district division locations.<sup>49</sup> As statutorily required, the judicial council issued three reports (the last dated February 16, 2019) about implementation of the program.<sup>50</sup> (See discussion of “Felonies First” and its effects on the indigent defense system at pages 100-104.)

## 1. The New Hampshire Supreme Court

The state’s supreme court is established by the state’s constitution.<sup>51</sup> With five appointed justices and located in Concord, the supreme court is the court of last resort, exercising both discretionary review and appellate jurisdiction.<sup>52</sup> The supreme court has supervisory authority over all New Hampshire courts.<sup>53</sup> The chief justice is the administrative head of the state’s court system, responsible for establishing rules of court and the practice and procedure in all courts.<sup>54</sup>

## 2. Trial courts

There are two levels of trial courts: the superior court, which can conduct both jury and non-jury trials; and the circuit court, which can only hear non-jury matters.<sup>55</sup> Before going into detail, the following table shows the superior court locations and the circuit court locations throughout the state that handle cases arising out of each county.<sup>56</sup> Some circuit court locations have jurisdiction over cases arising out of counties other than where the court is located. This means that a person accused of committing a crime or delinquent act within a given county may have to go to court in a different county than where the offense is alleged to have occurred. The New Hampshire

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implementation of “Felonies First” in a given county continue to be filed initially into the circuit court, as they previously were. N.H. REV. STAT. ANN. § 592-B:2(III) (2019).

<sup>48</sup> Act permitting arraignments for felonies and preliminary examinations to be heard in circuit court, 2022 N.H. Legis. Serv. ch. 268 (HB1597-FN)..

<sup>49</sup> N.H. R. CRIM. PROC. preamble.

<sup>50</sup> N.H. REV. STAT. ANN. § 592-B:2 (2019); NEW HAMPSHIRE JUDICIAL COUNCIL, REPORT ON FELONIES FIRST (Feb. 16, 2019); NEW HAMPSHIRE JUDICIAL COUNCIL, REPORT ON FELONIES FIRST (Oct. 16, 2017); NEW HAMPSHIRE JUDICIAL COUNCIL, REPORT ON FELONIES FIRST (Jan. 1, 2017).

<sup>51</sup> N.H. CONST. pt. II, art. 72-a.

<sup>52</sup> N.H. REV. STAT. ANN. §§ 490:1, 490:4, 599:1-c (2019).

<sup>53</sup> N.H. REV. STAT. ANN. § 490:4 (2019).

<sup>54</sup> N.H. CONST. pt. II, art. 73-a; N.H. REV. STAT. ANN. §§ 490-A:2, 490-A:3 (2019). One of the five justices is designated as “chief justice,” rotating based on seniority for a term of up to five years, but with any justice allowed to decline to serve in the role. N.H. REV. STAT. ANN. § 490:1 (2019).

<sup>55</sup> N.H. CONST. pt. II, art. 72-a; N.H. REV. STAT. ANN. § 491:7 (2019) (superior court). N.H. REV. STAT. ANN. §§ 490-F:1, 490-F:2, 490-F:3 (2019) (circuit court).

<sup>56</sup> N.H. REV. STAT. ANN. § 496:1 (2019) (superior court); N.H. REV. STAT. ANN. §§ 490-F:1, 490-F:2, 490-F:3 (2019) (circuit court); N.H. REV. STAT. ANN. § 502-A:1 (2019) and as amended effective Sept. 21, 2020 (establishing circuit judicial districts and court locations); N.H. REV. STAT. ANN. § 490-D:4 (2019) and as amended effective Sept. 21, 2020 (establishing the court locations/facilities at which family division cases are heard).

**NEW HAMPSHIRE TRIAL COURT LOCATIONS, BY COUNTY**

County	Superior Court hearing cases arising within the county	Town location	Circuit Court divisions hearing cases arising within certain geographic areas of the county (the name of the district identifies its town location)	
			district division (adult criminal)	family division (juvenile delinquency)
<b>Belknap</b>	Belknap Superior Court	Laconia	Franklin District (in Merrimack County) * Laconia District	
<b>Carroll</b>	Carroll Superior Court	Ossipee	Conway District Ossipee District	
<b>Cheshire</b>	Cheshire Superior Court	Keene	Jaffrey-Peterborough District *** Keene District	
<b>Coos</b>	Coos Superior Court	Lancaster	Berlin District Colebrook District Lancaster District	
<b>Grafton</b>	Grafton Superior Court	North Haverhill	Haverhill District Lebanon District Littleton District Plymouth District	
<b>Hillsborough</b>	Hillsborough Superior Court North	Manchester	Goffstown District Hillsborough District ** Jaffrey-Peterborough District (in Cheshire County) *** Manchester District Merrimack District	
	Hillsborough Superior Court South	Nashua	Jaffrey-Peterborough District (in Cheshire County) *** Merrimack District Milford District Nashua District Salem District (in Rockingham County) *****	
<b>Merrimack</b>	Merrimack Superior Court	Concord	Concord District Franklin District * Hillsborough District (in Hillsborough County) ** Hooksett District Newport District (in Sullivan County) ****	
<b>Rockingham</b>	Rockingham Superior Court	Brentwood	Brentwood District Candia District Derry District Hampton District Portsmouth District Salem District *****	

County	Superior Court hearing cases arising within the county	Town location	Circuit Court divisions hearing cases arising within certain geographic areas of the county (the name of the district identifies its town location)	
			district division (adult criminal)	family division (juvenile delinquency)
Strafford	Strafford Superior Court	Dover	Dover District	
			Rochester District	
Sullivan	Sullivan Superior Court	Newport	Claremont District	
			Newport District ****	

\* The Franklin District has geographic jurisdiction over cases arising out of parts of both Belknap County and Merrimack County: in Belknap County, the towns of Sanbornton and Tilton.

in Merrimack County, the city of Franklin and the towns of Northfield, Danbury, Andover, Boscawen, Salisbury, Hill, and Webster.

\*\* The Hillsboro District has geographic jurisdiction over cases arising out of parts of both Hillsborough County and Merrimack County: in Hillsborough County, the towns of Hillsborough, Deering, Windsor, Antrim, and Bennington.

in Merrimack County, the towns of Henniker, Warner, Sutton, and Bradford.

\*\*\* The Jaffrey-Peterborough District has geographic jurisdiction over cases arising out of parts of both Cheshire County and Hillsborough County:

in Cheshire County, the towns of Jaffrey, Dublin, Fitzwilliam, and Rindge.

in Hillsborough County, the towns of Peterborough, Hancock, Greenville, Greenfield, New Ipswich, Temple, and Sharon.

\*\*\*\* The Newport District has geographic jurisdiction over cases arising out of parts of both Merrimack County and Sullivan County: in Merrimack County, the towns of New London, Newbury, and Wilmot.

in Sullivan County, the towns of Newport, Grantham, Croydon, Springfield, Sunapee, Goshen, Lempster, and Washington.

\*\*\*\*\* The Salem District has geographic jurisdiction over cases arising out of parts of both Hillsboro County and Rockingham County: in Hillsborough County, the town of Pelham.

in Rockingham County, the towns of Salem, Windham, Atkinson, Hampstead, and Plaistow.

Judicial Council states that this anomaly was created to make it more geographically convenient for people to make appearances in circuit court.

*a. Superior Court*

The superior court is established by the state's constitution.<sup>57</sup> Although there is only one superior court, it is required to preside at 11 statutorily designated locations – two superior court locations in Hillsborough County and one superior court location in each of the other nine counties.<sup>58</sup> (*See* court locations table at pages 19-20.)

Relevant to this evaluation, the superior court has exclusive original jurisdiction over felonies and directly-related misdemeanors and violations, but it also has general jurisdiction over all criminal cases and proceedings.<sup>59</sup> As a result, a prosecutor can choose whether to file a misdemeanor offense into the superior court, rather than into the circuit court as is more commonly done, though the superior court can also choose to dismiss any case over which the circuit court could exercise jurisdiction.<sup>60</sup>

The superior court is statutorily authorized to have one chief justice and 21 associate justices, for a total of 22, though it is not unusual for there to be a vacancy on the court.<sup>61</sup> The chief justice is so designated by the governor and council to a five-year term and serves as the administrative judge of the superior court, with responsibility for, among other things, issuing superior court administrative orders, appointing a presiding judge for each court location, and assigning judges and court personnel to court locations.<sup>62</sup> The superior court's chief justice, as administrative judge, assigns each of the superior court justices to preside at certain times in certain superior court locations, based on the workload data from each of the locations.<sup>63</sup>

All of this taken together means that, during FY 2021, the 22 statutorily authorized superior court judges were responsible for hearing all the adult criminal cases across all the 11 superior court locations in the state, in addition to the other types of cases for which they are responsible. The most recent year for which superior court caseloads have been reported is calendar year 2020. In total, the superior court had 14,779 new cases of every type filed during 2020,<sup>64</sup> and this does not take into consideration the cases that were already pending in the superior court at the beginning

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<sup>57</sup> N.H. CONST. pt. II, art. 72-a.

<sup>58</sup> N.H. REV. STAT. ANN. § 496:1 (2019).

<sup>59</sup> N.H. REV. STAT. ANN. §§ 592-A:1, 592-B:1, 592-B:2 (2019); Order (N.H. Oct. 17, 2016) (implementation of the "Felonies First" project). The superior court also conducts de novo jury trials in class A misdemeanors on direct appeal from the circuit court - district division. N.H. REV. STAT. ANN. §§ 592-A:2, 592-B:1, 599:1 (2019).

<sup>60</sup> N.H. REV. STAT. ANN. § 592-A:1 (2019).

<sup>61</sup> N.H. REV. STAT. ANN. § 491:1 (2019).

<sup>62</sup> N.H. REV. STAT. ANN. § 491:1 (2019); N.H. SUP. CT. R. 54.

<sup>63</sup> N.H. SUP. CT. R. 54. These assignments are made for three months at a time, even though a justice may serve in the same superior court location(s) for many years. *See, Superior Court – Justices*, NEW HAMPSHIRE JUDICIAL BRANCH, <https://www.courts.state.nh.us/superior/justicesmarital.htm>.

<sup>64</sup> *Superior Court – New Case Filings Calendar Year 2020, in Data & Reports*, NEW HAMPSHIRE JUDICIAL BRANCH, <https://www.courts.state.nh.us/cio/2020-Superior-Court-Filings.pdf>.



of the year. Of the newly filed cases during 2020, 8,907 (with five involving juveniles) were newly filed criminal cases.<sup>65</sup>

There is a wide range in the number of criminal cases heard in each superior court location and in the number of judge days available each week for those cases. For example, Hillsborough Superior Court North averages nearly double the number of criminal cases of any other superior court location, with 2,131 new criminal cases filed during 2020.<sup>66</sup> Hillsborough Superior Court North is typically assigned four full-time justices who all hear criminal cases, and there is at least one criminal docket scheduled every day. By contrast, Coos Superior Court had the lowest number of newly filed criminal cases during 2020, with 221 new criminal cases filed.<sup>67</sup> Two full-time justices are usually assigned to the Coos Superior Court, but for only four weeks out of every two months, and only one of the justices hears criminal cases each day during those four weeks that the court is in session.

Even in those courts that have a relatively low number of criminal cases, superior court justices point out that limited time available to hear those cases means felony cases, especially those going to trial, may often be delayed or continued and can take many months or perhaps a year or more to reach disposition.

#### *b. Circuit Court*

The circuit court was established by the legislature, effective July 1, 2011, as a court of record with statewide jurisdiction over trial-level non-jury cases.<sup>68</sup> Although there is only one circuit court, it is required to preside at 31 statutorily designated judicial district locations, and those locations can be modified by the state's supreme court.<sup>69</sup>

When created, the circuit court was endowed with the subject matter jurisdiction that had previously been exercised by separate probate courts and district courts and their judicial branch family divisions.<sup>70</sup> Every location of the circuit court is authorized to hear every type of case within its subject matter jurisdiction.<sup>71</sup> The circuit court comprises three divisions, but only two are relevant to this evaluation: the district division and the family division.<sup>72</sup>

- The circuit court - district division has original jurisdiction over all crimes and offenses “punishable by a fine not exceeding \$2,000 or imprisonment not exceeding one year, or

<sup>65</sup> *Superior Court – New Case Filings Calendar Year 2020, in Data & Reports*, NEW HAMPSHIRE JUDICIAL BRANCH, <https://www.courts.state.nh.us/cio/2020-Superior-Court-Filings.pdf>.

<sup>66</sup> *Superior Court – New Case Filings Calendar Year 2020, in Data & Reports*, NEW HAMPSHIRE JUDICIAL BRANCH, <https://www.courts.state.nh.us/cio/2020-Superior-Court-Filings.pdf>.

<sup>67</sup> *Superior Court – New Case Filings Calendar Year 2020, in Data & Reports*, NEW HAMPSHIRE JUDICIAL BRANCH, <https://www.courts.state.nh.us/cio/2020-Superior-Court-Filings.pdf>.

<sup>68</sup> N.H. REV. STAT. ANN. §§ 490-F:1, 490-F:2, 490-F:3 (2019).

<sup>69</sup> N.H. REV. STAT. ANN. §§ 490-D:4 (establishing judicial branch family division locations), 490-F:4, 502-A:1 (establishing judicial district locations) (2019).

<sup>70</sup> N.H. REV. STAT. ANN. § 490-F:3 (2019).

<sup>71</sup> N.H. REV. STAT. ANN. § 490-F:2 (2019).

<sup>72</sup> N.H. REV. STAT. ANN. § 490-F:3 (2019). The third is the probate division.

both;<sup>73</sup> in other words, misdemeanors and violations.

- The circuit court - family division has exclusive original jurisdiction over juvenile delinquency proceedings.<sup>74</sup>

While every circuit court location can hear all of these types of cases, each circuit court location can only hear those cases that arise out of the location's geographic jurisdiction.<sup>75</sup> As mentioned, some circuit court locations have jurisdiction over cases arising out of counties other than where the court is located, which means that a person accused of committing a crime or delinquent act within a given county may have to go to court in a different county than where the offense is alleged to have occurred. (*See* court locations table at pages 19-20.) The New Hampshire Judicial Council states that this anomaly was created to make it more geographically convenient for people to make appearances in circuit court.

When the circuit court was established, it was statutorily authorized to have a specific number of circuit court judges,<sup>76</sup> but that number can change with each legislative budget cycle. The state's supreme court determines the number of judges required in the circuit court based on the caseload and weighted case values assigned to the types of cases heard by the circuit court, and then, to the extent that the legislature funds those positions, the circuit court judges are appointed by the governor and council.<sup>77</sup> At the end of the state's FY 2021, the circuit court had a total of 36 judges plus five senior active status judges.<sup>78</sup> Most circuit court judges are full-time and are prohibited from practicing law,<sup>79</sup> though there may still be some part-time circuit court judges whose positions have not yet been eliminated or been changed to full-time.<sup>80</sup>

From among the circuit court judges, the state's supreme court appoints an administrative judge and a deputy administrative judge, who are responsible for, among other things, issuing circuit court administrative orders, appointing a presiding judge for court locations, and assigning judges and court personnel to court locations.<sup>81</sup> For administrative purposes, the circuit court locations are divided into ten numbered circuits, one for each county.<sup>82</sup> Since January 1, 2020,

<sup>73</sup> N.H. REV. STAT. ANN. § 491-F:3, 502-A:11, 502-A:11-a (2019).

<sup>74</sup> N.H. REV. STAT. ANN. §§ 169-B:3, 490-D:2(III), 490-F:3 (2019).

<sup>75</sup> N.H. REV. STAT. ANN. §§ 490-D:4, 490-F:4, 502-A:1 (2019).

<sup>76</sup> N.H. REV. STAT. ANN. § 490-F:7 (2019).

<sup>77</sup> N.H. CONST. pt. II, arts. 46, 47; N.H. REV. STAT. ANN. §§ 490-F:7, 490-F:11 (2019)

<sup>78</sup> *Circuit Court – Circuit Court Judges*, NEW HAMPSHIRE JUDICIAL BRANCH, <https://www.courts.state.nh.us/circuitcourt/judges.htm> (last visited June 30, 2021).

<sup>79</sup> N.H. REV. STAT. ANN. §§ 490-F:10, 502-A:21-a (2019).

<sup>80</sup> When the circuit court was established, the intention was that the part-time judges would be eliminated as the existing probate and district court judges left their appointments, and all those positions would be converted to full-time judicial positions. N.H. REV. STAT. ANN. § 490-F:7 (2019). This automatic statutory provision was suspended for the biennium ending June 30, 2021. N.H. REV. STAT. ANN. § 490-F:7(III) (2019).

<sup>81</sup> N.H. SUP. CT. R. 54.

<sup>82</sup> N.H. REV. STAT. ANN. § 490-F:4 (2019). The counties and circuit numbers are:

First Circuit	Coos County
Second Circuit	Grafton County
Third Circuit	Carroll County
Fourth Circuit	Belknap County
Fifth Circuit	Sullivan County

the circuit court locations have been further grouped into four circuit court regions, with a presiding judge overseeing each region.<sup>83</sup> The administrative and/or presiding judges assign each circuit court judge to preside at certain times in certain circuit court locations and divisions within them, based on the workload data from each of the locations.<sup>84</sup>

All of this taken together means that, during FY 2021, the 36 circuit court judges were responsible for hearing all the adult misdemeanor and violation cases and juvenile delinquency cases across all the 31 circuit court locations in the state, in addition to the other types of cases for which they are responsible. The most recent year for which circuit court caseloads have been reported is calendar year 2020. In total, the circuit court had 108,016 new cases of every type filed during 2020,<sup>85</sup> and this does not take into consideration the cases that were already pending in the circuit court at the beginning of the year. Of the newly filed cases during 2020, 55,395 were newly filed criminal cases and 1,169 were newly filed juvenile delinquency cases.<sup>86</sup>

There is a wide range in the number of adult criminal and juvenile delinquency cases heard in each circuit court location and in the number of judge days available each week for those cases. For example, the Concord District circuit court location, situated in and hearing cases arising out of only a portion of Merrimack County, had the greatest combined number of new criminal and delinquency cases filed during 2020, with 4,017 newly filed criminal cases and 113 newly filed juvenile delinquency cases.<sup>87</sup> (Focusing solely on juvenile delinquency cases though, the Manchester District circuit court location, situated in and hearing cases arising out of only a portion of Hillsborough County, received a relatively much higher 168 newly filed juvenile delinquency cases during 2020.<sup>88</sup>) The Haverhill District circuit court location, situated in and hearing cases arising out of only a portion of Grafton County, had by far the fewest new criminal

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Sixth Circuit	Merrimack County
Seventh Circuit	Strafford County
Eighth Circuit	Cheshire County
Ninth Circuit	Hillsborough County
Tenth Circuit	Rockingham County

<sup>83</sup> Circuit Court Administrative Order 2020-01 (N.H. Circ. Ct. Jan. 1, 2020) (appointing presiding judges for 2020). The regions are:

- Region A: Circuits 1, 2, 3, 4, and Franklin
- Region B: Circuits 5, 6 (not Franklin), and 8
- Region C: Circuits 7 and 10
- Region D: Circuit 9

<sup>84</sup> N.H. REV. STAT. ANN. §§ 491-F:5(II), 490-F:6 (2019); N.H. SUP. CT. R. 54.

<sup>85</sup> *Circuit Court New Filings 2011 - 2020, in Data & Reports*, NEW HAMPSHIRE JUDICIAL BRANCH, <https://www.courts.state.nh.us/cio/2011-2020-Circuit-Court-Filings-compared.pdf>.

<sup>86</sup> *District Division - New Case Filings Calendar Year 2020, in Data & Reports*, NEW HAMPSHIRE JUDICIAL BRANCH, <https://www.courts.state.nh.us/cio/2020-Circuit-Court-Filings-by-District-Division.pdf>; *Family Division - New Case Filings Calendar Year 2020, in Data & Reports*, NEW HAMPSHIRE JUDICIAL BRANCH, <https://www.courts.state.nh.us/cio/2020-Circuit-Court-Filings-by-Family-Division.pdf>.

<sup>87</sup> *District Division - New Case Filings Calendar Year 2020, in Data & Reports*, NEW HAMPSHIRE JUDICIAL BRANCH, <https://www.courts.state.nh.us/cio/2020-Circuit-Court-Filings-by-District-Division.pdf>; *Family Division - New Case Filings Calendar Year 2020, in Data & Reports*, NEW HAMPSHIRE JUDICIAL BRANCH, <https://www.courts.state.nh.us/cio/2020-Circuit-Court-Filings-by-Family-Division.pdf>.

<sup>88</sup> *Family Division - New Case Filings Calendar Year 2020, in Data & Reports*, NEW HAMPSHIRE JUDICIAL BRANCH, <https://www.courts.state.nh.us/cio/2020-Circuit-Court-Filings-by-Family-Division.pdf>.

and delinquency cases filed during 2020, with 152 newly filed criminal cases and 3 newly filed juvenile delinquency cases.<sup>89</sup> Justice system stakeholders attribute the variations in the numbers of cases filed from circuit court location to circuit court locations to, in part, the populations of the areas and, in part, the discretion exercised by law enforcement officers in deciding when to arrest and by prosecutors in deciding whether to prosecute a defendant for a felony or a misdemeanor or not at all.

### 3. Other court-related officials relevant to indigent defense

There are two other court-related officials who are relevant to the provision of trial-level indigent defense services in New Hampshire: bail commissioners and clerks of court.

**Bail commissioners.** A bail commissioner is an officer of the court, commissioned as a justice of the peace and subject to the judicial code of conduct.<sup>90</sup> The bail commissioner has “two distinct roles: the quasi-judicial function of setting bail, and the ministerial function of accepting bail” that has been set by a court or bail commissioner.<sup>91</sup> Bail commissioners are appointed by either the chief justice of the superior court or the administrative judge of the circuit court, and every bail commissioner appointed by either court is authorized to act in cases in both courts.<sup>92</sup>

A bail commissioner is usually the first judicial officer before whom a defendant appears following arrest.<sup>93</sup> The bail commissioner is the first judicial officer to determine whether and under what circumstances an in-custody defendant may be released.<sup>94</sup> The bail commissioner is responsible for giving the in-custody defendant written notice of the defendant’s obligation to appear in court for arraignment, if the defendant is able to bail out of jail.<sup>95</sup> And, the bail commissioner is responsible for advising the defendant of their right to counsel if indigent and providing them with the necessary paperwork to request appointed counsel.<sup>96</sup>

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<sup>89</sup> *District Division - New Case Filings Calendar Year 2020, in Data & Reports*, NEW HAMPSHIRE JUDICIAL BRANCH, <https://www.courts.state.nh.us/cio/2020-Circuit-Court-Filings-by-District-Division.pdf>; *Family Division - New Case Filings Calendar Year 2020, in Data & Reports*, NEW HAMPSHIRE JUDICIAL BRANCH, <https://www.courts.state.nh.us/cio/2020-Circuit-Court-Filings-by-Family-Division.pdf>.

<sup>90</sup> N.H. REV. STAT. ANN. §§ 597:15, 597:15-a, 597:17 (2019). See NEW HAMPSHIRE JUDICIAL BRANCH, BAIL COMMISSIONER HANDBOOK ¶¶ I.B., III.B. (2019).

<sup>91</sup> N.H. REV. STAT. ANN. § 597:18 (2019). See NEW HAMPSHIRE JUDICIAL BRANCH, BAIL COMMISSIONER HANDBOOK ¶ III.A. (2019).

<sup>92</sup> N.H. REV. STAT. ANN. §§ 597:15, 597:15-a (2019); Superior Court Administrative Order 2015-04 (N.H. Super. Ct. Dec. 31, 2015), and Circuit Court – District Div’n Administrative Order 2015-017 (N.H. Circ. Ct. – Dist. Div’n Dec. 31, 2015) (eff. Jan. 1, 2016, bail commissioners). See NEW HAMPSHIRE JUDICIAL BRANCH, BAIL COMMISSIONER HANDBOOK ¶ III.C. (2019).

<sup>93</sup> N.H. REV. STAT. ANN. § 597:18 (2019). See NEW HAMPSHIRE JUDICIAL BRANCH, BAIL COMMISSIONER HANDBOOK ¶ III.A. (2019).

<sup>94</sup> N.H. REV. STAT. ANN. § 597:18 (2019). See NEW HAMPSHIRE JUDICIAL BRANCH, BAIL COMMISSIONER HANDBOOK ¶ III.A. (2019).

<sup>95</sup> See NEW HAMPSHIRE JUDICIAL BRANCH, BAIL COMMISSIONER HANDBOOK ¶ V. (2019).

<sup>96</sup> N.H. R. CRIM. PROC. 5(a), 5(b). See NEW HAMPSHIRE JUDICIAL BRANCH, BAIL COMMISSIONER HANDBOOK ¶ VI. (2019).

**Clerks of court.** Clerks of court in New Hampshire are appointed by and serve at the pleasure of their court.<sup>97</sup> When a defendant requests appointed counsel, the clerk of court is responsible for reviewing the financial affidavit submitted by the defendant and making the initial determination of whether that defendant is indigent and eligible for appointment of counsel.<sup>98</sup>

## B. The prosecution

New Hampshire has three levels of prosecuting attorney: the attorney general (an appointed position in state government, funded by the state); county attorney (elected positions at the county level, separately funded by each county); and municipal prosecutor (employed or contracted positions at the municipal level, separately funded by each municipality).<sup>99</sup>

As this section explains, the attorney general has discretion to exercise authority over enforcement of all criminal laws anywhere in the state, and each county attorney then has discretion to exercise the remaining authority over enforcement of all criminal laws anywhere within the county, leaving the remaining prosecutorial authority with municipal prosecutors. Every felony and misdemeanor is a crime, though violations are not, and a juvenile delinquency case alleges the commission by a child of an offense that would be a felony or misdemeanor if committed by an adult.<sup>100</sup>

Taken together, this results in broad variation about the types of adult criminal and juvenile delinquency cases that are prosecuted, in which courts, and by whom.

### 1. Attorney general

The New Hampshire attorney general is the head of the state's department of justice, located in Concord, in the executive branch.<sup>101</sup> The attorney general is appointed to a four-year term by the governor and council together, with either the governor or the council having the power to prevent an appointment.<sup>102</sup>

<sup>97</sup> N.H. CONST. pt. II, art. 82; N.H. REV. STAT. ANN. § 490-19 (2019) (supreme court appoints clerk); N.H. REV. STAT. ANN. § 490-F:13 (2019) (administrative judge of the circuit court appoints clerk for each circuit court location); N.H. REV. STAT. ANN. § 499:1 (2019) (superior court appoints clerk for each county and may appoint separate clerks for the two Hillsborough County locations).

<sup>98</sup> Superior Court Administrative Order 2011-45 (N.H. Super. Ct. Sept. 26, 2011) (clerks authorized to determine indigency for appointment of counsel); Circuit Court Administrative Order 2011-12 (N.H. Circ. Ct. Sept. 26, 2011) (clerks authorized to determine indigency for appointment of counsel). In the superior court, the clerk of court is also authorized to select the attorney to be appointed to represent an indigent defendant, whenever the court orders appointment. N.H. SUPER. CT. ADMIN. R. 1-6.

<sup>99</sup> N.H. CONST. pt. II, arts. 46, 47; N.H. REV. STAT. ANN. §§ 7:1, 21-M:3 (2019) (attorney general). N.H. CONST. pt. II, art. 71; N.H. REV. STAT. ANN. §§ 7:33, 655:9 (2019) (county attorney). N.H. REV. STAT. ANN. §§ 41:10-a, 44:2, 105:3, 105:4 (2019); N.H. R. CRIM. P. 42(a); *State v. Urban*, 98 N.H. 346, 100 A.2d 897 (N.H. 1953) (municipal prosecutor).

<sup>100</sup> N.H. REV. STAT. ANN. §§ 169-B:1, 169-B:2(IV), 318-B:2-c, 625:9(II) (2019).

<sup>101</sup> N.H. REV. STAT. ANN. §§ 7:5, 21-G:6-b(I)(d), 21:M-2 (2019).

<sup>102</sup> N.H. CONST. pt. II, arts. 46, 47; N.H. REV. STAT. ANN. §§ 7:1, 21-M:3 (2019).

The attorney general represents the state “in all criminal and civil cases in the supreme court in which the state is interested, and in the prosecution of persons accused of crimes punishable with death or imprisonment for life.”<sup>103</sup> The attorney general also has express statutory authority to supervise all criminal cases in the supreme court and the superior court and, in their discretion, to control the enforcement of every criminal law throughout the state (no matter the level of the charge).<sup>104</sup> In other words, the attorney general has statutory authority to direct any prosecutor anywhere in the state to handle any misdemeanor or felony case (including juvenile delinquency cases) in a particular manner, or the attorney general can choose to step in and conduct the prosecution of any criminal or juvenile delinquency case in any court.<sup>105</sup> The New Hampshire Judicial Council says that this rarely occurs.

In practice, each attorney general determines the circumstances under which to exercise authority over criminal cases in the trial courts, but typically does not do so in every type of case or for extended periods of time. For example, the attorney general may take over a prosecution that is beyond a county attorney’s capabilities due to the complexity of the case or to provide experts when the county attorney lacks sufficient funding. The attorney general may issue directives to county attorneys and municipal prosecutors about how to handle certain types of cases, such as domestic violence or those involving a child victim or elder abuse.

Of particular significance to the provision of indigent defense services, the legislature statutorily mandates that:

- the attorney general (or their designee) is a member of the judicial council that is responsible for administering indigent representation services<sup>106</sup> (*see* discussion of the judicial council at pages 29-34); and
- the attorney general must approve rules adopted by the state’s commissioner of administrative services “governing determinations of eligibility for payment of indigent defense expenditures, determinations of repayment schedules,” and other matters related to indigent defendants’ finances.<sup>107</sup>

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<sup>103</sup> N.H. REV. STAT. ANN. § 7:6 (2019).

<sup>104</sup> N.H. REV. STAT. ANN. §§ 7:6, 7:11, 7:34 (2019).

<sup>105</sup> *See Wyman v. Danais*, 101 N.H. 487, 490, 147 A.2d 116, 118 (N.H. 1958) (finding “a legislative purpose to place ultimate responsibility for criminal law enforcement in the Attorney General, and to give him the power to control, direct and supervise criminal law enforcement by the county attorneys in cases where he deems it in the public interest”).

<sup>106</sup> N.H. REV. STAT. ANN. §§ 494:1, 494:2, 494:3(VI) (2019).

<sup>107</sup> N.H. REV. STAT. ANN. § 604-A:10(IV) (2019).

## 2. County attorney, in each county

Each county elects a county attorney for a two-year term.<sup>108</sup> The budget for the county attorney's office (including the salary and benefits of the elected county attorney, any authorized assistant county attorneys, and any authorized support staff) is established by the county convention when adopting the county's biennial budget, and the county pays for its operation.<sup>109</sup> As a result, the staffing, compensation, and resources of the county attorney's office differs from county to county.

The county attorney "aid[s]" the attorney general in enforcing the criminal laws.<sup>110</sup> Every county attorney performs the duties of the attorney general's office for the county and is statutorily "under the direction of the attorney general."<sup>111</sup> Every county attorney is under the supervision of the attorney general and must, for example, obtain the approval of the attorney general in order to have assistant county attorneys (when authorized and funded by the county convention).<sup>112</sup> This means the county attorney has authority to prosecute all criminal cases in all trial court locations that have jurisdiction in the county, unless the attorney general opts to prosecute a particular case or type of case, and the county attorney has discretion to determine which cases to prosecute and how to do so, unless the attorney general provides directives.

As a practical matter, the default expectation is that the county attorney prosecutes the criminal cases heard in the superior court's location in the county (other than crimes punishable by life imprisonment), which are most often felonies and directly-related misdemeanors and violations, although from time to time a county attorney may choose to directly file a misdemeanor into the superior court. Because the county attorney has only the resources allocated by the county convention, some county attorneys choose to not prosecute the misdemeanor cases that are heard in the circuit court locations within the county, while other county attorneys choose to prosecute particular misdemeanor cases or types of misdemeanor cases in some or all circuit court locations within the county.

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<sup>108</sup> N.H. CONST. pt. II, art. 71; N.H. REV. STAT. ANN. §§ 7:33, 655:9 (2019). To be elected, a county attorney must be licensed to practice law in New Hampshire and have a domicile in the county. N.H. REV. STAT. ANN. §§ 7:33, 655:9 (2019).

State law prohibits the county attorney in each of Carroll, Cheshire, Coos, Rockingham, Strafford, and Sullivan counties from the private practice of law during their elected term of office. N.H. REV. STAT. ANN. §§ 7:34-a, 7:34-b, 7:34-d, 7:34-e, 7:34-f, 7:34-g (2019). State law allows the county attorney in Belknap County to have a private civil law practice, but not criminal, during the elected term of office. N.H. REV. STAT. ANN. § 7:34-c (2019). State law is silent as to whether the county attorney in each of Grafton, Hillsborough, and Merrimack counties may have a private law practice during the elected term of office. In practice, all the elected county attorneys throughout the state work full-time in their elected position and do not have a private law practice while in office.

<sup>109</sup> N.H. REV. STAT. ANN. §§ 7:33-b, 7:33-f, 7:36, 23:5, 23:7 (2019).

<sup>110</sup> N.H. REV. STAT. ANN. § 7:6 (2019).

<sup>111</sup> N.H. REV. STAT. ANN. § 7:6 (2019).

<sup>112</sup> N.H. REV. STAT. ANN. §§ 7:33-b, 7:33-f, 7:33-g (2019).

### 3. Municipal prosecutor, in each municipality

A municipal prosecutor is authorized to prosecute cases in the circuit court, unless either the attorney general or the county attorney chooses to prosecute.<sup>113</sup>

Each municipality in New Hampshire (both towns and cities) is authorized to have and fund police officers for “the detection and conviction of criminals and the prevention of crime” within the municipality.<sup>114</sup> Through long-standing historical tradition, the police officers of each municipality have prosecuted the misdemeanors and violations occurring within their geographic authority, and in 1953 the New Hampshire Supreme Court expressly approved the practice.<sup>115</sup> The state police similarly prosecute misdemeanor and violation cases initiated by their officers.<sup>116</sup> Often referred to as “police prosecutors,” the police officers who prosecute these cases are not required to be attorneys.<sup>117</sup> Alternatively, a municipality may appoint and compensate a licensed attorney to prosecute misdemeanors and violations arising out of the municipality’s geographic area, though not to the exclusion of the state police.<sup>118</sup>

There are innumerable combinations of who prosecutes the misdemeanors and violations in each circuit court location, depending on decisions made by the municipalities encompassed by the geographic jurisdiction of each circuit court location, as well as the extent to which the attorney general or the county attorney chooses to exercise their prosecutorial authority.

## C. The indigent defense system as designed by the state

The entire New Hampshire indigent defense system is provided and funded by the state through and overseen by the New Hampshire Judicial Council.<sup>119</sup>

### 1. Judicial Council

The New Hampshire Judicial Council (judicial council) is an executive branch state agency.<sup>120</sup> The judicial council is statutorily created to “serve as an institutional forum for the on-going and disinterested consideration of issues affecting the administration of justice,”<sup>121</sup> through continuous discussion and study. The judicial council makes recommendations to policymakers and others to improve justice policies, practices, and statutes. The judicial council also has

<sup>113</sup> N.H. REV. STAT. ANN. § 502-A:20-a (2019).

<sup>114</sup> N.H. REV. STAT. ANN. §§ 105:3, 105:4 (2019). *See* N.H. REV. STAT. ANN. § 44:2 (2019) (statutes relating to towns also apply to cities).

<sup>115</sup> *See State v. Urban*, 98 N.H. 346, 100 A.2d 897 (N.H. 1953) (discussing history of prosecution by police officers and holding that police officers are permitted to prosecute misdemeanors in a municipal court).

<sup>116</sup> *See* N.H. REV. STAT. ANN. § 41:10-a (2019).

<sup>117</sup> N.H. R. CRIM. P. 42(a).

<sup>118</sup> N.H. REV. STAT. ANN. § 41:10-a (2019).

<sup>119</sup> N.H. REV. STAT. ANN. §§ 494:3, 604-A:1 (2019). *See* NEW HAMPSHIRE JUDICIAL COUNCIL, 22ND BIENNIAL REPORT JULY 1, 2011 – JUNE 30, 2013, at 6-7 (Mar. 2014).

<sup>120</sup> N.H. REV. STAT. ANN. § 21-G:6-b(III)(g) (2019).

<sup>121</sup> N.H. REV. STAT. ANN. § 494:3(I) (2019).



the duty “[t]o administer the indigent defense delivery system and ensure its quality and cost effectiveness.”<sup>122</sup> The judicial council carries out much of its daily work through its three subcommittees (only the indigent defense subcommittee is relevant to this report) and its executive director and staff.

**The judicial council members.** As statutorily established, the judicial council has 23 members: 15 members are each appointed to serve a three-year term (and continuing until their successor is appointed), and eight members automatically serve (or designate their representative) by virtue of holding some other office.<sup>123</sup>

The attorney general is one of the eight members who automatically sits on the judicial council.<sup>124</sup> Also automatically serving on the judicial council are the chief justice of the supreme court, the chief justice of the superior court, and the administrative judge of the circuit court,<sup>125</sup> all of whom have judicial authority over at least some of the cases of indigent defendants for whom the judicial council is charged with providing a defense. Also automatically serving on the judicial council are the chairs of the senate judiciary committee and the house judiciary committee, both members of the legislature who vote on the state’s laws governing the provision of indigent defense services and the funding appropriated for that purpose.

Seven of the other judicial council members must be licensed New Hampshire attorneys: the president-elect of the New Hampshire Bar Association, three attorneys appointed by the chief justice of the supreme court, and three attorneys appointed by the governor and council.<sup>126</sup> Nothing in New Hampshire law prevents these attorney members of the judicial council from being paid through the judicial council to represent indigent defendants, and they sometimes do so.<sup>127</sup>

<sup>122</sup> N.H. REV. STAT. ANN. § 494:3(VI) (2019). The judicial council also provides legal and guardian-ad-litem services in child protection cases and provides legal services for indigent proposed wards in guardianship proceedings. Neither of these additional duties are a focus of this report.

<sup>123</sup> N.H. REV. STAT. ANN. §§ 494:1, 494:2 (2019). See N.H. SUP. CT. R. 54. The members are:

- the chief justice of the supreme court (or their designee);
- the chief justice of the superior court;
- the administrative judge or deputy administrative judge of the circuit court;
- the director of the administrative office of courts;
- the attorney general (or their designee);
- the president-elect of the New Hampshire Bar Association;
- the chair of the senate judiciary committee (or their designee from the committee);
- the chair of the house judiciary committee (or their designee from the committee);
- a superior court clerk, appointed by the chief justice of the superior court;
- a circuit court clerk, appointed by the circuit court administrative judge;
- six New Hampshire attorneys who have been practicing in New Hampshire for more than five years: three appointed by the governor and council, and three appointed by the chief justice of the supreme court; and
- seven lay people: five appointed by the governor and council, and two appointed by the chief justice of the supreme court.

<sup>124</sup> N.H. REV. STAT. ANN. §§ 494:1(II) (2019).

<sup>125</sup> N.H. REV. STAT. ANN. § 494:1(I) (2019); N.H. SUP. CT. R. 54.

<sup>126</sup> N.H. REV. STAT. ANN. § 494:1(V), (VIII), (IX) (2019).

<sup>127</sup> For example, two of the seven attorney members of the judicial council during FY 2021 also held judicial council contracts to serve as contract counsel during FY 2020 and FY 2021, and they or members of their law

**The judicial council's indigent defense subcommittee.** Recognizing that some members of the full judicial council could possibly have conflicts of interest, during the 1970s the judicial council established its indigent defense subcommittee to advise the judicial council and its executive director about indigent defense. In the mid-1990s, in an attempt to ameliorate some of the direct conflicts of interest, the judicial council's state-provided legal advisor opined that: the indigent defense subcommittee should oversee all proposals, contracting, and other decision-making about indigent defense services, with the full judicial council voting only up or down on the subcommittee's recommendations; and members of the attorney general's office, judicial branch, and legislature should not serve on the indigent defense subcommittee. The judicial council agreed with the legal opinion and followed the recommendations.

Today, the indigent defense subcommittee considers and makes decisions on behalf of the full judicial council about, among other things, the award of contracts to private attorneys to serve as contract counsel, and, in theory, the private attorneys appointed as assigned counsel. The subcommittee only makes recommendations to the judicial council regarding budgets and the award of the contract to serve as the public defender program; those recommendations have always been ratified by the full judicial council.

The indigent defense subcommittee is composed of four members of the judicial council. However, there are no statutes, rules, or written criteria creating the indigent defense subcommittee nor describing its membership, duties, or procedures. Traditionally the members of the indigent defense subcommittee have current or recent experience in criminal defense law.

Nothing in New Hampshire law prevents the members of the indigent defense subcommittee from being paid through the judicial council to represent indigent defendants, and they sometimes do so. It is not always a financial benefit – it may in fact be a financial loss – for a member of the indigent defense subcommittee to serve as contract counsel and/or assigned counsel, as explained more fully in chapter V discussing compensation of appointed attorneys. Members of the subcommittee often feel an obligation to accept appointments to represent indigent defendants because of their commitment to indigent defense, because of the lack of sufficient attorneys available for appointment, and to bring to bear their expertise on behalf of indigent defendants and as mentors to other appointed attorneys.

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firm were assigned by the judicial council (at least during FY 2021) to assigned counsel cases. One of those two attorneys also serves on the board of directors of the New Hampshire Public Defender and on its finance committee and received a subcontract from NHPD during August 2021 to be assigned to NHPD cases.

**The judicial council’s executive director & staff.** The judicial council appoints an executive director who serves at their pleasure.<sup>128</sup> In addition to the executive director, the judicial council has two staff members; the same number of staff it has had for at least 40 years.<sup>129</sup> As the judicial council noted in 2014 in its biennial report:

While we have an extraordinary staff, we are nevertheless only a three-person agency administering a \$24,000,000 budget. Accordingly, the Judicial Council has a limited ability to do a whole lot more than responsibly and reliably processing invoices and conducting the financial management and accountability measures necessary to carry out our statutory mandates and oversee the indigent-defense delivery system.<sup>130</sup>

**State funding to the judicial council.** Funding for all operations and responsibilities of the judicial council, of which adult criminal and juvenile delinquency defense is only a part, is through general fund appropriation in the state’s operating budget.<sup>131</sup> From that appropriation, the judicial council pays for (among other things) all representation provided to indigent defendants in criminal and juvenile delinquency cases, including both: the cost of the attorney; and “investigative, expert and other services and expenses, including process to compel the attendance of witnesses, as may be necessary for an adequate defense before the courts of this state,” which the judicial council refers to anecdotally as “services other than counsel.”<sup>132</sup>

If expenditures are anticipated to exceed the operating budget appropriation, the judicial council can and does go to the legislature’s fiscal committee to request additional funding, which the governor and council can authorize to be paid “from any money in the treasury not otherwise appropriated.”<sup>133</sup>

The table on page 33 shows the amounts spent by the state through the judicial council for FY 2020 and FY 2021 for: the contract to provide the public defender program; all contract counsel attorneys; all assigned counsel attorneys (excluding representation of parents in abuse and neglect cases, which is outside the scope of this evaluation); all case-related expenses; and training for contract counsel attorneys.<sup>134</sup>

<sup>128</sup> N.H. REV. STAT. ANN. § 494:7 (2019).

<sup>129</sup> See NEW HAMPSHIRE JUDICIAL COUNCIL, 22ND BIENNIAL REPORT JULY 1, 2011 – JUNE 30, 2013, at 10 (Mar. 2014) (“With 2 full-time staffers and an executive director, and with the invoice paying and oversight responsibilities entrusted to it, the Judicial Council has been shorthanded for over 30 years.”). The judicial council reiterated this difficulty in its 2018 biennial report: “With 2 full-time staffers and an executive director, and with the invoice paying and oversight responsibilities entrusted to it, the Council has been shorthanded for over 30 years.” NEW HAMPSHIRE JUDICIAL COUNCIL, 23RD BIENNIAL REPORT JULY 1, 2015 – JUNE 30, 2017, at .pdf page 9 (Apr. 2018).

<sup>130</sup> NEW HAMPSHIRE JUDICIAL COUNCIL, 22ND BIENNIAL REPORT JULY 1, 2011 – JUNE 30, 2013, at 12 (Mar. 2014).

<sup>131</sup> See, e.g., NEW HAMPSHIRE OPERATING BUDGET, 2020-2021 Biennial, at 308-12.

<sup>132</sup> N.H. REV. STAT. ANN. § 604-A:1 (2019).

<sup>133</sup> N.H. REV. STAT. ANN. § 604-A:1-b (2019).

<sup>134</sup> STATE OF NEW HAMPSHIRE, 2022-2023 BIENNIUM BUDGET REQUEST, at 862-898.

**STATE FUNDING TO THE JUDICIAL COUNCIL FOR INDIGENT DEFENSE SERVICES, FY 2020 AND FY 2021**

	FY 2020	FY 2021
Public defender program	\$23,119,355	\$23,751,832
Contract counsel	\$1,759,367	\$2,128,902
Contract counsel – training	\$1,758	\$987
Assigned counsel *	\$271,240	\$188,929
Ancillary non-counsel service **	\$1,879,899	\$1,514,350

\* Assigned counsel funding from the state to the judicial council has two components: attorney compensation in adult criminal and juvenile delinquency cases (assessed in this evaluation); and attorney compensation in representation of parents in abuse and neglect cases (outside the scope of this evaluation). The amounts shown in the table do not include representation of parents in abuse and neglect cases.

\*\* Ancillary non-counsel service is those expenses referred to by the judicial council as “services other than counsel” and discussed in this report as “case-related expenses.” (See discussion in chapter V.)

Additionally, a state statute provides that:

Every state department, board, institution, commission, or agency which receives general fund grants or supplemental appropriations outside of the state biennial operating budget for the purpose of conducting law enforcement activities that may result in increased costs for indigent defense as determined by the court, shall transfer 5 percent of such funds received to the judicial council to be used to pay for indigent defense costs resulting from such law enforcement activities.<sup>135</sup>

The judicial council has never received any funding pursuant to this statute. The judicial council explains that the state’s department of justice provided guidance (protected under attorney-client privilege) to all the state agencies for which this statute is relevant and that the lack of funding to the judicial council under this statute results from that privileged guidance.

Of note, the judicial council is not responsible for rules “governing determinations of eligibility for payment of indigent defense expenditures, determinations of repayments schedules,” and other matters related to the finances of indigent defendants. Instead, that responsibility is statutorily assigned to the state’s commissioner of administrative services *with the approval of the attorney general*.<sup>136</sup>

<sup>135</sup> N.H. REV. STAT. ANN. § 604-A:1-c (2019).

<sup>136</sup> N.H. REV. STAT. ANN. § 604-A:10(IV) (2019). The department of administrative services is an executive branch department headed by a commissioner, and that commissioner is appointed by the governor with the consent of the council to a four-year term. N.H. REV. STAT. ANN. §§ 21-G:6, 21-G:6-b(II)(a), 21-G:8, 21-I:2 (2019). The unit of cost containment, typically referred to as the office of cost containment or the OCC, is the component of the office of the commissioner of administrative services that is responsible for “all functions and duties . . . regarding payment, recoupment and monitoring of indigent defense funds.” N.H. REV. STAT. ANN. § 21-I:7-b (2019); N.H. CODE ADMIN. R. ANN. ADM. 1002.09 (eff. July 1, 2020) (as amended by adopted rules 2020-33).

The rules adopted by the commissioner of administrative services are contained in the state’s administrative rules. N.H. CODE ADMIN. R. ANN. ch. Adm. 1000, [http://www.gencourt.state.nh.us/rules/state\\_agencies/adm.html](http://www.gencourt.state.nh.us/rules/state_agencies/adm.html). As a result of some changes in statutes taking effect on July 1, 2019 and July 1, 2020, the commissioner of administrative services was required to modify the previously existing rules. See 2019 N.H. Laws ch. 346. The changes to the rules were adopted on May 29, 2020, taking effect July 1, 2020. See N.H. Dept. of Admin. Serv.

**How the judicial council provides attorneys to represent indigent defendants.** The New Hampshire legislature statutorily requires that, whenever a court appoints an attorney to represent an indigent defendant in a criminal case or a juvenile delinquency case, “the appointment shall be:”

- “first, appointment of the public defender program . . . if that office is available;”
- “second, in the event the public defender program is not available, appointment of a contract attorney . . . if such an attorney is available;” and
- “third, in the event that neither the public defender program nor a contract attorney is available, the appointment of any qualified attorney . . . .”<sup>137</sup>

As previously mentioned, the judicial council uses a three-part system of private attorneys to provide the right to counsel in adult criminal and juvenile delinquency cases, in every case where the courts appoint counsel:

- a two-year contract with the non-profit New Hampshire Public Defender law firm to serve as the state’s “public defender program;”
- a series of one-year contracts with individual private attorneys, for-profit private law firms, and a law school, referred to as “contract counsel,” to be available for assignment (in non-homicide cases) when the New Hampshire Public Defender has a conflict or is otherwise unavailable; and
- case-by-case appointments of individual private attorneys, referred to as “assigned counsel,” who accept assignments in cases when the New Hampshire Public Defender is unavailable and there is no available contract counsel.

Although the judicial council has had authority since 1988, with approval of the governor and council, to additionally contract with an “alternate public defender program” to provide indigent representation when the primary public defender program has a conflict or is otherwise unable to be appointed,<sup>138</sup> it has never been funded to do so.

## 2. The contract public defender program through the New Hampshire Public Defender non-profit law firm

The authorizing statute that requires the judicial council to contract to provide a public defender program says:

The state of New Hampshire, by the judicial council and with the approval of governor and council, shall contract with any organization or groups of lawyers approved by the board of governors of the New Hampshire Bar Association to

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Adopted Rules 2020-33, eff. July 1, 2020, readopting with amendments the N.H. CODE ADMIN. R. ANN. ch. Adm. 1000. At the time of this report, the current version of the rules is not yet updated on publicly available legal research sites; the Sixth Amendment Center obtained the current version of the rules directly from the department of administrative services.

<sup>137</sup> N.H. REV. STAT. ANN. § 604-A:2(II) (2019).

<sup>138</sup> See N.H. REV. STAT. ANN. § 604-B:8 (2019).

operate the public defender program and provide public defender representation as provided in RSA 604-B:2 and 3. The contract shall fix the number of defender attorneys providing representation in each county and shall permit the public defender program to subcontract for attorney services, including appellate services, as may be necessary to provide such representation. No such contract shall be effective for longer than 2 years. The compensation for operation of the public defender program shall be such sums as may be fixed by the contract, subject to the appropriations made therefor.<sup>139</sup>

As statutorily required,<sup>140</sup> every two years, the judicial council issues a request for proposals to provide public defender program services. On February 22, 2019, the judicial council issued its request for proposals for the contract period of July 1, 2019 through June 30, 2021.<sup>141</sup> The non-profit New Hampshire Public Defender submitted the only proposal.<sup>142</sup> The judicial council awarded the contract to the New Hampshire Public Defender, which signed the contract May 30, 2019.<sup>143</sup>

Under the contract for FY 2020 and FY 2021, the judicial council must pay to the New Hampshire Public Defender (NHPD) a total of \$46,871,187.<sup>144</sup> The NHPD must refund to the state, within 80 days of the end of the contract term, any amounts that exceed the operational expenses of the NHPD during the term of the contract.<sup>145</sup>

In exchange for that compensation, from July 1, 2019 through June 30, 2021, the NHPD must represent all indigent defendants to whom appointed by a court in criminal cases, delinquency cases, and involuntary commitment proceedings (other than in: trial-level capital cases, conflict cases as governed by the *Rules of Professional Conduct*, or when caseload limits under the contract have been reached).<sup>146</sup> The duties of representation include representation in specialty courts, in children in need of services proceedings that are related to an appointed delinquency case, in non-criminal proceedings that are related to an appointed case, and in competency to

<sup>139</sup> N.H. REV. STAT. ANN. § 604-B:4 (2019).

<sup>140</sup> N.H. REV. STAT. ANN. § 604-B:4 (2019).

<sup>141</sup> New Hampshire Judicial Council Request for Proposals for Public Defender Services Pursuant to RSA 604-B (Feb. 22, 2019).

<sup>142</sup> Proposal to Provide Statewide Public Defender Services Pursuant to RSA 604B . . . Through State Fiscal Years 2020 and 2021, submitted to New Hampshire Judicial Council by The New Hampshire Public Defender (Mar. 28, 2019). The New Hampshire Public Defender also submitted the only proposal for FY 2018 - FY 2019 and may be the only entity ever to have submitted a proposal since 1986.

<sup>143</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender (for the term of July 1, 2019 through June 30, 2021).

<sup>144</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, ¶¶ 1.8, 5, and Exh. B (for the term of July 1, 2019 through June 30, 2021).

<sup>145</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, ¶¶ 1.8, 5, and Exh. B, ¶ 7 (for the term of July 1, 2019 through June 30, 2021).

<sup>146</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶¶ 1, 6 (for the term of July 1, 2019 through June 30, 2021). *See* N.H. REV. STAT. ANN. § 604-B:3 (2019) (“The public defender program shall not represent more than one person where a conflict of interest exists under the code of professional responsibility.”); N.H. R. Crim. Proc. 5(l); N.H. CIRC. CT. – FAMILY DIV. R. 3.2.

stand trial proceedings related to an appointed case.<sup>147</sup> The NHPD is contractually required to provide two attorneys in each homicide case and in each civil commitment of sexually violent predator case.<sup>148</sup> The contract specifically required the office to “provide representation in the ongoing appeal of the Michael Addison capital case.”<sup>149</sup> The contract contains other provisions that are addressed, where relevant, throughout this report.

*a. NHPD oversight, administration, and organization*

**Board of directors.** The NHPD is a non-profit corporation formed in 1985 for the sole purpose of being appointed to represent indigent New Hampshire defendants, and it is overseen by a nine-member board of directors.<sup>150</sup> Three of the nine board members are appointed by the New Hampshire Bar Association board of governors, and the other six members are elected by the then-sitting members of the NHPD board.<sup>151</sup> One of the nine board members also served on the judicial council during FY 2021, received a subcontract from the NHPD during August 2021 to be assigned to NHPD cases, held judicial council contracts to serve as contract counsel during fiscal years 2020 and 2021 in cases where the NHPD is unavailable, and they or members of their law firm were assigned by the judicial council (at least during FY 2021) to assigned counsel cases where the NHPD is unavailable and there is no available contract counsel. The judicial council explains that the multiple roles held by this NHPD board member were necessary because there was an insufficient number of qualified attorneys available to accept appointed cases and that all parties involved guarded against any actual conflicts of interest.

**Executive director & statewide organization.** The judicial council contract requires the NHPD to:

- have an executive director to supervise the public defender program;<sup>152</sup>
- have an appellate division with no less than three full-time equivalent attorneys;<sup>153</sup>
- have 10 branch offices, each in a specified location,<sup>154</sup> with a total of no less than 113 full-

<sup>147</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶¶ 2, 2.A., 2.B., 2.C. (for the term of July 1, 2019 through June 30, 2021).

<sup>148</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A-1, ¶¶ 6, 10 (for the term of July 1, 2019 through June 30, 2021).

<sup>149</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. C, ¶ 6 (for the term of July 1, 2019 through June 30, 2021). However, “[i]f the Addison Petition for Post-Conviction Relief should result in a remedy that requires the Public Defender Program to provide any additional representation, the parties agree to amend the Price Limitation” paragraph 1.8 of the contract.” “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. C, ¶ 6 (for the term of July 1, 2019 through June 30, 2021).

<sup>150</sup> “Articles of Agreement of New Hampshire Public Defender,” art. 2 and By-Laws, arts. III, IV (as amended through Jan. 5, 1987).

<sup>151</sup> “Articles of Agreement of New Hampshire Public Defender,” By-Laws, art. IV (as amended through Jan. 5, 1987).

<sup>152</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶ 3 (for the term of July 1, 2019 through June 30, 2021).

<sup>153</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶ 5 (for the term of July 1, 2019 through June 30, 2021).

<sup>154</sup> Although the mandated locations of the 10 branch offices are specified in the judicial council’s contract with the NHPD, it is the NHPD rather than the judicial council that decided where the branch offices are located. Eight

time equivalent attorneys;<sup>155</sup> and

- operate and administer the Conflict Case Administrator Office.<sup>156</sup>

Otherwise, the judicial council leaves it to the NHPD to organize its operations and provide other staff as they see fit, so long as the NHPD has “such other staff as is necessary to provide the services” under the contract.<sup>157</sup>

The NHPD is organized into: central administration; the Conflict Case Administrator Office (CCAO); the information technology department; an appellate division; and 10 branch offices. The NHPD’s organization and staffing at the beginning of FY 2021 is shown in the table on page 38.<sup>158</sup>

In addition to the executive director, there are three other directors in the central administration office located in Concord who help to guide the overall operations of the NHPD:

- The executive director is required by the judicial council contract to supervise the entire public defender program<sup>159</sup> and does not directly represent any person in any appointed case.
- The director of legal services oversees the day-to-day operations of all NHPD attorneys throughout the state and does not directly represent any person in any appointed case.
- The director of litigation oversees training, homicide cases, and the NHPD’s litigation policy, and in very rare instances serves as the appointed attorney in a trial-level case.
- The director of investigations & internships oversees all NHPD investigators, social workers, interns, and volunteers throughout the state, and in very rare instances serves as the primary investigator on a trial-level case.

There is nothing in the judicial council’s contract with the NHPD that prohibits the NHPD directors from being assigned to directly represent indigent people in appointed cases.

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of the 10 office locations existed at least before 1989, with the Orford Office in Grafton County and the Newport Office in Sullivan County established later. The NHPD determined where to locate each of its branch offices taking into consideration the distances and travel times to each of the superior court locations and circuit court locations in which NHPD attorneys are assigned to represent indigent defendants.

<sup>155</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶¶ 4, 5 (for the term of July 1, 2019 through June 30, 2021).

<sup>156</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶ 11 (for the term of July 1, 2019 through June 30, 2021).

<sup>157</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶ 3 (for the term of July 1, 2019 through June 30, 2021).

<sup>158</sup> Compiled from the New Hampshire Public Defender office directory for July 19, 2020 and “attorneys on staff” reports provided by the New Hampshire Public Defender. The NHPD office directory for July 19, 2020 is the only complete listing of NHPD non-attorney staff provided by the NHPD during this evaluation, so the number of non-attorney staff shown in the table is as of July 19, 2020. The NHPD provided more detailed information about NHPD attorney staffing that is used throughout this report, so the number of attorney staff shown in the table is as of July 1, 2020.

<sup>159</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶ 3 (for the term of July 1, 2019 through June 30, 2021).



**NHPD ORGANIZATION AND STAFFING AT START OF FY 2021**

NHPD office	County location	Attorney staff <sup>a</sup>				Non-attorney staff			
		Managing	Asst managing	Line	TOTAL IN OFFICE	Investigators	Social workers <sup>b</sup>	Other support <sup>c</sup>	TOTAL IN OFFICE
Concord	Merrimack	1		17	<b>18</b>	4	1	9	<b>14</b>
Dover	Strafford	1		10	<b>11</b>	3		5	<b>8</b>
Keene	Cheshire	1		5	<b>6</b>	2		3 ft 1 pt	<b>5 ft 1 pt</b>
Laconia	Belknap	1		8 ft 1 pt	<b>9 ft 1 pt</b>	1		4	<b>5</b>
Littleton	Grafton	1		2	<b>3</b>	1		1 ft 1 pt	<b>2 ft 1 pt</b>
Manchester	Hillsborough	1	1	22 ft 1 pt	<b>24 ft 1 pt</b>	6	1	13	<b>20</b>
Nashua	Hillsborough	1		17 ft 1 pt	<b>18 ft 1 pt</b>	4		10	<b>14</b>
Newport	Sullivan	1		3	<b>4</b>			2	<b>2</b>
Orford	Grafton	1		6	<b>7</b>	1		4	<b>5</b>
Stratham	Rockingham	1	1	18	<b>20</b>	4		9	<b>13</b>
<b>TOTAL ALL BRANCH OFFICES</b>		10	2	108 ft 3 pt	<b>120 ft 3 pt</b>	26	2	60 ft 2 pt	<b>88 ft 2 pt</b>
Appellate Defender Office <sup>d</sup>	Merrimack	1		3	<b>4</b>			2	<b>2</b>
Information Technology Dept <sup>e</sup>	Hillsborough							4	<b>4</b>
Conflict Case Administrator Office	Merrimack							2	<b>2</b>
Central Administration Office	Merrimack	3			<b>3</b>			7	<b>7</b>
<b>TOTAL ALL NHPD</b>		14	2	111 ft 3 pt	<b>127 ft 3 pt</b>	26	2	75 ft 2 pt	<b>103 ft 2 pt</b>

<sup>a</sup> The total of 130 NHPD attorneys does not include the NHPD director of investigations & internships or the NHPD manager of administrative services, who both work in the central administration office. Although both are attorneys, their positions at NHPD are, respectively, to direct support staff and to manage administrative services. As a result, they are both more properly considered as non-attorney staff for purposes of this evaluation.

In addition to NHPD employed attorneys, the NHPD from time-to-time subcontracts with outside attorneys when vacancies occur in a branch office or the appellate division until the vacancy can be filled with an NHPD employed attorney. Subcontractor attorneys are not included in this table.

<sup>b</sup> One social worker alternates between the Concord and Laconia offices and is counted in the table under Concord.

<sup>c</sup> "Other support" includes the NHPD director of investigations & internships and the NHPD manager of administrative services, administrators, non-attorney managers, assistants, receptionists, legal assistants, and legal secretaries.

<sup>d</sup> The role of the appellate division is outside the scope of this evaluation. The appellate division provides representation when appointed in cases in the supreme court.

<sup>e</sup> The information technology department provides access to and functionality of hardware, such as phones and computers, and software.

*b. NHPD trial-level staff and subcontractors*

The judicial council contract requires the NHPD to have 10 branch offices in specified locations,<sup>160</sup> but the judicial council contract does not dictate the trial-level court locations that each NHPD branch office must serve. Similarly, the judicial council contract does not dictate the minimum number of full-time equivalent attorneys that must be employed in or subcontracted to each branch office. Instead, the NHPD is left to make those decisions as it sees fit.

The judicial council contract requires that, “subject to the normal turnover of staff and the availability of qualified replacements,” the NHPD must have no fewer than 113 full-time attorneys or the equivalent, throughout the term of the contract, to provide trial-level representation (including for de novo appeals in the superior court) when the NHPD is appointed by a court.<sup>161</sup> To meet this attorney staffing requirement, the NHPD may employ full-time or part-time staff attorneys (though NHPD staff attorneys cannot practice law outside of the judicial council contract) and may also subcontract with private attorneys (with pre-approval of the judicial council).<sup>162</sup>

As statutorily required,<sup>163</sup> the judicial council contract also specifies the minimum number of attorneys, among the total 113 full-time equivalent trial-level attorneys, that the NHPD must provide to serve each New Hampshire county.<sup>164</sup> As explained at pages 18-25, while the superior court locations match the geography of the counties, the circuit court locations do not, so some

<sup>160</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶ 4 (for the term of July 1, 2019 through June 30, 2021).

<sup>161</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶ 5 (for the term of July 1, 2019 through June 30, 2021).

The judicial council contract also requires NHPD to have three attorneys to provide appellate representation, which is outside the scope of this evaluation.

<sup>162</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶¶ 7, 8, and Exh. C, ¶ 5 (for the term of July 1, 2019 through June 30, 2021). The “workload of full-time salaried attorney staff” is used to determine the “equivalent” number of part-time attorney staff and/or subcontract attorneys necessary to perform the same workload. “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶ 8 (for the term of July 1, 2019 through June 30, 2021).

<sup>163</sup> N.H. REV. STAT. ANN. § 604-B:4 (2019).

<sup>164</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶ 5 (for the term of July 1, 2019 through June 30, 2021).

The judicial council contract requires NHPD to provide (in addition to 3 appellate attorneys statewide):

- 10 FTE attorneys for Belknap County and Carroll County combined
- 7 FTE attorneys for Cheshire County
- 3 FTE attorneys for Coos County
- 5 FTE attorneys for Grafton County
- 22 FTE attorneys for northern Hillsborough County
- 19 FTE attorneys for southern Hillsborough County
- 15 FTE attorneys for Merrimack County
- 19 FTE attorneys for Rockingham County
- 10 FTE attorneys for Strafford County
- 3 FTE attorneys for Sullivan County.

“Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶ 5 (for the term of July 1, 2019 through June 30, 2021).

circuit court locations have geographic jurisdiction over cases arising out of more than one county. As a result, it is unclear whether the judicial council intends the contract provision about the minimum number of attorneys to apply to: cases heard in all of the court locations within each county, no matter out of which county they arise; or to all of the cases arising out of each county, no matter in what court location they are heard. This contract provision becomes even more difficult to understand and impossible to apply when considered in light of the locations of the NHPD branch offices and the manner in which the NHPD allocates representation responsibilities across those branch offices (*see* discussion of court locations in which each NHPD branch office provides counsel at pages 40-42).

The judicial council contract requires the NHPD to provide all of the personnel that are “necessary” to fulfill the NHPD’s representational duties under the contract,<sup>165</sup> but the contract does not define the roles that are included in necessary personnel nor the number of personnel required in any role. Instead, the NHPD decides for itself to what extent non-attorney support staff are necessary to trial-level representation in each case of an indigent person, including the provision of investigators and social workers.

**NHPD branch offices, staff attorneys, and non-attorney staff.** The NHPD determines for itself the court locations in which each NHPD branch office provides representation. (*See* table on page 41 showing the court locations in which each NHPD branch office provides representation during FY 2021 and the number of attorneys in each branch office at the beginning and end of FY 2021.)

- In some instances, a branch office provides representation in only a portion of the cases heard in a given court location, meaning that a single court location may have cases handled by NHPD attorneys from more than one branch office, depending on the geographic area out of which the cases arise or on the type of case. For example, cases heard in the Jaffrey-Peterborough location of the circuit court may be handled by either the Keene branch office, the Manchester branch office, or the Nashua branch office, depending on the type of case and the town out of which it arises. Similarly, cases heard in the Merrimack location of the circuit court may be handled by either the Manchester branch office or the Nashua branch office, depending on the town out of which the case arises.
- Of the 10 NHPD branch offices, five provide representation at court locations in a different county than where the NHPD branch office is located (in addition to court locations in the county where the branch office is located). The Concord branch office is located in Merrimack County, but also represents indigent defendants in the Hillsborough circuit court location in Hillsborough County. The Laconia branch office is located in Belknap County, but also represents indigent defendants in the superior court and two circuit court locations in Carroll County. The Littleton branch office is located in Grafton County, but also represents indigent defendants in the superior court and all three circuit court locations in Coos County. The Manchester branch office is located in Hillsborough County, but also represents indigent defendants in adult misdemeanor cases arising out

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<sup>165</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, ¶ 7.1, and Ex. A, ¶ 3 (for the term of July 1, 2019 through June 30, 2021).

**NHPD BRANCH OFFICE COURT LOCATION ASSIGNMENTS AND NUMBER OF ATTORNEYS DURING FY 2021**

NHPD branch office		Court locations served by NHPD branch office		
Office name # of attys	County location	Superior Court	Circuit Court	
			district division (adult criminal)	family division (juvenile delinquency)
Concord 18 at start 20 at end	Merrimack	Merrimack		Concord Franklin Hooksett Hillsborough (in Hillsborough County)
Dover 11 at start 10 at end	Strafford	Strafford		Dover Rochester
Keene 6 at start 5 at end	Cheshire	Cheshire	Jaffrey-Peterborough (only cases from towns within Cheshire County)	Jaffrey-Peterborough Keene
Laconia 10 at start 11 at end	Belknap	Belknap Carroll (in Carroll County)		Laconia Conway (in Carroll County) Ossipee (in Carroll County)
Littleton 3 at start 3 at end	Grafton	Coos (in Coos County)		Berlin (in Coos County) Colebrook (in Coos County) Lancaster (in Coos County) Littleton
Manchester 25 at start 25 at end	Hillsborough	Hillsborough North	Jaffrey-Peterborough (in Cheshire County) (only cases from towns of Greenfield, Hancock, and Peterborough)	Goffstown Manchester Merrimack (only cases from town of Bedford)
Nashua 19 at start 16 at end	Hillsborough	Hillsborough South	Jaffrey-Peterborough (in Cheshire County) (only cases from towns of Greenville, New Ipswich, Sharon, and Temple)	Merrimack (only cases from towns of Litchfield and Merrimack) Milford Nashua
Newport 4 at start 4 at end	Sullivan	Sullivan		Claremont Newport
Orford 7 at start 8 at end	Grafton	Grafton		Haverhill Lebanon Plymouth
Stratham 20 at start 20 at end	Rockingham	Rockingham		Brentwood Candia Derry Hampton Portsmouth Salem

of certain towns in the Jaffrey-Peterborough circuit court location in Cheshire County. The Nashua branch office is located in Hillsborough County, but also represents indigent defendants in adult misdemeanor cases arising out of certain towns in the Jaffrey-Peterborough circuit court location in Cheshire County.

The NHPD determines for itself how many attorneys and non-attorney support staff it assigns to each branch office. The NHPD designates one of the attorneys in each branch office as the managing attorney who is responsible for supervising the entire branch office in addition to directly representing appointed clients, and the two consistently largest offices (Manchester and Stratham) also have an assistant managing attorney.

The number of attorneys in each branch office, combined with the number and locations of the courts served, means there is wide variation in the work required of the attorneys in each branch office. The table on page 41 shows the court locations in which each NHPD branch office provides representation during FY 2021 and the number of attorneys in each branch office at the beginning and end of FY 2021.

As shown in the table at page 38, during FY 2021, the NHPD employed approximately 26 investigators, 2 social workers, and 62 other non-attorney support staff, distributed across the 10 branch offices, to provide necessary defense services in the trial-level cases of indigent people to whom NHPD attorneys are appointed.<sup>166</sup>

**NHPD subcontracts with private attorneys.** As statutorily required,<sup>167</sup> the judicial council allows the NHPD to subcontract with private attorneys in order to maintain the number of full-time equivalent attorneys that the NHPD is required by the judicial council contract to have.<sup>168</sup> The NHPD's executive director decides when it is necessary to subcontract with private attorneys to provide representation in NHPD cases and determines how many subcontracts are needed, for what period of time, and the branch office locations or court locations out of which those subcontract attorneys will receive cases. The NHPD executive director also decides which private law firms receive those subcontracts. The judicial council contract requires the NHPD to obtain pre-approval from the judicial council before entering into a subcontract,<sup>169</sup> and the NHPD does so.

The NHPD subcontracts do not specify the identity of the attorneys who are to perform the work. Although each subcontract prohibits the law firm from further subcontracting out the work, the law firm can assign the work to any attorney employed by the law firm.

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<sup>166</sup> The NHPD office directory for July 19, 2020 is the only complete listing of NHPD non-attorney staff provided by NHPD during this evaluation, so the number of non-attorney staff shown in the table is as of July 19, 2020.

<sup>167</sup> N.H. REV. STAT. ANN. § 604-B:4 (2019).

<sup>168</sup> See "Agreement" between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶¶ 5, 7, 8, and Exh. C, ¶ 5 (for the term of July 1, 2019 through June 30, 2021).

<sup>169</sup> "Agreement" between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶ 7 (for the term of July 1, 2019 through June 30, 2021).

Under every subcontract, the private attorneys are assigned cases that would otherwise be assigned to an NHPD-employed attorney in a branch office (these are not conflict cases that would otherwise be assigned through the conflict case administrator office to a contract counsel attorney or an assigned counsel attorney, as discussed at pages 98-99). Each subcontract identifies the branch office managing attorney who is responsible for assigning cases to the subcontractor and in some instances identifies the specific court locations out of which cases may be assigned.

Most often, the NHPD subcontracts for the private law firm to be assigned not more than a certain number of cases of specified types, with the cases to be assigned during a defined period of time. The cases assigned through the subcontract may be either cases to which the NHPD is newly appointed during the time period, or they may be cases that had already been assigned to an NHPD-employed attorney but must be reassigned within the NHPD because that attorney has terminated employment with the NHPD. Occasionally, though, the NHPD subcontracts for the private law firm to provide representation in a list of existing NHPD cases that are identified in the subcontract. (*See* discussion of how an individual attorney is assigned to represent an individual client at pages 93-99.)

The table on page 44 shows the NHPD subcontracts with private law firms to provide representation in NHPD cases during FY 2021 and identifies the court locations covered by each subcontract and the NHPD branch office otherwise responsible for providing representation in those cases.

Nothing prohibits these NHPD subcontractors from also contracting with the judicial council to serve as contract counsel in cases where the NHPD is unavailable, even for the same time periods and court locations. For example, out of the eight law firms that subcontracted with the NHPD to provide representation in NHPD cases during FY 2019, FY 2020, or FY 2021: five of them held judicial council contracts covering the same time periods; and four of those five subcontracted with the NHPD to receive NHPD cases in the same court locations where they were available to be assigned under their judicial council contract to cases in which the NHPD is unavailable. Having a subcontract from the NHPD creates an advantage for the law firm over others who hold judicial council contracts to serve as contract counsel in the same court locations during the same fiscal years, because the NHPD subcontractor law firm is assigned by the NHPD to cases in which the NHPD is available, rather than the law firm having to wait for a case in which the NHPD is not available and then hoping the CCAO assigns the case to them instead of to another judicial council contract counsel attorney. In addition, the law firm is still allowed to take the full allotment of work units authorized to them through their judicial council contract. (*See* discussion of contract counsel at pages 45-49.)

Similarly, nothing prohibits these NHPD subcontractors from also accepting assignments through the judicial council to serve as assigned counsel in cases where the NHPD is unavailable and there is no available contract counsel. (*See* discussion of assigned counsel at page 50.)

### NHPD SUBCONTRACTS WITH PRIVATE LAW FIRMS DURING FY 2021

Subcontractor	NHPD branch office responsible	Term of subcontract	Court locations included in subcontract	
			Superior Court	Circuit Court district location
Subcontractor 1	Laconia	12-6-2019 through no end date	Belknap	Laconia
		12-16-19 through 9-16-20		Conway
		9-16-20 through 4-30-21	Carroll	Ossipee
		6-14-21 through no end date		
Subcontractor 2	Nashua	3-2-21 through 3-31-21	Hillsborough South	Jaffrey-Peterborough (in Cheshire County) (only cases from towns of Greenville, New Ipswich, Sharon, and Temple)
		4-19-21 through 5-14-21		Merrimack (only cases from towns of Litchfield and Merrimack)
		6-14-21 through 7-9-21		Milford
				Nashua
Subcontractor 3	Nashua	3-8-21 through 4-2-21		Jaffrey-Peterborough (in Cheshire County) (only cases from towns of Greenville, New Ipswich, Sharon, and Temple)
		4-12-21 through 5-7-21		Merrimack (only cases from towns of Litchfield and Merrimack)
		5-10-21 through 6-4-21		Milford
				Nashua

#### c. NHPD Conflict Case Administrator Office

Throughout the New Hampshire courts, when a judge finds a defendant to be financially eligible to receive court-appointed counsel, the court must appoint the New Hampshire Public Defender program to represent that defendant, unless the NHPD is unavailable due to a conflict of interest as defined by the *Rules of Professional Conduct* or due to caseloads exceeding the contractual limits imposed by the judicial council.<sup>170</sup> (See discussion of how the NHPD determines when it is unavailable at pages 85-93.) If the NHPD is not available, then a contract counsel attorney must be appointed, and if a contract counsel attorney is not available, then any qualified attorney must be appointed.<sup>171</sup>

<sup>170</sup> N.H. REV. STAT. ANN. §§ 604-A:2(II), 604-B:6 (2019). See “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶ 1 (for the term of July 1, 2019 through June 30, 2021).

<sup>171</sup> N.H. REV. STAT. ANN. § 604-A:2(II) (2019).

The judicial council contract requires the NHPD to “operate and administer the Conflict Case Administrator Office” (CCAO) to “distribute conflict cases to contract attorneys and assigned counsel.”<sup>172</sup> (See discussion of how an individual attorney is assigned to represent an individual client at pages 93-99.) During FY 2021, two NHPD employees, referred to as the CCAO administrators, made up the whole of the CCAO. There is no mechanism for anyone to supervise the CCAO administrators. Because they are employed by the NHPD, they are considered to report to the NHPD executive director who signs their timecards, but the NHPD executive director does not supervise their work. They have more contact with the judicial council’s executive director, who considers the CCAO to be “walled off” from the NHPD, but who also does not supervise their work.

### 3. Contract counsel - private attorneys under annual contracts

The legislature authorizes the judicial council to, “within the limits of available appropriations, contract with any qualified attorney in the state to provide for the representation of indigents in circumstances where . . . the public defender program is unavailable to provide such representation.”<sup>173</sup> Pursuant to that statutory authorization, for each fiscal year, the judicial council awards some number of one-year contracts to individual private attorneys, for-profit law firms, and/or a law school, to be available for assignment to the (non-homicide) cases of indigent people where the NHPD is unavailable.<sup>174</sup>

For FY 2021, the judicial council awarded 31 contracts providing 36 attorneys to be available for assignment in up to 6,105 units of work at a projected cost of \$1,831,500. Each contract establishes: the beginning and ending dates during which the contractor may be assigned cases; the identity of the attorneys who are allowed to perform the contract; the court locations in which the attorneys may be assigned; the maximum number of units of work the contractor is authorized to be assigned; the maximum compensation available to be earned; and whether the contractor is paid on a “monthly pro rata” or a “pay-as-you-go” basis.<sup>175</sup>

Most contracts are for the full fiscal year, beginning July 1 and ending June 30, but a few contracts begin later in the fiscal year. In most contracts, only one identified attorney is authorized to perform work under the contract, so all cases assigned by the judicial council are handled by that one attorney. In a few contracts though – four of the 31 contracts awarded for FY 2021 – two or three attorneys are authorized to perform work under the contract.

The judicial council uses the term “units” to quantify the work a contract counsel is available to be assigned, but one unit *is not* one hour and it *is not* one case – instead, the judicial council

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<sup>172</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶ 11 (for the term of July 1, 2019 through June 30, 2021).

<sup>173</sup> N.H. REV. STAT. ANN. § 604-A:2-b (2019).

<sup>174</sup> NEW HAMPSHIRE JUDICIAL COUNCIL, JUDICIAL COUNCIL PLAN FOR THE PARTICIPATION OF THE PRIVATE BAR IN COURT APPOINTED CRIMINAL CASES I (Sept. 9, 2014); “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021,” App. B (sample). The judicial council does not contract with contract counsel attorneys for assignment of homicide cases. Homicide cases are only assigned to NHPD or assigned counsel attorneys.

<sup>175</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021” (sample).



allows a maximum number of units for which a contract counsel can be paid in each type of case (with some limited exceptions).<sup>176</sup> When a contract counsel is actually assigned a case, the judicial council pays the contractor a flat fee (subject to some exceptions) in an amount determined by the type of case. (*See* discussion of contract counsel compensation at pages 135-140).

The attorneys in each contract agree to be assigned cases only in the specific court locations designated in the contract, typically located in the same county as the attorney's law office. Most contract counsel also agree to accept cases out of some court locations in counties other than where their offices are located, but frequently they do not contract to accept representation in all of the court locations in a given county. There are some court locations where many contract counsel are available to be assigned, and there are some court locations where only a small number of contract counsel are available. For example, during FY 2021, there are 18 contract counsel attorneys available to be assigned felony cases in Rockingham Superior Court and 14 in Hillsborough Superior Court North. By contrast, in each court location within Coos County, there is only one contract counsel attorney available to be assigned cases of indigent defendants, and the same is true of most of the court locations within Grafton County. In nearly every circuit court location in the state, there are fewer contract counsel attorneys available to be assigned juvenile delinquency cases than are available for adult misdemeanor cases.

The table on pages 47-49 shows the contract counsel for FY 2021 and the court locations in which they have agreed to be available for assignment (barring a conflict or other reasons for unavailability).

Nothing prohibits these contract counsel attorneys from also entering into subcontracts with the NHPD to provide representation in NHPD cases, and some do (*see* discussion of NHPD subcontractors at pages 42-44).

Additionally, when assigned counsel is necessary in a case, contract counsel attorneys who are not under judicial council contract for the court location of that case may agree to be assigned to that case and be paid the hourly rate established by the New Hampshire Supreme Court (and subject to a maximum fee per type of case)<sup>177</sup> rather than having the case counted under their contract (*see* discussion of assigned counsel at page 50). During FY 2021, attorneys or other members of their law firm in 15 of the 31 contract counsel law offices also received assignments as assigned counsel. These contract counsel are still allowed to take the full allotment of work units authorized to them through their judicial council contract.

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<sup>176</sup> The judicial council defines a "unit" as a "monetary basis for compensation." "New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021," App. B (sample).

<sup>177</sup> N.H. REV. STAT. ANN. § 604-B:5 (2019); N.H. R. SUP. CT. 47, 48.

**CONTRACT COUNSEL DURING FY 2021**

Contracts		Superior Court	Court locations in which available	
Contractor office county location	Contractor authorized attorneys		Circuit Court district div	Circuit Court family div
Belknap	2 attorneys	Belknap Superior Carroll Superior	Conway District Laconia District Ossipee District Plymouth District	Conway District Laconia District Ossipee District Plymouth District
Carroll	1 attorney	Carroll Superior	Ossipee District	Ossipee District
Cheshire	1 attorney	Cheshire Superior Sullivan Superior	Claremont District Jaffrey-Peterborough District Keene District Newport District	Claremont District Jaffrey-Peterborough District Keene District Newport District
Cheshire	1 attorney	Cheshire Superior		
Cheshire	1 attorney	Cheshire Superior Sullivan Superior	Claremont District Jaffrey-Peterborough District Keene District Newport District	Claremont District Jaffrey-Peterborough District Keene District Newport District
Grafton	1 attorney	Coos Superior Grafton Superior	Berlin District Colebrook District Haverhill District Lancaster District Littleton District Plymouth District	Berlin District Colebrook District Haverhill District Lancaster District Littleton District Plymouth District
Grafton	1 attorney		Lebanon District (misd only) Newport District (misd only)	
Hillsborough	3 attorneys	Hillsborough Superior North Hillsborough Superior South Rockingham Superior	Manchester District Merrimack District Milford District Nashua District Salem District	Manchester District Merrimack District Milford District Nashua District Salem District
Hillsborough	1 attorney	Hillsborough Superior North Hillsborough Superior South Rockingham Superior	Candia District Derry District Goffstown District Manchester District Merrimack District Milford District Nashua District	Candia District Derry District Goffstown District Manchester District Merrimack District Milford District Nashua District
Hillsborough	1 attorney	Hillsborough Superior North	Concord District Goffstown District Hooksett District Manchester District Merrimack District Milford District	Concord District Goffstown District Hooksett District Manchester District Merrimack District Milford District
Hillsborough	2 attorneys	Hillsborough Superior North Hillsborough Superior South Rockingham Superior	Brentwood District Derry District Goffstown District Hillsborough District Hooksett District Manchester District Merrimack District Milford District Nashua District Portsmouth District Salem District	Brentwood District Derry District Goffstown District Hillsborough District Hooksett District Manchester District Merrimack District Milford District Nashua District Portsmouth District Salem District
Hillsborough	1 attorney	Hillsborough Superior North Hillsborough Superior South	Manchester District Merrimack District Milford District Nashua District	Nashua District

Contracts		Court locations in which available		
Contractor office county location	Contractor authorized attorneys	Superior Court	Circuit Court district div	Circuit Court family div
Hillsborough	1 attorney	Belknap Superior Hillsborough Superior North Hillsborough Superior South Merrimack Superior	Concord District Franklin District Goffstown District Hillsborough District Hooksett District Laconia District Manchester District Merrimack District Milford District Nashua District	Concord District Franklin District Goffstown District Hillsborough District Hooksett District Laconia District Manchester District Merrimack District Milford District Nashua District
Hillsborough	1 attorney	Hillsborough Superior North Hillsborough Superior South Merrimack Superior	Goffstown District Manchester District Merrimack District Milford District Nashua District	
Hillsborough	1 attorney	Hillsborough Superior North	Goffstown District Manchester District Merrimack District Milford District	
Hillsborough	1 attorney	Hillsborough Superior North Hillsborough Superior South Rockingham Superior	Candia District Jaffrey-Peterborough District Manchester District Merrimack District Milford District Nashua District Salem District	Manchester District Merrimack District Nashua District Salem District
Hillsborough	1 attorney	Merrimack Superior Rockingham Superior	Concord District Franklin District Goffstown District Hillsborough District Hooksett District Manchester District Merrimack District Milford District Nashua District	Concord District Franklin District Goffstown District Hillsborough District Hooksett District Manchester District Merrimack District Milford District Nashua District
Merrimack	1 attorney	Belknap Superior Merrimack Superior	Concord District Franklin District Hillsborough District Hooksett District Laconia District	Concord District Franklin District Hillsborough District Hooksett District Laconia District
Merrimack	1 attorney	Hillsborough Superior North Merrimack Superior	Concord District Goffstown District Hillsborough District	
Merrimack	1 attorney	Merrimack Superior	Concord District Franklin District Hooksett District Laconia District Plymouth District	
Rockingham	1 attorney	Belknap Superior Merrimack Superior	Concord District Franklin District Hooksett District	Concord District Franklin District Hooksett District
Rockingham	1 attorney	Rockingham Superior Strafford Superior	Brentwood District Candia District Derry District Dover District Hampton District Portsmouth District Rochester District Salem District	Brentwood District Dover District Hampton District Portsmouth District Rochester District
Rockingham	1 attorney	Rockingham Superior Strafford Superior	Brentwood District Candia District Derry District Dover District Hampton District Portsmouth District Rochester District Salem District	Brentwood District Candia District Derry District Dover District Hampton District Portsmouth District Rochester District Salem District

Contracts		Court locations in which available		
Contractor office county location	Contractor authorized attorneys	Superior Court	Circuit Court district div	Circuit Court family div
Rockingham	1 attorney	Hillsborough Superior North Hillsborough Superior South Rockingham Superior	Candia District Derry District Goffstown District Manchester District Salem District	
Rockingham	1 attorney	Rockingham Superior	Brentwood District Candia District Derry District Hampton District Salem District	Brentwood District Candia District Derry District Hampton District Salem District
Rockingham	2 attorneys	Carroll Superior Rockingham Superior Strafford Superior	Brentwood District Candia District Dover District Hampton District Portsmouth District Rochester District	Brentwood District Candia District Dover District Hampton District Portsmouth District Rochester District
Rockingham	1 attorney	Rockingham Superior Strafford Superior	Brentwood District Candia District Derry District Dover District Hampton District Portsmouth District Rochester District Salem District	
Rockingham	1 attorney	Rockingham Superior Strafford Superior	Brentwood District Candia District Derry District Dover District Hampton District Portsmouth District Rochester District Salem District	Brentwood District Candia District Derry District Dover District Hampton District Portsmouth District Rochester District Salem District
Rockingham	1 attorney	Carroll Superior Rockingham Superior Strafford Superior	Brentwood District Candia District Derry District Dover District Hampton District Portsmouth District Rochester District Salem District	Brentwood District Derry District Dover District Hampton District Portsmouth District Rochester District Salem District
Strafford	1 attorney	Rockingham Superior Strafford Superior	Brentwood District Dover District Portsmouth District Rochester District	Brentwood District Dover District Portsmouth District Rochester District
Sullivan	1 attorney	Cheshire Superior Sullivan Superior	Claremont District Lebanon District Newport District	Claremont District Lebanon District Newport District

#### 4. Assigned counsel - private attorneys appointed case by case

When the NHPD is unavailable and there is no contract counsel available to be appointed in a case, the legislature authorizes the court to appoint, and the judicial council to pay, “any qualified attorney.”<sup>178</sup> Private attorneys appointed in these circumstances are referred to in statutes and by the judicial council as “assigned counsel.”<sup>179</sup> While this is the method of providing appointed counsel that was in use before New Hampshire’s modern indigent defense system was established, the difference today is that the judicial council designates the private attorney who is assigned to a case rather than a trial judge doing so. When an assigned counsel attorney is assigned a case, the attorney can bill periodically and the judicial council pays the attorney at an hourly rate that is established by the New Hampshire Supreme Court (and subject to a maximum fee per type of case).<sup>180</sup>

During FY 2021, one or more assigned counsel attorneys from 53 separate private law firms accepted assignments to represent indigent defendants in the trial courts.

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<sup>178</sup> N.H. REV. STAT. ANN. §§ 604-A:1, 604-A:2(II), 604-A:4 (2019).

<sup>179</sup> N.H. REV. STAT. ANN. §§ 604-B:5, 604-B:6 (2019); NEW HAMPSHIRE JUDICIAL COUNCIL, JUDICIAL COUNCIL PLAN FOR THE PARTICIPATION OF THE PRIVATE BAR IN COURT APPOINTED CRIMINAL CASES 1 (Sept. 9, 2014).

<sup>180</sup> N.H. REV. STAT. ANN. § 604-B:5 (2019); N.H. R. SUP. CT. 47, 48.

## Chapter III

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

Before any individual attorney can be appointed to represent any individual defendant, the indigent defense system must first select the attorneys who are available to be appointed. In *Powell v. Alabama* – the case the U.S. Supreme Court points to in *United States v. Cronin* as representative of the constructive denial of the right to counsel<sup>181</sup> – the judge overseeing the Scottsboro Boys’ Alabama trial appointed as defense counsel a real estate lawyer from Chattanooga, Tennessee, who was not licensed in Alabama and was admittedly unfamiliar with the state’s rules of criminal procedure.<sup>182</sup> The *Powell* Court concluded that defendants require the “guiding hand” of counsel,<sup>183</sup> that is, the attorneys a government provides to represent indigent people must be qualified and trained to help those people advocate for their stated legal interests.

Although attorneys graduate from law school with a strong understanding of the principles of law and legal theory and generally how to think like a lawyer, no law school graduate enters the legal profession automatically knowing how to be a criminal defense lawyer or a juvenile delinquency defense attorney.<sup>184</sup> Expertise and skill must be developed. Just as one would not go to a dermatologist for heart surgery, a real estate or divorce lawyer cannot be expected to

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<sup>181</sup> *United States v. Cronin*, 466 U.S. 648, 659-60 (1984) (“[I]f counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. . . . Circumstances of that magnitude may be present on some occasions when, although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. *Powell v. Alabama*, 287 U.S. 45 (1932), was such a case.”)

<sup>182</sup> *Powell v. Alabama*, 287 U.S. 45, 53-56 (1932). A retired local Alabama attorney who had not practiced in years was also appointed to assist in the representation of all nine co-defendants.

<sup>183</sup> *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) (“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.”).

<sup>184</sup> Christopher Sabis and Daniel Webert, *Understanding the Knowledge Requirement of Attorney Competence: A Roadmap for Novice Attorneys*, 15 *Geo. J. Legal Ethics* 915, 915 (2001-2002) (“[B]ecause legal education has long been criticized as being out of touch with the realities of legal practice and because novice attorneys often lack substantive experience, meeting the knowledge requirements of attorney competence may be particularly difficult for a lawyer who recently graduated from law school or who enters practice as a solo practitioner.”).

handle a complex criminal case competently. Attorneys must know what legal tasks need to be considered in each and every case they handle, and then how to perform them.

To ensure that attorneys continue to be competent from year to year to represent indigent defendants in the types of cases they are assigned, national standards require that the indigent defense system provide attorneys with access to a “systematic and comprehensive” training program,<sup>185</sup> at which attorney attendance is compulsory.<sup>186</sup> Training must be tailored to the types and levels of cases for which the attorney is appointed.<sup>187</sup> For example, an attorney who is appointed in drug-related cases must be trained in the latest forensic sciences and case law related to drugs. Ongoing training, therefore, is an active part of the job of being an indigent defense system attorney.

Attorneys who were once well-qualified and well-trained can, for any number of reasons, lose their competency to handle cases over time, and indigent people do not get to choose which attorney is assigned to represent them. National standards require that all indigent defense system attorneys must be “supervised and systematically reviewed” to ensure that they continue to provide effective assistance of counsel to each and every indigent client.<sup>188</sup> Implicit within supervision is that the supervisor has authority to ensure an attorney is no longer assigned if they are no longer competent.

For all of these reasons, national standards require that each attorney must have the qualifications, training, and experience necessary for each specific type of case to which they are appointed.<sup>189</sup> As national standards explain, an attorney’s ability to provide effective representation in a criminal case depends on their familiarity with the “substantive criminal law and the law of criminal procedure and its application in the particular jurisdiction.”<sup>190</sup> The American Bar Association observed nearly 30 years ago that “[c]riminal law is a complex and difficult legal area, and the skills necessary for provision of a full range of services must be carefully developed. Moreover, the consequences of mistakes in defense representation may be substantial, including wrongful conviction and death or the loss of liberty.”<sup>191</sup>

Similarly, the National Juvenile Defender Center notes that “juvenile defense [is] a specialized practice requiring specialized skills,”<sup>192</sup> and “[t]he role of the juvenile defender has evolved to require a challenging and complex skill set needed to meet core ethical obligations.”<sup>193</sup> For

<sup>185</sup> NATIONAL ADVISORY COMM’N ON CRIM. JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, ch. 13 (The Defense), std. 13.16 (1973). *See also* AMERICAN BAR ASS’N, CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, std. 4-1.12(b) (4th ed. 2017).

<sup>186</sup> AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, principle 9 & cmt. (2002).

<sup>187</sup> AMERICAN BAR ASS’N, CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, std. 4-1.12(c) (4th ed. 2017).

<sup>188</sup> *See* AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, principle 10 (2002).

<sup>189</sup> *See, e.g.*, AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, principle 6 & cmt. (2002).

<sup>190</sup> NATIONAL LEGAL AID & DEF. ASS’N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION, guideline 1.2(a) (1995).

<sup>191</sup> AMERICAN BAR ASS’N, CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, § 5-1.5 & cmt. (3d ed. 1992).

<sup>192</sup> NATIONAL JUV. DEF. CTR, NATIONAL JUVENILE DEFENSE STANDARDS std. 9 (2012).

<sup>193</sup> NATIONAL JUV. DEF. CTR, NATIONAL JUVENILE DEFENSE STANDARDS std. 8 (2012).

these reasons, attorneys appointed to represent juveniles “must be skilled in juvenile defense” and “knowledgeable about adolescent development and the special status of youth in the legal system,”<sup>194</sup> because otherwise children “may face unnecessary detention and excessive confinement, . . . decreased educational and/or employment opportunities, restriction of access to public benefits and privileges, and compromised immigration status, as well as placement on lifelong registries.”<sup>195</sup>

## A. Selecting qualified attorneys to represent indigent defendants

With only one exception, New Hampshire statutes and court rules do not establish any particular qualifications, skills, or level of expertise that an attorney must possess, other than being licensed to practice law in New Hampshire, before they are eligible to represent an indigent person in any type of case. State law does require the judicial council to establish eligibility requirements that attorneys must meet before they can be assigned to a juvenile delinquency proceeding.<sup>196</sup>

### 1. Qualifications & selection of NHPD attorneys

The judicial council contract with the NHPD requires that, “subject to the normal turnover of staff and the availability of qualified replacements,” the NHPD must have no fewer than 113 full-time attorneys or the equivalent, throughout the term of the contract, to provide trial-level representation (including for de novo appeals in the superior court) when the NHPD is appointed by a court.<sup>197</sup> To meet this attorney staffing requirement, the judicial council contract allows the NHPD to employ full-time or part-time staff attorneys and also (with pre-approval of the judicial council) to subcontract with private attorneys.<sup>198</sup>

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<sup>194</sup> NATIONAL JUV. DEF. CTR, NATIONAL JUVENILE DEFENSE STANDARDS std. 1.1 (2012).

<sup>195</sup> NATIONAL JUV. DEF. CTR, NATIONAL JUVENILE DEFENSE STANDARDS std. 1.1 cmt. (2012).

<sup>196</sup> N.H. REV. STAT. ANN. § 604-A:10(V) (2019).

<sup>197</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶ 5 (for the term of July 1, 2019 through June 30, 2021).

The judicial council contract also requires NHPD to have three attorneys to provide appellate representation, which is outside the scope of this evaluation.

<sup>198</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶¶ 7, 8, and Exh. C, ¶ 5 (for the term of July 1, 2019 through June 30, 2021). The “workload of full-time salaried attorney staff” is used to determine the “equivalent” number of part-time attorney staff and/or subcontract attorneys necessary to perform the same workload. “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶ 8 (for the term of July 1, 2019 through June 30, 2021).



## New Hampshire's challenge to provide enough qualified attorneys to meet its right to counsel needs

One of the greatest ongoing challenges faced in New Hampshire is to provide enough qualified attorneys to fill all of the right to counsel needs in the state. This challenge permeates the entire system, from the membership of the judicial council all the way through to individual private attorneys serving as assigned counsel on a case-by-case basis.

According to the judicial council, during 2021, the New Hampshire Association of Criminal Defense Lawyers (NHACDL) had 264 members. Acknowledging that attorneys do not have to be a member of the NHACDL in order to be experienced and skilled in the practice of criminal defense, the NHACDL membership is nonetheless a good indication of the number of New Hampshire attorneys who consider themselves to be actively involved in criminal defense representation. As reported by the judicial council, among those 264 NHACDL members, four were federal public defenders and six were retired from the practice of law, leaving 254 potentially available for state court practice.

The judicial council intends that each of the four members of its indigent defense subcommittee have current or recent experience in criminal defense law. The judicial council's FY 2020 - FY 2021 contract with the NHPD requires the NHPD to have no less than 113 full-time equivalent attorneys available to represent indigent defendants at the trial court level and three more for appellate representation.<sup>a</sup> During FY 2021, 36 attorneys were under contract with the judicial council (through 31 contracts) to serve as contract counsel to represent indigent defendants. During FY 2021, one or more attorneys from 53 separate private law firms accepted appointments as assigned counsel to represent indigent defendants. Altogether, this shows that New Hampshire needs an absolute minimum of 209 qualified criminal defense attorneys to fulfill the systemic right to counsel needs within the state courts, and that presumes the existing required number of attorneys is sufficient to prevent excessive caseloads and to provide conflict-free representation to each individual indigent defendant, which is doubtful.

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<sup>a</sup> "Agreement" between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶ 5 (for the term of July 1, 2019 through June 30, 2021).

The judicial council's contract with the NHPD does not impose any mandatory qualifications for the attorneys that the NHPD hires or subcontracts to represent indigent people, except that attorneys employed by the NHPD are prohibited from having any private law practice.<sup>199</sup> The NHPD likewise does not have any formal requirements or qualifications that attorneys must meet to be hired or for the private attorneys with whom it subcontracts. (As statutorily mandated, the judicial council's contract with the NHPD does require that any NHPD attorney assigned to a juvenile delinquency proceeding must meet the judicial council's eligibility standards for those cases.<sup>200</sup> *See* discussion of assigning individual attorneys to the cases of individual defendants at pages 93-99.)

As long as the NHPD maintains the 113 full-time equivalent trial-level attorneys that it is required by the judicial council contract to have,<sup>201</sup> then it is free to determine for itself how many staff attorneys to employ, how many private attorneys to subcontract, and how to distribute those attorneys among the NHPD branch offices. From the beginning of FY 2019 through the conclusion of FY 2021, the NHPD has never employed fewer than 113 full-time equivalent staff attorneys across its 10 branch offices. The low point occurred during a two-month period from June 29, 2019 to August 26, 2019, when the NHPD had 115 attorneys on staff and one of those attorneys was part-time working 80%. (Complete tables showing the detailed chronology of all changes in NHPD branch office attorneys, during FY 2019 through FY 2021, are included in appendix A.) As the table on page 56 shows, there have been only slight changes in the number of NHPD staff attorneys in the branch offices from the beginning of FY 2019 through the end of FY 2021,<sup>202</sup> although as the judicial council notes, even where attorney staffing numbers seem stable, it is sometimes the case that experienced attorneys have left the NHPD and been replaced by less-experienced attorneys.

In addition to the NHPD-employed staff attorneys shown in the table on page 56, the NHPD subcontracted with eight separate private law offices to provide representation in NHPD cases at various times during FY 2019, FY 2020, and FY 2021, through a total of 19 separately executed subcontracts.

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<sup>199</sup> "Agreement" between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶ 4 (for the term of July 1, 2019 through June 30, 2021).

<sup>200</sup> "Agreement" between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A-1, ¶ 8 (for the term of July 1, 2019 through June 30, 2021).

<sup>201</sup> *See* "Agreement" between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶¶ 5, 7, 8, and Exh. C, ¶ 5 (for the term of July 1, 2019 through June 30, 2021).

<sup>202</sup> Compiled from "attorneys on staff" reports provided by the New Hampshire Public Defender.

**NHPD BRANCH OFFICE STAFF ATTORNEYS, FY 2019 THROUGH FY 2021**

NHPD office	start FY 2019	end FY 2019 / start FY 2020	end FY 2020 / start FY 2021	end FY 2021 / start FY 2022
Concord	17	16	18	20
Dover	11	11	11	10
Keene	6	7	6	5
Laconia	10	10	10	11
Littleton	3	3	3	3
Manchester	23	24	25	25
Nashua	18	15	19	16
Newport	3	4	4	4
Orford	6	5	7	8
Stratham	21	20	20	20
<b>TOTAL ALL BRANCH OFFICES</b>	<b>118</b>	<b>115</b>	<b>123</b>	<b>122</b>
Managing attorneys (full-time)	10	10	10	10
Assistant managing attorneys (full-time)	2	2	2	2
Line attorneys (full-time)	104	102	108	107
Line attorneys (part-time)	2	1	3	3

*a. NHPD branch office staff attorneys*

Like every law office the size of the NHPD, there are usually some number of vacant staff attorney positions on any given day. Historically and on average over any given 10-year period, the NHPD expects to lose through attrition about 10% of its attorneys each year. As a result, the NHPD hires (or attempts to hire) attorneys on an ongoing basis.

The NHPD advertises on its website when it has attorney openings it is seeking to fill.<sup>203</sup> To apply for a position, attorneys or law students in their final year of law school submit a cover letter, resume, and law school transcript. The decision about whom to hire, from among the applicants, is made collectively by the NHPD executive director, the director of legal services, and the director of litigation. The NHPD categorizes all of the attorneys whom it hires as either “new hires” (attorneys hired immediately following graduation from law school or completion of a judicial clerkship, but who have no experience directly representing clients) or “lateral hires” (attorneys with some amount of experience directly representing clients).

<sup>203</sup> See *Employment*, NEW HAMPSHIRE PUBLIC DEFENDER, <https://www.nhpd.org/employment/>.

The following table shows, for FY 2019 through FY 2021, the number of NHPD branch office staff attorneys who were hired and who were terminated or transferred out of branch office positions, along with the break-down of new hires and lateral hires.

**NHPD BRANCH OFFICE ATTORNEY CHANGES, FY 2019 THROUGH FY 2021**

		FY 2019	FY 2020	FY 2021
<b>Attorneys at start of fiscal year</b>		118	115	123
<b>Hired</b>	<b>New hires</b>	10	14	11
	<b>Lateral hires</b>	5	6	8
<b>Terminated / transferred out</b>		18	12	20
<b>Attorneys at end of fiscal year</b>		115	123	122

**“Lateral hires.”** Throughout its history, the NHPD has rarely hired experienced attorneys and has instead focused on hiring attorneys who just graduated from law school. During the coronavirus pandemic, the NHPD was unable to fill all vacant attorney positions with newly graduated attorneys and instead hired some number of lateral attorneys. Most New Hampshire attorneys with experience in criminal defense began their legal careers at the NHPD and, after gaining experience, left the NHPD to begin or join a private law firm, where they can choose the areas of law in which they practice, can choose the cases that they take, and their potential for increased income is higher. New Hampshire stakeholders say that most of the NHPD’s lateral hires come from out-of-state attorneys who have already decided they want to relocate to New Hampshire when they apply, and these are usually attorneys who were previously employed in a public defender office in another state. As shown in the table above, about one-third of the NHPD’s hires each year are lateral hires.

**“New hires.”** To fill most vacant attorney positions, the NHPD brings on staff each year, usually in late August or early September, a group of 12 to 14 people who just graduated from law school and are awaiting their bar results<sup>204</sup> or graduated the preceding year and served in a judicial clerkship. The NHPD tends to actively recruit law students from the “top-14 law schools,” which some believe has contributed to a lack of diversity and cultural competency at the NHPD,<sup>205</sup> though any third-year law student or judicial clerk from anywhere in the country can apply. The hiring process for new hires occurs over nearly a full year, with applications accepted from law students and judicial clerks beginning in October of the year before they will come on staff at the NHPD if hired.

<sup>204</sup> The New Hampshire bar examination is administered each year in February and July, with the results released in April and September respectively.

<sup>205</sup> National standards provide that, “in selecting personnel, a public defense office should also consider the diverse interests and makeup of the community it serves, and seek to recruit, hire, promote and retain a diverse group of defenders and staff that reflect that community.” AMERICAN BAR ASS’N, CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, std 4-1.13(b) (2017). There is no entity in New Hampshire that is charged with a responsibility to or that does collect data about the demographic makeup of indigent defendants served by New Hampshire’s indigent defense system.

Each year, the NHPD creates a 10- to 12-person hiring committee from among its staff, to consider applications, conduct interviews, and make recommendations to NHPD central administration about whom to hire from among the applicants.<sup>206</sup> There are no formal criteria for evaluating applicants. The hiring committee compares applicants generally based on: whether they have taken law school courses geared toward a career as a public defender and their grades in those courses (such as evidence, criminal procedure, constitutional law, and trial advocacy); whether they have participated in criminal clinic programs or worked at public defender offices while in law school; and their stated reasons for why they want to be a public defender attorney in New Hampshire.

From among the applicants, the field is narrowed to those the NHPD interviews. One or two NHPD senior attorneys or administrators conduct a brief 20- to 30-minute interview with each applicant,<sup>207</sup> to further narrow the number of potential hires. The full hiring committee as a group interviews each of the remaining applicants, and each applicant answers questions, asks any questions they have of the hiring committee, and does a mock presentation of a pre-assigned element of a trial (such as an opening statement or closing argument). The hiring committee quickly makes recommendations to NHPD central administration about which applicants the NHPD should hire.

NHPD central administration decides which applicants it wants to hire and sends job offers by email on a rolling basis, beginning usually in January and continuing as needed until (hopefully) all vacant attorney positions are filled by applicants who have accepted their job offers. Each new hire attorney is assigned to a specific branch office location based on the NHPD's need and taking into consideration the attorney's preferences to the extent possible.<sup>208</sup>

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<sup>206</sup> NHPD often receives applicants from those who worked at NHPD as an intern while in law school.

<sup>207</sup> All law students who intern with NHPD at any time following their second year of law school are automatically interviewed by NHPD at the end of their summer internship.

<sup>208</sup> After an applicant accepts a job offer, NHPD asks them to identify their top three preferences for the branch office to which they would like to be assigned. Reportedly, most "new hire" attorneys request assignment to the larger, more urban area branch offices, located in Concord, Manchester, and Nashua.

## Hiring branch office attorneys at the NHPD during the coronavirus pandemic

Fiscal year 2021 began on July 1, 2020, about four months into the spread of the coronavirus pandemic across the U.S. At that time, the NHPD had 123 attorneys distributed across its 10 branch offices. As a result of the pandemic, state government officials warned the judicial council's executive director to be prepared for the possibility of spending freezes or cuts to the state's appropriation to the judicial council. To protect against the danger that the state might "claw back" funding from the judicial council's appropriation, the judicial council's executive director and the NHPD's executive director agreed that the NHPD would pause most hiring from September 1, 2020 through January 1, 2021.<sup>a</sup>

Although no "claw back" of funding ever occurred, the NHPD's hiring pause meant the 11 attorneys in the new hire class of FY 2021 did not come onto the NHPD's staff until January 2021 (rather than in the fall of 2020) and then had to be trained before being available full-time to represent NHPD clients. Many within the New Hampshire justice system believe this caused increased per-attorney caseloads in the NHPD branch offices. As the logic goes: there were fewer NHPD attorneys than needed during the September to January hiring freeze; then the new hire class was not assigned cases for some number of months after they were hired on January 2, 2021; so all cases to which the NHPD was appointed – at least from September 1, 2020 through some indefinite end date – were assigned to the insufficient number of existing NHPD attorneys.

<sup>a</sup> The judicial council contract with the NHPD provides that all funding to the NHPD under the contract is "contingent upon the continued appropriation of funds for the services provided" by the NHPD, and if funding to the NHPD is reduced then "there shall be a concomitant and pro rata reduction of the services which the NHPD is obligated to perform." "Agreement" between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. C, ¶ 1 (for the term of July 1, 2019 through June 30, 2021). Accordingly, if the state had clawed back funds appropriated to the judicial council and contractually obligated to the NHPD, then the services the NHPD is required to provide would have also been reduced and the NHPD would not have needed as many attorneys to perform the contract.

Even with the delay in bringing on the new hire class of FY 2021, staffing at the NHPD's branch offices never went below 121 attorneys at any time during FY 2021.<sup>b</sup> That is eight attorneys *more than* the judicial council contract requires the NHPD to have in its branch offices.<sup>c</sup> In advance of the new hire class of FY 2021 coming aboard, the NHPD brought onto its staff seven lateral hire attorneys – four of them during the hiring pause period of September 1, 2020 through January 1, 2021 – and lateral hire attorneys are assigned a full-time caseload without any training period delay. (Complete tables showing the detailed chronology of all changes in NHPD branch office attorneys, during FY 2019 through FY 2021, are included in appendix A.) In addition to its staff attorneys, the NHPD also subcontracted with three separate private law offices to provide representation in a significant number of NHPD cases at various times during FY 2021 – cases that would otherwise have been assigned to NHPD staff attorneys in the Laconia and Nashua branch offices.

Although there is widespread belief among New Hampshire justice system stakeholders that NHPD new hire attorneys are slowly assigned cases over time, NHPD staff attorneys report that they begin to receive case assignments during their first or second week of employment and typically have per-attorney open caseloads nearing the judicial council contract limits<sup>d</sup> within just a few months of

<sup>b</sup> Compiled from "attorneys on staff" reports provided by the New Hampshire Public Defender.

<sup>c</sup> "Agreement" between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶¶ 4, 5 (for the term of July 1, 2019 through June 30, 2021).

<sup>d</sup> All full-time NHPD trial attorneys are contractually limited to "a caseload of not more than 70 open and active cases." For full-time NHPD trial attorneys assigned a mixed caseload (which is all of them), among the maximum 70 open and active cases there is a further limit of not more than:

- 35 felonies
  - no more than 2 first-degree murder, second-degree murder, manslaughter;
- 35 misdemeanors;
- 20 juvenile delinquencies; and
- 16 other
  - no more than 2 civil commitment of sexually violent predator.

"Agreement" between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A-1, ¶¶

being hired. The caseload data produced during this evaluation bears that out consistently during FY 2019 through FY 2021. (Appendix B contains complete tables, for FY 2019 through FY 2021, that show the attorneys hired during each fiscal year and the number & type of open NHPD cases they had on day one of the fiscal year following being hired.) For example, on July 16, 2021, just six months after the new hire class of FY 2021 began work at the NHPD, all 11 of the new hire attorneys had already been assigned a mixed caseload that included felonies. Four of the 11 new hire attorneys had a number of open cases that,

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5, 6, 10 (for the term of July 1, 2019 through June 30, 2021).

in some fashion, exceeded the judicial council contract limits; as did six of the eight lateral hire attorneys who joined NHPD staff during FY 2021.

Perhaps most significantly, as explained at pages 88-93, there has been a long-standing problem at the NHPD of its attorneys having per-attorney open caseloads that exceed the judicial council's contract limits. This is not a problem that began with the coronavirus pandemic nor with the four-month delay in hiring the new hire class of FY 2021.

*b. NHPD subcontractor private attorneys*

The NHPD from time to time enters into limited subcontracts with private law firms to provide trial-level representation in cases to which the NHPD is appointed. The NHPD's executive director decides when it is necessary to subcontract with private attorneys to provide representation in NHPD cases and determines how many subcontracts are needed, for what period of time, and the branch office locations or court locations out of which those subcontract attorneys will receive cases. The NHPD does not have any criteria or procedures for this decision-making. The NHPD executive director also chooses the private law firm with whom the NHPD enters into subcontracts, although there are no formal criteria governing how the executive director decides.

The NHPD subcontracted with eight separate private law offices to provide representation in NHPD cases at various times during FY 2019, FY 2020, and FY 2021, through a total of 19 separately executed subcontracts. The judicial council contract requires the NHPD to obtain pre-approval from the judicial council before entering into a subcontract,<sup>209</sup> and the NHPD does so.

The NHPD's subcontracts do not specify the identity of the attorneys who are to perform the work. Although each subcontract prohibits the law firm from further subcontracting out the work, the law firm can assign the work to any attorney employed by the law firm. As a result, neither the judicial council nor the NHPD know the qualifications possessed by attorneys assigned to represent indigent defendants through these NHPD subcontracts.

The private attorneys with whom the NHPD subcontracts are sometimes attorneys who recently left employment at the NHPD. For example, beginning December 6, 2019 and continuing into FY 2022, the NHPD subcontracted with a private law firm to provide representation in NHPD cases that would normally be handled by NHPD staff attorneys in the Laconia branch office. Both of the attorneys in that private law firm were employed by the NHPD in the Laconia branch office until December 2, 2019, and one of the attorneys had been the managing attorney of the office. In another example, two attorneys left their employment in the NHPD Manchester branch office (in Hillsborough County), one on August 20, 2020 and the other on November 30, 2020, and established a private law firm. The NHPD subcontracted with that private law firm from March 2, 2021 through July 9, 2021 to provide representation in NHPD cases that would normally be handled by NHPD staff attorneys in the Nashua branch office (in Hillsborough County). That a private attorney was previously employed by the NHPD does not ensure they (or the attorneys employed by them in a private law office) have the necessary qualifications, skill, and expertise to provide effective assistance of counsel to indigent defendants, because the NHPD does not have any formal requirements or qualifications that attorneys must meet to be hired.

Even more frequently, the private attorneys with whom the NHPD subcontracts to provide representation in NHPD cases also hold judicial council contracts to be available for assignment

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<sup>209</sup> "Agreement" between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶ 7 (for the term of July 1, 2019 through June 30, 2021).



as contract counsel in cases where the NHPD is unavailable. Of the eight law firms that subcontracted with the NHPD to provide representation in NHPD cases during FY 2019, FY 2020, or FY 2021: five of them held judicial council contracts covering the same time periods; and four of those five subcontracted with the NHPD to receive NHPD cases in the same court locations where they were available to be assigned under their judicial council contract to cases in which the NHPD is unavailable.

## 2. Qualifications & selection of contract counsel attorneys & assigned counsel attorneys

The judicial council has established some qualifications that an attorney must meet to be eligible to serve as contract counsel or as assigned counsel.<sup>210</sup> An attorney must:

- be licensed to practice law in New Hampshire;
- have \$100,000/\$300,000 professional liability insurance;
- demonstrate through their application that they have “the experience and the legal skills necessary to independently and reliably provide high-quality representation;” and
- have references that demonstrate confidence in the applicant’s “ability to handle serious felonies independently and reliably” and that “affirm the attorney’s reputation for professionalism.”<sup>211</sup>

For contract counsel, the attorney must have “actively practiced criminal law for a minimum of three years and possess a substantial record of jury trial experience.”<sup>212</sup> To be eligible as assigned counsel, the judicial council adds some requirements for juvenile delinquency cases, “major crime” cases (felony sexual assault, first degree assault, or homicide), and capital cases.<sup>213</sup>

Attorneys apply to the judicial council to serve as contract counsel or assigned counsel or both by submitting a one-page form application.<sup>214</sup> To encourage attorneys to apply, the judicial council’s executive director places notices in the state bar association’s newsletter and, especially in areas of the state with few attorneys, reaches out to former NHPD attorneys for recommendations of attorneys to contact directly. In the application, the attorney must provide:

- law firm name, address, and telephone;
- attorney cell phone and email;
- New Hampshire Bar number, date of admission, and law school & year of graduation;
- number of years practicing law;
- whether they have ever been professionally disciplined;

<sup>210</sup> NEW HAMPSHIRE JUDICIAL COUNCIL, JUDICIAL COUNCIL ELIGIBILITY STANDARDS FOR CONTRACT COUNSEL AND ASSIGNED COUNSEL (no date).

<sup>211</sup> NEW HAMPSHIRE JUDICIAL COUNCIL, JUDICIAL COUNCIL ELIGIBILITY STANDARDS FOR CONTRACT COUNSEL AND ASSIGNED COUNSEL (no date).

<sup>212</sup> NEW HAMPSHIRE JUDICIAL COUNCIL, JUDICIAL COUNCIL ELIGIBILITY STANDARDS FOR CONTRACT COUNSEL AND ASSIGNED COUNSEL (no date).

<sup>213</sup> NEW HAMPSHIRE JUDICIAL COUNCIL, JUDICIAL COUNCIL ELIGIBILITY STANDARDS FOR CONTRACT COUNSEL AND ASSIGNED COUNSEL (no date).

<sup>214</sup> NEW HAMPSHIRE JUDICIAL COUNCIL, JUDICIAL COUNCIL PLAN FOR THE PARTICIPATION OF THE PRIVATE BAR IN COURT APPOINTED CRIMINAL CASES I (Sept. 9, 2014). *See* “New Hampshire Judicial Council Application to Serve as Appointed Counsel in Criminal and Delinquency Cases.”

- whether they have ever provided trial-level representation in a capital case;
- the number of:
  - criminal cases handled, tried to a jury, and involving major crimes
  - defenses or prosecutions conducted in homicide cases and felony sexual assault cases
  - civil cases tried to a jury
  - bench trials tried to conclusion
  - juvenile delinquency matters handled
  - appeals briefed and argued in criminal cases and civil cases; and
- names and contact information for two references who are professionals in criminal or juvenile justice systems.<sup>215</sup>

*a. Contract counsel attorneys*

In the spring of each year, the judicial council’s indigent defense subcommittee begins the process to determine the number of contracts that the judicial council will award for the coming fiscal year “based on the regional projected need for representation in conflict cases” and with a view toward providing “enough lawyers in each judicial district . . . to allocate cases efficiently and economically.”<sup>216</sup>

In April, the judicial council sends a contract renewal notice to all existing contract counsel and requires that they notify the judicial council by not later than April 30 if they desire to renew their contract.<sup>217</sup> Historically, the renewal notice was a one-page form asking whether the contractor desired to renew their contract on identical terms, with changes, or not at all. For the past six or seven years, the renewal notice also includes a second page that requires the contract counsel to provide some information about their work representing clients in cases they have been assigned through the judicial council:

- a copy of a motion to suppress or motion to dismiss written or filed on behalf of an assigned client;
- an estimate of the number of motions they have filed requesting funding for an expert or investigator;
- their process to meet with and accept phone calls from clients held in custody;
- whether they are current in submitting closed case cards to the judicial council; and
- continuing legal education courses on criminal law and practice that they attended or at which they presented while serving as contract counsel, along with their suggestions about CLE topics that would be helpful in their contract counsel practice.

During April and May, the judicial council’s executive director gathers the first-time applications and the renewal applications that have been submitted by attorneys who seek to serve as contract counsel. For new applicants, the judicial council’s executive director checks their references, does an internet search about them, and checks with the state bar disciplinary authority for any

<sup>215</sup> See “New Hampshire Judicial Council Application to Serve as Appointed Counsel in Criminal and Delinquency Cases.”

<sup>216</sup> NEW HAMPSHIRE JUDICIAL COUNCIL, JUDICIAL COUNCIL PLAN FOR THE PARTICIPATION OF THE PRIVATE BAR IN COURT APPOINTED CRIMINAL CASES I (Sept. 9, 2014).

<sup>217</sup> See “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021” ¶ 38 (sample).

discipline imposed on them. For renewing applicants, the judicial council's executive director reviews the attorney's work as contract counsel (such as whether they have conducted any trials or secured a reduction in charges) and the record of comments about the attorney (such as from appellate counsel, court clerks, prosecutors, or judges) and any serious complaints made against the attorney. The judicial council's executive director prepares a memo compiling all of this information about each contract counsel applicant for the indigent defense subcommittee to use in awarding contracts.

Usually at least one member of the indigent defense subcommittee knows each attorney applicant. Occasionally the indigent defense subcommittee interviews an applicant if they are unsure about the attorney's commitment, qualifications, or experience; these are usually informal telephone conversations with the attorney or the law firm that employs them.

In May of each year, the indigent defense subcommittee votes in private about the award of contracts for the fiscal year that begins the following July 1.<sup>218</sup> On occasion, additional contracts are awarded *during* the fiscal year, usually either because: no attorney initially applied to serve as contract counsel in a particular court location; or a renewing contract counsel attorney was behind in their paperwork due to the judicial council.

The following table shows the judicial council's award of contracts for each fiscal year 2019 through 2021.

**JUDICIAL COUNCIL CONTRACTS FOR "CONTRACT COUNSEL" FY 2019 THROUGH FY 2021**

	FY 2019	FY 2020	FY 2021
Number of contracts	34	32	31
Number of attorneys	39	40	36
Authorized units of work	6,445	6,370	6,105
Projected cost	\$1,933,500	\$1,911,000	\$1,831,500

In practice, the judicial council generally awards contracts to the same private law offices year after year, unless the authorized attorney in the contract dies, retires from practice, changes law firms, relocates their office to a different area of the state, or no longer desires to serve as contract counsel. New applicants typically only receive contracts as these openings arise. Of the 34 law offices holding contracts for FY 2019, all but five were renewed for FY 2020: in one the attorney passed away; in one the attorney began moving toward retirement; in one the attorney became a prosecutor; in one the attorney joined a law firm that did not desire a judicial council contract; and one law firm chose not to renew because the compensation was inadequate.

<sup>218</sup> NEW HAMPSHIRE JUDICIAL COUNCIL, JUDICIAL COUNCIL PLAN FOR THE PARTICIPATION OF THE PRIVATE BAR IN COURT APPOINTED CRIMINAL CASES I (Sept. 9, 2014).

Occasionally, though very rarely, the indigent defense subcommittee votes to not renew a contract with a particular attorney. Some attorneys believe that judges play an outsized role in the judicial council's award of contracts, relating anecdotes of, for example, an attorney speaking rudely to a judge and losing their contract the next day or, conversely, being awarded a contract after a friendly judge intervened on their behalf with the judicial council. While theoretically the judicial council can decline to award a contract that the indigent defense subcommittee has approved, the executive director cannot recall the last time that happened.

This left 29 renewing contracts for FY 2020, and the judicial council awarded contracts to three new applicant law offices; two of those three law firms were established by attorneys who left employment with the NHPD in the fall of 2019. Of the 32 law offices holding contracts for FY 2020, all but four were renewed for FY 2021: both of the attorneys in one law office joined NHPD staff; two law offices chose to not renew; and one attorney initially chose to not renew and when he changed his mind the judicial council chose to not renew. This left 28 renewing contracts for FY 2021, and the judicial council awarded contracts to three new applicant law offices; one of those law offices was established by an attorney who had been an authorized attorney on another law office's contract during FY 2020.

The greatest challenge faced by the judicial council is in securing one or more attorneys who are willing to serve as contract counsel in every court location in the state. Although the indigent defense subcommittee decides in May of each year to *whom* the judicial council will award contracts, there is often still some negotiation between the judicial council's executive director and the contract counsel about the specific court locations in which the contract counsel is willing to accept appointments and relatedly the maximum number of work units to which they may be appointed under the contract. As shown in the table above, each year since FY 2019, the judicial council has slightly reduced its projections for the amount of work anticipated to be assigned to contract counsel and its related cost. (*See* discussion of contract counsel compensation at pages 133-140 and contract counsel caseloads at pages 157-159.)

That a contract has been awarded does not guarantee that a contract counsel attorney will be assigned to *any* case during the term of the contract. Rather, it simply makes the contract counsel attorney eligible to be assigned cases in certain court locations if the NHPD is unavailable to accept a case in one of those court locations.

*b. Assigned counsel attorneys*

The judicial council expressed its intention to maintain five formal lists of assigned counsel attorneys whom it approves to represent indigent defendants (one list for each of: juvenile delinquency; misdemeanors and felonies; major crimes; capital cases; and supreme court appeals).<sup>219</sup> In actual practice, to the extent there is any list, it is simply a compilation of private attorneys who have in the past agreed to be assigned a case when asked by the judicial council or the CCAO to do so.

The judicial council may ask any licensed New Hampshire attorney to represent an indigent defendant, without regard to whether the attorney has applied to serve as assigned counsel and without regard to whether the attorney has ever been on any judicial council list. There are regions of the state where it is difficult to find an attorney who is available and willing to represent an indigent defendant, at least under the strictures of and compensation provided through the judicial council.

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<sup>219</sup> NEW HAMPSHIRE JUDICIAL COUNCIL, JUDICIAL COUNCIL PLAN FOR THE PARTICIPATION OF THE PRIVATE BAR IN COURT APPOINTED CRIMINAL CASES 1 (Sept. 9, 2014).

## B. Training indigent defense system attorneys

New Hampshire’s court rules require every active member of the New Hampshire bar to complete, each year, 12 hours of continuing legal education, two of which must be in the areas of: legal ethics; professionalism; or the prevention of malpractice, substance abuse, or attorney-client disputes.<sup>220</sup> New Hampshire statutes and court rules do not establish any further training requirements for attorneys who are appointed to represent indigent adults and children.

Other than for contract counsel attorneys, the judicial council has not established any training requirements for indigent defense system attorneys to ensure that they have the ongoing knowledge and skills necessary to represent indigent adults and children in the types of cases to which they are assigned. This section explains in detail the training required (if any) for each category of indigent defense system attorney, the training that is available to them, and who bears responsibility for the costs of obtaining that training. In brief:

- NHPD attorneys:
  - Subcontractor private attorneys – no requirement to attend any training focused on the types of cases in which they are assigned to represent indigent defendants.
  - Staff attorneys – required by the NHPD to attend 2 ½ days of annual training focused on the types of cases in which they are assigned to represent indigent defendants, and the NHPD pays all costs.
- Contract counsel attorneys – required by the judicial council to attend 10 hours of training annually focused on the types of cases in which they are assigned to represent indigent defendants, including one hour on juvenile representation.
- Assigned counsel attorneys – no requirement to attend any training focused on the types of cases in which they are assigned to represent indigent defendants.

The judicial council contract allows, but does not require, the NHPD “to make training presentations and materials available” to all New Hampshire indigent defense system attorneys.<sup>221</sup>

### 1. Training NHPD attorneys

#### *a. NHPD subcontractor private attorneys*

The NHPD has not established any training requirements for the private attorneys it subcontracts to represent indigent defendants in NHPD cases. Like all New Hampshire attorneys, these private attorney subcontractors must complete 12 hours of continuing legal education each year, however nothing requires that they obtain training in the areas of law in which they are assigned to represent indigent defendants and they must pay for the cost of obtaining training.

<sup>220</sup> N.H. SUP. CT. R. 53.1.

<sup>221</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶ 7 (for the term of July 1, 2019 through June 30, 2021).

NHPD subcontractor attorneys are allowed, but not required, to attend a one-day program provided by the NHPD each year in May. The presentations focus on the types of cases to which NHPD attorneys are assigned, including developments in case law and changes in statutes.

*b. NHPD branch office staff attorneys*

The NHPD devotes significant resources of both time and money toward ensuring that its attorney employees receive regular training in the types of cases to which they are assigned. The NHPD pays all costs for NHPD attorney employees to attend training programs provided by the NHPD and also to attend external training programs from time to time.

The NHPD director of litigation oversees training of all NHPD employees (both attorneys and non-attorneys) and frequently calls on attorneys throughout the NHPD to assist in coordinating attorney training and to directly provide portions of NHPD training programs and materials. For example, the appellate division attorneys are expected to present an update on changes in the law at an annually-required training program. NHPD attorneys who have developed expertise in certain types of cases, such as homicides or juvenile delinquency, are expected to provide training at the NHPD's required annual retreat and at trainings for "new hire" attorneys. Eight NHPD attorneys are designated "trial skills trainers," responsible for developing the curriculum for and presenting the trial skills component of the annual training for "new hire" attorneys, requiring 8 to 10 weekly meetings during the lead-up to the program and approximately 20 hours during the program. Any NHPD attorney can be called on to prepare training materials for all attorneys, and branch office attorneys are often asked to serve as a mentor to "new hire" attorneys.

In short, NHPD attorney employees across the organization devote significant time to providing and receiving training in the types of cases in which they are assigned to represent indigent adults and juveniles. While this is excellent for ensuring that NHPD attorneys have the skills and experience necessary to provide effective assistance of counsel, it also lessens the amount of time they have available to devote to providing representation to each individual indigent defendant (*see* discussion of workloads at pages 153-156).

**Required training for all NHPD attorneys.** The NHPD requires all of its attorney employees to attend two training programs each year that fulfill the NHPD attorneys' continuing legal education requirements for the year while focusing their training on the types of cases to which they are assigned.

- The primary training program is a one-and-a-half-day overnight annual retreat for all employees of the NHPD, both attorneys and non-attorneys, usually held in September. The content for attorneys includes ethics, issues in substantive practice areas, and some amount of skills training.
- The second training program is a one-day program, held in May, of presentations on substantive practice areas and ethics, with a focus on developments in case law and changes in statutes.

**Optional training available to all NHPD attorney employees.** The NHPD itself provides a range of training programs and tools available to all of its attorneys and also pays all costs for NHPD attorneys to attend a significant number of external training programs.

*NHPD practice guide.* Upon coming to work at the NHPD, every attorney is provided a printed copy of the NHPD’s extensive practice guide.<sup>222</sup> Arranged topically, the guide lays out in clear language the practical steps that an attorney should take to conduct legal analysis and factual investigation and to raise defenses and preserve legal issues in appointed cases. It is useful not only for case preparation but also for answering questions that unexpectedly arise during a busy day in court.

The guide covers United States and New Hampshire case law and New Hampshire statutes and court rules on each topic. It includes information on the basics of criminal and juvenile defense (such as principles of statutory interpretation, sufficiency of charging documents, and rules of evidence) and also on less familiar topics (such as extradition), and it provides useful practice tips (such as how to handle evidence located on a client’s cell phone and how to conduct investigation on social media without running afoul of ethical rules).

*Access to NHPD-wide expertise.* All NHPD attorney employees say they rely heavily on the expertise of other NHPD attorneys. As one attorney explains: “I don’t know if the [judicial council] understands how much we rely on inter-office communication about our cases and each other’s cases. It’s the best way to learn – with that type of field work, to deal with all different types of cases and courts and deadlines and prosecutors. We need a lot of unstructured time [to discuss legal issues].” The NHPD makes it as easy as possible for attorneys to obtain advice from others throughout the organization.

All NHPD employees have access to the NHPD’s internal intranet website, called “The Forum.” Through “The Forum,” attorneys can browse through information previously posted by others in the NHPD community (such as sample motions and proposed court orders and case law summaries), and they can post questions as they arise in their cases and receive help from other NHPD attorneys. As one NHPD attorney explains, “I can learn a lot about procedure and learn from more experienced attorneys about what are the best ways to get the best results for my client.”

Branch office attorneys frequently call or email attorneys in other offices or the appellate division for advice about their current cases. This can be especially helpful when an attorney represents a client who simultaneously has another case being handled by a different NHPD attorney in a different branch office.

Some branch office attorneys are assigned to unique procedural stages of cases or types of cases and benefit greatly from being able to confer with the attorneys similarly assigned in other

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<sup>222</sup> See NEW HAMPSHIRE PUBLIC DEFENDER, PRACTICE GUIDE (Jan. 2020). All new NHPD employees also receive the NHPD’s “Employee Manual” and “Attorney Policies and Procedures” manual. See NEW HAMPSHIRE PUBLIC DEFENDER, EMPLOYEE MANUAL (Mar. 28, 2019); New Hampshire Public Defender, NHPD Attorney Policies and Procedures (no date).

branch offices. For example, NHPD attorneys who are assigned to specialty courts communicate with each other regularly about practices and procedures in the specialty courts. One NHPD attorney who has developed expertise in homicide cases schedules meetings frequently for all NHPD attorneys who are appointed in homicide cases.

*Branch office weekly case conferences.* Each branch office holds “case conferences,” weekly when possible, that are attended by all NHPD attorneys within that office (assuming they are not otherwise tied up in court) and sometimes include the office’s investigators or support staff. In most branch offices, the case conferences are on Friday afternoons and last one to two hours.

The content covered during case conferences varies from office to office, depending on the desires of the managing attorney and the number of attorneys in the office, but in every office the goal is for attorneys to discuss and ask questions about substantive issues on their active cases and get feedback and ideas from the other office attorneys. A case conference might include an attorney presenting the opening statement they plan to give in an upcoming trial for critique by other attorneys, or it might include bringing in a client to prepare the client to testify and having another attorney conduct a mock cross-examination.

Managing attorneys sometimes use these case conferences to make administrative announcements, and attorneys sometimes share updates on current issues in the courts in which they provide representation. In some branch offices, the weekly case conferences are the only time when all attorneys are present together at the same time. Occasionally two branch offices hold a joint case conference.

*Periodically available NHPD-provided training.* Throughout the year, approximately monthly, the NHPD provides short training programs that any NHPD attorney employee can attend if their schedule allows and they so desire. The content varies from month to month, but each program covers either a particular area of practice (such as homicide or competency cases) or a particular skill (such as cross-examination or developing the theory of a case) or a change in the NHPD’s policies or practices (such as the NHPD’s decision during 2020 to assign parole violation cases to all branch office attorneys rather than to only the Concord office attorneys).

*External training.* Each year the NHPD selects some number of its attorneys to attend highly-regarded nationally-recognized training programs provided outside of New Hampshire. Similarly, the NHPD regularly sends some number of its attorneys to training programs on topics relevant to indigent defense representation that are sponsored by the New Hampshire Bar Association and the New Hampshire Association of Criminal Defense Lawyers. Any NHPD attorney employee can request approval to attend any in-state or out-of-state training program. Some NHPD attorneys prefer to not attend external training programs, because after attending they are expected to do a presentation at an in-house NHPD training program about the information they learned.

**Limited orientation for NHPD “lateral hire” attorneys.** There are some shortcomings in the training the NHPD makes available for the “lateral hire” attorneys who join the NHPD already



having some amount of experience in directly representing clients. When lateral hire attorneys join the NHPD, they typically have only a two-day orientation in their branch office, where they receive human resource, administrative, and technical orientation about the “inner workings of the office” and how to use the NHPD’s *defenderData* case management system.

Some lateral hire attorneys have never practiced criminal or juvenile delinquency law before joining the NHPD’s staff, and some come to the NHPD from out-of-state and so have no experience in New Hampshire law or procedures. But lateral hire attorneys, regardless of how limited their experience in representing adult and juvenile indigent defendants in New Hampshire cases, are not immediately trained in those areas and they are not assigned a more-experienced NHPD attorney as a mentor.

Because “lateral hires” join the NHPD’s staff at any time during the year, it may be quite some time before they attend either the May or September required NHPD training programs, and they will not meet all of the NHPD staff outside of their branch office until the annual retreat in September following their hire date. So, while they have access to all of the optional available resources throughout the NHPD, it takes time for them to become comfortable using those resources and to know whom to contact when they have a question in a case they are handling.

**Required training for NHPD “new hire” attorneys.** Justice system stakeholders throughout the state express high regard for the training the NHPD provides to the “new hire” attorneys who join NHPD’s staff as a group each year. As explained, these are law school graduates who are awaiting their bar results or graduated the preceding year and served in a judicial clerkship, but who have no experience directly representing clients. Because of the extensive resources that the NHPD devotes to training each new hire attorney, the NHPD hopes that these attorneys will remain on staff for at least three years.

*Initial five-week orientation and training.* All new hire attorneys are required to participate in a five-week training program immediately upon joining the NHPD staff. The training program begins in Concord, with all of the new hire attorneys together as a group. This allows the new hire attorneys to meet the NHPD central administration staff, receive human resource and administrative orientation, and meet one another and begin to form bonds. A new hire class usually comes on staff in late August or early September, and so they attend the NHPD’s required annual retreat held each September where they meet all of the NHPD staff. During each week of the new hire training program, the new hire attorneys usually spend: four days in Concord, receiving group training; and one day in the branch office to which they are assigned, receiving individual training and their initial case assignments.

The group training is primarily conducted by NHPD attorneys, though the NHPD sometimes brings in as presenters during the program judges, experienced private attorneys, former clients of the NHPD, and field experts such as mental health professionals or drug treatment providers.

- Substantive and procedural law. The NHPD introduces the new hire attorneys to substantive and procedural law (including case law, statutes, and court rules) in the types of cases to which they will be appointed. For example, one to two days usually focus on

juvenile delinquency cases, and there are often sessions on substance abuse and mental health.

- Client representation skills. New hire attorneys receive instruction about necessary client representation skills (such as interviewing clients, bail advocacy, and plea negotiation), then they practice these skills in mock presentations.
- Trial skills. The most extensive portion of the group training is over 20 hours, spread across the five weeks, devoted to trial skills (such as identifying facts, how to review discovery, developing theories and defenses, preparing and conducting direct and cross-examination of witnesses, preparing and presenting opening and closing arguments, and preparing jury instructions). Attorneys work sequentially through three sample cases: in the first, the instructors teach each component; in the second, the new hire attorney works through each component with input from the instructors; and in the third, the new hire attorney prepares and presents each component on their own and then their work is critiqued by the instructors.

The individual training is provided by the attorneys in the branch office to which the new hire attorney is assigned. The new hire attorney meets the personnel in their branch office and receives orientation about administrative matters and office technology. Typically, the new hire attorney visits the court locations where they will represent clients, observes some court sessions, meets the judges and court personnel and prosecutors, and tours the relevant correctional facilities.

NHPD staff attorneys who came in as new hires are very appreciative of having received this initial five-week training. As one attorney commented, it is “as good as an office training can be.”

*Monthly half-day training programs for one year.* For one year, the new hire class meets together monthly for a half-day training program. The monthly training is held in either Concord, Manchester, or Nashua. Usually there is a speaker and then breakout sessions in small groups of five. Each month covers a different topic, which may be a particular type of case (such as DWI or rape) or a particular courtroom skill (such as impeaching a witness or conducting voir dire) or practice skill (such as working with legal assistants or developing a case strategy).

*Mentor/co-counsel for one year.* Each new hire attorney is assigned a mentor generally for the first year of their NHPD employment.

The mentor is another attorney in the same branch office. There is no formal process or qualifications for a branch office attorney to be designated as a mentor. The managing attorney of the branch office assigns one attorney to be the mentor to each new hire attorney – as one attorney explains, when asked by the managing attorney, “it would not be appropriate to say ‘no.’” Attorneys who serve as mentors do not receive any training about how to carry out their role. In the smaller branch offices with only a small number of attorneys, the mentor may themselves have only one or two years’ experience. One mentor to an FY 2021 new hire attorney was “nervous about juggling a mentorship while having a full caseload” and, with only a little over two years of experience, felt like “the blind is leading the blind.”

The relationship between the mentor and the new hire attorney is almost wholly dependent on the personalities of the two individuals. For some, the mentor is passively available to answer any questions the new hire attorney poses to them. At the other extreme, the mentor formally schedules weekly meetings to review the new hire attorney's work and caseload, actively identifies cases the mentor has in which the new hire attorney can co-counsel to learn new case types and skills, and sits second-chair to the new hire attorney at their first bench trial and first jury trial.

## 2. Training contract counsel attorneys

Each contract counsel attorney is required by their judicial council contract to, during the term of the contract, “attend 10 hours of training in the area of criminal defense or trial practice provided by the Public Defender Program or other provider of continuing legal education approved by the Judicial Council,” and at least one hour “must concentrate on juvenile representation.”<sup>223</sup> (See discussion of the qualifications and selection of contract counsel attorneys at pages 62-65.)

Contract counsel attorneys are allowed, but not required, to attend the one-day program provided by the NHPD each year in May at no cost to the contract counsel attorneys. The presentations focus on the types of cases in which indigent defense system attorneys are assigned to represent indigent defendants, including developments in case law and changes in statutes. The NHPD provides a copy of its extensive practice guide to any contract counsel attorney who requests one.

In 2019, for the first time, the judicial council required contract counsel attorneys to attend a training program produced by the NHPD on litigation skills, although some attorneys complained that the content was too elementary to be useful.<sup>224</sup> The judicial council, for the first time, budgeted \$3,000 in each of fiscal years 2020 and 2021 for training contract counsel.<sup>225</sup>

## 3. Training assigned counsel attorneys

Like all New Hampshire attorneys, assigned counsel attorneys must complete 12 hours of continuing legal education each year, however nothing requires that they obtain training in the areas of law in which they are assigned to represent indigent defendants and they must pay for the cost of obtaining training.

Assigned counsel attorneys are allowed, but not required, to attend the one-day program provided by the NHPD each year in May. The presentations focus on the types of cases in which indigent defense system attorneys are assigned to represent indigent defendants, including developments in case law and changes in statutes.

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<sup>223</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021” ¶ 26 (sample).

<sup>224</sup> An agenda provided by the judicial council shows the program to contain six hours of presentations covering six topics: client-centered advocacy; building a relationship with the client and coping with mental illness and addiction; general case analysis including common pretrial motions; specific case analysis including issues in commonly-arising cases; trial issues including jury selection; and common issues in ethics.

<sup>225</sup> NEW HAMPSHIRE OPERATING BUDGET, 2020-2021 BIENNIAL, pp. 308-312.

## C. Supervising indigent defense system attorneys

New Hampshire statutes and court rules do not establish any standards that indigent defense system attorneys must meet in representing indigent adults and children. The judicial council is statutorily responsible for ensuring the quality of the indigent defense delivery system,<sup>226</sup> but the judicial council also has not established any standards against which to measure the representation provided by indigent defense system attorneys. Because the judicial council selects the public defender program, the contract counsel attorneys, and the assigned counsel attorneys who represent indigent defendants,<sup>227</sup> the judicial council is responsible for ensuring that all indigent defense system attorneys are supervised. The judicial council has never been sufficiently staffed nor funded to establish standards and ensure compliance with those standards.

### 1. Supervising NHPD attorneys

The judicial council contract requires the NHPD executive director to supervise the entire public defender program.<sup>228</sup>

#### *a. NHPD subcontractor private attorneys*

The NHPD does not supervise the subcontract attorneys it assigns to represent indigent defendants in some NHPD cases.

Each NHPD subcontract with a private attorney is unique, and so there are no across-the-board provisions that apply to every NHPD subcontract attorney. Most of the NHPD subcontracts contain a provision stating something like: “Contractor will provide representation consistent with the Rules of Professional Conduct.” The NHPD subcontracts do not establish any other standards that the subcontractor attorney must meet in representing indigent adults and children in NHPD cases assigned to them. The NHPD subcontracts do not establish any method of supervising the work performed by the private attorney subcontractors, and the subcontracts usually state that “in all respects Contractor performs the obligations under this Agreement as an independent contractor, not as an employee or agent of NHPD.”

#### *b. NHPD branch office staff attorneys*

The NHPD requires that all of its attorney employees maintain good standing as a member of the New Hampshire bar and be familiar with and abide by the *Rules of Professional Conduct*.<sup>229</sup> Beyond this, the NHPD has not established any written standards that its attorneys must meet in representing indigent adults and children.

<sup>226</sup> N.H. REV. STAT. ANN. § 494:3(VI) (2019).

<sup>227</sup> N.H. REV. STAT. ANN. §§ 494:3(VII)-(VIII), 604-A:1, 604-A:2(II), 604-A:2-b, 604-A:4, 604-B:4 (2019).

<sup>228</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶ 3 (for the term of July 1, 2019 through June 30, 2021).

<sup>229</sup> NEW HAMPSHIRE PUBLIC DEFENDER, EMPLOYEE MANUAL, §§ 4.3, 6.3 (Mar. 28, 2019).

The NHPD designates one of the attorneys in each branch office as the managing attorney who is responsible for supervising the entire branch office, in addition to directly representing clients. The NHPD requires each branch office managing attorney to ensure that those whom they supervise are familiar with and act in accord with applicable ethical requirements.<sup>230</sup> The two consistently largest offices (Manchester and Stratham) also have an assistant managing attorney to whom the managing attorney may delegate some supervisory responsibilities; for example, the assistant managing attorney in the Manchester office supervises the attorneys who have one to three years of experience.

Each branch office managing attorney for the most part determines for themselves how to supervise the attorneys in the office, although theoretically each attorney is supposed to receive a performance evaluation from time to time.

**Informal day-to-day supervision.** Some managing attorneys say they do not believe the branch office attorneys require much formal supervision. As one managing attorney put it: “Nobody here needs someone over their shoulder all the time.” And staff attorneys in these offices confirm that they do not receive any supervision that they do not solicit. In these offices, the managing attorneys supervise primarily by being available to answer questions and by asking staff attorneys how they are doing when they pass each other in the office. Especially in the smaller offices, the managing attorneys believe they are constantly aware of any problems or concerns the staff attorneys face.

Some, but not all, managing attorneys make an effort to observe the staff attorneys in court occasionally. Usually this is through happenstance, when the managing attorney and the staff attorney happen to be in the same courtroom at the same time. As one staff attorney said, “I don’t think my managing attorneys have time to sit and watch me [in court].”

In two of the branch offices, the managing attorneys actively conduct one-on-one case reviews from time to time with staff attorneys in their office who have less than four years’ experience as an attorney.

Most managing attorneys do not actively monitor the caseloads of the attorneys in their office. Instead, the managing attorneys usually only look at the caseloads of staff attorneys on the days they are assigning new cases within the office.

Many staff attorneys appreciate the hands-off approach to supervision. One attorney believes one of the best things about the NHPD “is the autonomy lawyers get. . . . I did not have supervision, but I don’t think I needed it.” At the same time, though, the lawyer said “I cannot say we have a good supervision program.” For example, the lawyer explained that he filed juvenile pleadings into the wrong court for the first six months of his NHPD practice, and while the court clerks put the documents in the right place, nobody corrected him – “there should have been some mechanism to catch that.”

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<sup>230</sup> NEW HAMPSHIRE PUBLIC DEFENDER, EMPLOYEE MANUAL, § 6.3 (Mar. 28, 2019).

**Formal performance evaluations.** One NHPD attorney put it plainly: “There is a need to evaluate lawyers – there are impressive lawyers, but the program is deprived so much of lawyers and resources that attorneys who should not be practicing anymore are able to keep their jobs and scurry on through.” As of May 2021, the NHPD is in the process of obtaining and implementing a new attorney performance evaluation system.<sup>231</sup> As a result, all efforts to improve the previous performance evaluation system were suspended.

For many years, the NHPD has had a detailed process for conducting attorney performance evaluations. All staff attorneys were supposed to be evaluated at six months after beginning work at the NHPD and then yearly. At least as early as 2016, NHPD central administration acknowledged to all attorney staff that performance evaluations were sporadic and unhelpful and set out a plan to change that. At the time, some attorneys had not been evaluated in over eight years.

Beginning in 2017, attorneys were to be evaluated at six months, yearly for three years, and then at least once every three years. NHPD central administration provided written instructions and forms for managing attorneys to use. Performance evaluations consisted of three parts:

- a self-evaluation form completed by the attorney being evaluated, primarily focused on the number of trials conducted, the number of dispositive motions filed, and the number of capped plea hearings conducted;
- an assessment completed by the managing attorney that included soliciting input from various people familiar with the attorney’s work; and
- a meeting of the managing attorney and the attorney being evaluated to discuss the evaluation, and for attorneys with four or more years on staff at the NHPD the director of legal services participated in the discussion.

The managing attorney ranked the attorney’s performance on a scale of 1 to 5 in established categories defined by the NHPD for attorneys with varying years of experience.

Despite the new plan, many NHPD attorneys report having been evaluated only once during their tenure at the NHPD, no matter how long they have been on staff. Many attorneys say the performance evaluation process “causes a lot of anxiety” and yet “isn’t very helpful.” One attorney says: “It feels like checking an HR box. . . . How do you learn from that? I don’t think you do.” Some attorneys found evaluations helpful during their first year at the NHPD.

## 2. Supervising contract counsel attorneys

The judicial council contract with each contract counsel attorney establishes some standards that the attorney is required to meet in representing indigent adults and children. The contract requires every contract counsel attorney to:

- maintain good standing as a member of the New Hampshire bar, and otherwise the

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<sup>231</sup> The new system is intended to use regular performance “check-ins” rather than annual reviews, so that managing attorneys and central administration can monitor attorney performance on an on-going basis. NHPD hopes the new system will improve staff engagement, help identify and meet goals, and ensure that attorneys receive the support they need at all times.

- contract “terminates automatically;”<sup>232</sup>
- abide by the *Rules of Professional Conduct*;<sup>233</sup>
  - adhere to all performance standards established by the judicial council,<sup>234</sup> though the judicial council has not established any performance standards;
  - not carry an indigent defense caseload in excess of workload guidelines established by the judicial council,<sup>235</sup> though the judicial council has not established any workload guidelines applicable to contract counsel;
  - maintain a system to identify conflicts of interest early and efficiently, and “make reasonable and diligent efforts” to obtain documents necessary to determine any potential conflicts of interest when a case is assigned;<sup>236</sup>
  - provide a space to meet with clients near the courthouse location;<sup>237</sup>
  - provide for “prompt and effective communication with clients,” including ensuring reasonable telephone access for clients held in detention facilities;<sup>238</sup>
  - when a case is disposed, send the client a closing letter summarizing the resolution of the case and explaining any actions required of the client;<sup>239</sup> and
  - retain a copy of the client’s file for at least six years or beyond the statute of limitations, whichever is longer.<sup>240</sup>

The judicial council contract does not, however, establish any method for the judicial council to supervise the work performed by contract counsel attorneys or to measure their compliance with these contract provisions (other than attorneys must notify the judicial council of any change in their standing with the bar association), and the judicial council has never been sufficiently staffed nor funded to do so. The contract expressly states that: “It is understood and agreed to by the parties that in the performance of this Agreement, Contractor is in all respects an independent Contractor and is neither an agent nor an employee of the State or the Council . . . .”<sup>241</sup>

The judicial council does not have in place any formal procedures to supervise the contract counsel attorneys it assigns to represent indigent defendants in cases where the NHPD is unavailable, and the judicial council has never been sufficiently staffed nor funded to do so. The judicial council’s executive director informally maintains a file of any comments received about an attorney or serious complaints made against an attorney. Judges and clients sometimes complain directly to the judicial council about contract counsel attorneys – usually clients complain about their attorney not communicating with them or judges complain about repeated lack of preparation – but the judicial council has no regularized method to obtain feedback about

<sup>232</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021” ¶ 36 (sample).

<sup>233</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021” ¶ 24 (sample).

<sup>234</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021” ¶ 25 (sample).

<sup>235</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021” ¶ 20 (sample).

<sup>236</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021” ¶ 32 (sample).

<sup>237</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021” ¶ 16 (sample).

<sup>238</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021” ¶ 17 (sample).

<sup>239</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021” ¶ 28 (sample).

<sup>240</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021” ¶ 34 (sample).

<sup>241</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021” ¶ 40 (sample).

the attorneys. The CCAO administrators say they receive three to five client complaint calls each week, but they do not keep records of these complaints.

When the judicial council is aware of a complaint about a contract counsel attorney, it does not have any formal process to act on the complaint. Instead, decisions about how to proceed are made ad hoc by the executive director or the indigent defense subcommittee. For example, the indigent defense subcommittee received a complaint about an attorney not visiting clients in the jail quickly enough after case assignment, and a member of the subcommittee called the attorney to discuss the problem.

The judicial council might decide not to *renew* the contract of an attorney about whom it has received complaints. For example, in one instance the executive director learned that an attorney had withdrawn from a case without notifying the judicial council, leaving the client unrepresented for over a month. The contract counsel attorney did not receive a contract for the following fiscal year.

The judicial council retains authority under the contract to stop assigning cases to a contract counsel attorney if it determines that is necessary to protect the interests of clients or of the indigent defense system.<sup>242</sup> This rarely occurs.

### 3. Supervising assigned counsel attorneys

The judicial council has not established any standards that assigned counsel attorneys must meet in representing indigent adults and children, and the judicial council has never been sufficiently staffed nor funded to do so. The judicial council does not have in place any formal procedures to supervise the assigned counsel attorneys it assigns to represent indigent defendants in cases where the NHPD is unavailable and no contract counsel attorney is available.

The judicial council's executive director informally maintains a file of any comments or serious complaints made about an attorney, but there is no regularized method to obtain feedback. On the basis of information received informally, the judicial council's executive director has stopped assigning new cases to three or four assigned counsel attorneys during the past two years.

The judicial council has not established any procedures to remove an assigned counsel attorney from an indigent defendant's case unless a court orders the attorney to withdraw. The CCAO administrators recall one instance when the judicial council's executive director instructed the CCAO to reassign the cases of an attorney without a court order requiring the action. If the judicial council has concerns about the effectiveness of the representation provided by a particular assigned counsel attorney, then the judicial council ceases making assignments to that attorney.

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<sup>242</sup> "New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021" ¶ 21 (sample).



## Chapter IV

# The indigent defense system as applied in New Hampshire's trial courts

The Sixth Amendment right to the effective assistance of counsel is guaranteed to each individual adult and child who faces the possible loss of their liberty in a criminal matter and is unable to afford their own attorney.<sup>243</sup> As explained in chapter II, the trial-level right to counsel for an individual defendant in New Hampshire is carried out in one of the locations of the superior court or circuit court, and that court location is determined based on arrests made by a variety of law enforcement agencies according to their discretion and prosecutions instituted according to the discretion of first the attorney general and then the county attorney and finally the municipal prosecutor.

The involved law enforcement agency first determines the path of any case when it decides whether to charge a person with a misdemeanor or a felony. Any adult or child alleged to have committed any offense in New Hampshire can be arrested.<sup>244</sup> Where a detained defendant (adult or child) will be held depends on the county in which the accusing law enforcement agency is located. The access that a detained indigent defendant has to their attorney varies from county to county.

The geographic location of the accusing law enforcement agency also determines which prosecutors – the attorney general, the county attorney, the municipal prosecutor – have and are likely to exercise decision-making authority over the case and into which court locations a prosecution can be filed. For indigent defendants, and especially for indigent children, getting to the courthouse can often be difficult and it is likely even more difficult when that courthouse is in a different county than where the defendant resides.

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<sup>243</sup> U.S. CONST. amend. VI. *Gideon v. Wainwright*, 372 U.S. 335 (1963) (felonies); *Douglas v. California*, 372 U.S. 353 (1963) (direct appeal); *In re Gault*, 387 U.S. 1 (1967) (juvenile delinquency); *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (effective assistance); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (misdemeanors); *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984) (effective assistance); *United States v. Cronin*, 466 U.S. 648, 656 (1984) (effective assistance); *Alabama v. Shelton*, 505 U.S. 654 (2002) (including misdemeanors with suspended sentences); *Halbert v. Michigan*, 545 U.S. 605 (2005) (including appeals challenging a sentence imposed following a guilty plea where the sentence was not agreed to in advance).

<sup>244</sup> Throughout the state, adults accused of a felony are always arrested. *See* N.H. REV. STAT. ANN. § 594:10 (2019); N.H. R. CRIM. PROC. 3(d). Adult defendants charged with a class A misdemeanor are usually arrested, while those accused of some class B misdemeanors and almost all violations typically receive a summons instead of being arrested. *See* N.H. REV. STAT. ANN. §§ 592-A:14, 594:10, 594:14 (2019); N.H. R. CRIM. PROC. 3(b), 3(d). There is a presumption that most children accused of delinquency will be released to their parents, and most are, but under certain circumstances a child may be detained. *See* N.H. REV. STAT. ANN. § 169-B:11 (2019).

It is only after the court location for a case has been determined that an attorney can be appointed to represent the individual defendant in the case, pursuant to the indigent defense system established by New Hampshire and administered and funded by the state through the judicial council.<sup>245</sup> This is because a court cannot appoint counsel to represent an adult defendant in a criminal case (other than in limited circumstances of apparent mental illness) until that defendant completes a *Request for a Lawyer* form and submits it to the court for a determination as to whether the defendant is indigent and therefore entitled to appointed counsel,<sup>246</sup> and this rarely occurs until arraignment. When a child in a juvenile delinquency case appears before the court at either a detention hearing or arraignment, whichever occurs first,<sup>247</sup> the court determines through “appropriate inquiry” whether the child, independently of their parent or guardian, lacks the financial ability to obtain counsel and is therefore entitled to appointed counsel.<sup>248</sup> (Effective July 1, 2021, in advance of any decision to place a child outside of their home, whether through detention, commitment, or otherwise, a court must appoint counsel to represent every child in a juvenile delinquency case who does not have their own attorney and is considered for placement outside of their home, without regard to the child’s individual ability to obtain their own attorney.<sup>249</sup>)

The attorney who is actually assigned to represent the individual defendant in their case may be either an NHPD attorney (staff attorney or subcontractor private attorney) or a contract counsel attorney or an assigned counsel attorney, depending on attorney availability for the particular type of case in the court location where it is pending. This matters because, as attested by justice system participants and stakeholders throughout this evaluation, the effectiveness of the attorney assigned to represent an individual defendant in an adult criminal or juvenile delinquency case in New Hampshire may depend on whether that attorney is assigned counsel or contract counsel or an NHPD attorney and even on the particular NHPD office in which the attorney works. The identity of the assigned attorney can also pose challenges for an indigent defendant, especially where the attorney’s office is in a different city or even county than where the defendant lives and/or where the courthouse is located.

Appendix C describes, for each of the 10 New Hampshire counties, the structure of the adult criminal and juvenile delinquency justice system and how New Hampshire’s indigent defense system is implemented on behalf of the indigent defendants whose cases arise out of the county. The balance of this report explains how New Hampshire’s system of providing appointed counsel enables or impedes the effectiveness of each type of indigent defense system attorney. This chapter explains how a specific attorney is assigned to represent each individual defendant.

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<sup>245</sup> N.H. REV. STAT. ANN. §§ 494:3, 604-A:1 (2019). See NEW HAMPSHIRE JUDICIAL COUNCIL, 22ND BIENNIAL REPORT JULY 1, 2011 – JUNE 30, 2013, at 6-7 (Mar. 2014).

<sup>246</sup> N.H. REV. STAT. ANN. § 604-A:2 (2019); N.H. R. CRIM. PROC. 5(d), 5(e); N.H. CODE ADMIN. R. ANN. Adm. 1002.06 (effective July 1, 2020) (as amended by adopted rule 2020-33). See “Request for a Lawyer” form, NHJB-4044-DSSUPe (06/24/2020), <https://www.courts.state.nh.us/forms/nhjb-4044-dssupe.pdf>.

<sup>247</sup> N.H. REV. STAT. ANN. §§ 169-B:11, 169-B:12(I) (2019).

<sup>248</sup> N.H. REV. STAT. ANN. § 169-B:12(I) (2019).

<sup>249</sup> N.H. REV. STAT. ANN. § 169-B:12(VI) (2021) (as enacted by 2020 N.H. Laws ch. 26:31 (HB 1162) adding new § VI).

## A. Designating an individual attorney to represent each indigent defendant

“Most obvious[ly],” as the U.S. Supreme Court said in *Cronic*, each state is responsible for ensuring that every indigent defendant who does not choose to self-represent and who faces possible loss of liberty in a criminal case is actually represented by an attorney at every critical stage of the proceeding.<sup>250</sup> If an indigent defendant is actually deprived of counsel at a critical stage, the U.S. Supreme Court says that is unfair and so likely to prejudice the accused that “no amount of showing of want of prejudice would cure it.”<sup>251</sup>

In New Hampshire criminal proceedings,<sup>252</sup> indigent adults charged with a felony or a class A misdemeanor are statutorily entitled to have counsel appointed to represent them, unless they waive the right to appointed counsel.<sup>253</sup> Indigent children in all delinquency proceedings<sup>254</sup> are statutorily entitled to have counsel appointed to represent them, unless they waive the right to appointed counsel.<sup>255</sup> Once a court appoints counsel to represent an indigent defendant, for both adults and children, New Hampshire law requires that defendant “shall be represented by counsel from his initial appearance before the court at every stage of the proceedings until the entry of final judgment.”<sup>256</sup> In practice, though, this representation of indigent defendants in New

<sup>250</sup> *United States v. Cronic*, 466 U.S. 648, 659 (1984). *See also In re Gault*, 387 U.S. 1, 36 (1967) (“The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child ‘requires the guiding hand of counsel at every step in the proceedings against him.’”) (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)).

<sup>251</sup> *United States v. Cronic*, 466 U.S. 648, 658-59 (1984) (quoting *Davis v. Alaska*, 415 U.S. 308, 318 (1974)).

<sup>252</sup> Felonies and misdemeanors are considered to be crimes, while violations do not constitute a crime. N.H. REV. STAT. ANN. § 625:9(II) (2019). All felonies and Class A misdemeanors are punishable by loss of liberty. N.H. REV. STAT. ANN. § 625:9(III) (2019) (felony carries a maximum penalty of “imprisonment in excess of one year”); N.H. REV. STAT. ANN. § 625:9(IV)(a), 651:2(II)(c) (2019) (class A misdemeanor carries a maximum penalty of imprisonment up to (but not more than) one year). Class B misdemeanors and violations do not carry loss of liberty as a possible punishment. N.H. REV. STAT. ANN. § 625:9(IV)(b) (2019) (class B misdemeanor); N.H. REV. STAT. ANN. § 625:9(V) (2019) (violation). Although a person charged with a class B misdemeanor cannot be sentenced to jail, they can be detained without bail pending trial and counsel must be appointed to represent any indigent person during the detention hearing. N.H. REV. STAT. ANN. § 597:2(IX) (2019).

<sup>253</sup> N.H. REV. STAT. ANN. § 604-A:2(I) (2019).

<sup>254</sup> Delinquency proceedings allege the commission of an offense by a child (a person under the age of 18): that “would be a felony or misdemeanor . . . if committed by an adult;” or (ii) that is possession of up to 3/4 oz. marijuana or up to 5 grams hashish resulting in the child needing “counseling, supervision, treatment, or rehabilitation.” N.H. REV. STAT. ANN. §§ 169-B:1, 169-B:2(IV), 169-B:2(VI), 318-B:2-c (2019). If adjudicated delinquent (other than for certain delineated offenses), a child can be committed to custody until the age of 18, and in certain circumstances until the age of 21. N.H. REV. STAT. ANN. §§ 169-B:4(IV), 169-B:19(I)(j), 169-B:19 (III), 169-B:19(III-a) (2019).

<sup>255</sup> N.H. REV. STAT. ANN. § 169-B:12(I) (2019). Effective July 1, 2021, in advance of any decision to place a child outside of their home, whether through detention, commitment, or otherwise, a court must appoint counsel to represent every child in a juvenile delinquency case who does not have their own attorney, without regard to the child’s individual ability to obtain their own attorney. N.H. REV. STAT. ANN. § 169-B:12(VI) (2021) (as enacted by 2020 N.H. Laws ch. 26:31 (HB 1162) adding new § VI).

<sup>256</sup> N.H. REV. STAT. ANN. § 604-A:3 (2019). *See also* N.H. R. CRIM. PROC. 5.

Hampshire does not commence until an individual attorney is assigned to represent the individual defendant, which may be several days or even weeks after the court appoints counsel.

At arraignment (*see* side bar: The absence of indigent defense system attorneys at arraignment, at pages 82-84), a court must advise each defendant (adult or juvenile) of their right to counsel, including the right to have counsel appointed to represent them if they cannot afford to hire their own attorney.<sup>257</sup> A defendant who is accused of an offense for which incarceration is a possible punishment has three choices about the right to counsel. The defendant can: notify the judge that they have or intend to obtain their own private attorney; request that the judge appoint counsel to represent them; or waive their right to counsel altogether and choose to self-represent.<sup>258</sup>

When a defendant requests appointed counsel and a court determines the defendant is entitled to have counsel appointed,<sup>259</sup> the court appoints the New Hampshire Public Defender to represent the defendant (in writing, by completing a notification of eligibility and appointment form, referred to colloquially as an “NEA”). This is because the legislature requires that the public defender program be appointed in every case “if that office is available.”<sup>260</sup> Although a defendant learns during the arraignment (or within 24 hours or so after) that they have received an appointed attorney, they do not know the identity of that attorney, and in fact no specific individual attorney has yet been assigned to their case.

The court clerk sends the “notice of eligibility and appointment” (by either email or fax)<sup>261</sup> to the NHPD branch office that is responsible for representing indigent defendants in that court location and in the type of case in which the defendant is accused. Then the process begins to determine which indigent defense system attorney will be assigned to represent that individual indigent defendant in that particular case.

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<sup>257</sup> N.H. REV. STAT. ANN. §§ 169-B:13, 604-A:2 (2019). N.H. R. CRIM. PROC. 4(g)(2), 5(c), 10(d).

<sup>258</sup> A defendant has a Sixth Amendment right to waive counsel and self-represent, but a judge must determine that the defendant's choice to waive the right to counsel and represent themselves is made knowingly, voluntarily, and intelligently. *Faretta v. California*, 422 U.S. 802 (1975). There is no entity in the State of New Hampshire that is responsible for knowing how many defendants in criminal and juvenile delinquency cases that carry the possibility of incarceration waive their right to counsel and whether those defendants are indigent.

<sup>259</sup> A court must appoint counsel within 24 hours of receiving the *Request for a Lawyer* form, excluding weekends and holidays. N.H. R. CRIM. PROC. 5(b).

<sup>260</sup> N.H. REV. STAT. ANN. § 604-A:2(II) (2019).

<sup>261</sup> If the defendant is in custody, the notice must be made by telephone, fax, or electronically; if the defendant is out of custody, notice must be made by telephone, electronically, or first-class mail. N.H. R. CRIM. PROC. 5(b). The “notice of eligibility and appointment includes notification that counsel has been appointed, contact information for the responsible NHPD branch office, contact information for the defendant, notice of whether the defendant is out-of-custody or detained, and the date of the next scheduled court proceeding.

## The absence of indigent defense system attorneys at arraignment

When an arraignment is held depends on whether the defendant is in-custody or out-of-custody at the time of the arraignment. For any defendant (adult or juvenile) who is in-custody at the time of arraignment, the arraignment must occur within 24 hours of arrest, excluding weekends and holidays.<sup>a</sup> For a juvenile defendant who is out-of-custody at the time of arraignment, the arraignment must occur “not less than 24 hours nor more than 7 days” after service of a summons.<sup>b</sup> For an adult defendant who is out-of-custody at the time of arraignment: in the superior court, the arraignment must occur no later than within 20 days of the arrest;<sup>c</sup> while in the circuit court, the arraignment cannot occur any sooner than 35 days from when the defendant received a written summons or was released from jail.<sup>d</sup>

Broadly, there are three things that must occur during the arraignment of an adult on a felony or a class A misdemeanor or of a child in any juvenile delinquency proceeding.<sup>e</sup>

<sup>a</sup> N.H. REV. STAT. ANN. §§ 169-B:12(IV)(b), 169-B:13(I), 594:20-a (2019); N.H. R. CRIM. PROC. 4(b)(2), 10(a). Except if the defendant is arrested between 8:00 a.m. and 1:00 p.m. and their attorney is not available, arraignment must be held within 36 hours of arrest (excluding weekends and holidays). N.H. REV. STAT. ANN. § 594:20-a (2019); N.H. R. CRIM. PROC. 4(b)(2), 10(a).

<sup>b</sup> N.H. REV. STAT. ANN. § 169-B:7 (2019).

<sup>c</sup> N.H. R. CRIM. PROC. 10(a). Arraignments of out-of-custody defendants are scheduled in all superior court locations for 1:00 p.m. on Thursdays. In practice, arraignments are usually scheduled for about 30 days after the date of arrest (despite the requirement that they occur within 20 days).

<sup>d</sup> N.H. R. CRIM. PROC. 4(b)(1). *But see* Circuit Court Administrative Order 2015-11 (N.H. Circ. Ct. Oct. 26, 2015) (regarding domestic violence cases).

<sup>e</sup> N.H. REV. STAT. ANN. § 169-B:13 (2019); N.H. R. CRIM. PROC. 4, 5(c), 10.

There is a special rule that applies only to felonies that occurred prior to the effective date of the felonies first implementation order in a given court location, where a felony defendant is arraigned in circuit court. “If the defendant is charged with a felony, the defendant shall not be called upon to plead. The court shall inform the defendant of the nature of the charges, the possible penalties, the privilege against self-incrimination, the right to retain counsel, and the right to have an attorney appointed by the court pursuant to Rule 5 if the defendant is unable to afford an attorney. The court shall inform the defendant of the right to a probable cause hearing that will be conducted pursuant to Rule 6. If the defendant is represented by counsel, and if the State and defense notify the court that each is satisfied with the terms of bail, the arraignment may be continued until the probable cause

1. The defendant is given a copy of the complaint for an adult or the petition for a juvenile,<sup>f</sup> and the judge reads or explains the charges brought against the defendant and the possible penalties if convicted.<sup>g</sup>
2. The judge informs the defendant of the right to retain their own attorney and the right to appointed counsel if indigent,<sup>h</sup> and for all defendants in superior court and for defendants appearing without counsel in circuit court the judge informs the defendant of the privilege against self-incrimination.<sup>i</sup>
3. (a) If a defendant has an attorney present during the arraignment, or if the defendant waives their right to have counsel during the arraignment, then the defendant is required to plead to the charge.<sup>j</sup>  
(b) If a defendant does not have an attorney present during the arraignment and does not waive their right to have counsel during the arraignment, then the court automatically enters a plea of not guilty and “shall take no other action aside from” telling the defendant that nothing will

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hearing.” N.H. R. CRIM. PROC. 4(h) (circuit court, for felonies occurring prior to effective date of felonies first).

<sup>f</sup> N.H. REV. STAT. ANN. § 169-B:13 (2019); N.H. R. CRIM. PROC. 4(f), 10(c). In an adult prosecution, “[t]he complaint is a written statement of the essential facts constituting the offense charged.” N.H. R. CRIM. PROC. 3. In a juvenile delinquency proceeding, the petition alleges the statutory provision alleged to have been violated and “the date, time, manner, and place of the conduct alleged.” N.H. REV. STAT. ANN. § 169-B:6 (2019).

<sup>g</sup> N.H. R. CRIM. PROC. 4(g)(2), 5(c), 10(d). In superior court, if an attorney appears with the defendant, the judge is not required to inform the defendant of the possible penalties. N.H. R. CRIM. PROC. 10(d).

<sup>h</sup> N.H. R. CRIM. PROC. 4(g)(2), 5(c), 10(d). *See* N.H. REV. STAT. ANN. § 604-A:2 (2019).

<sup>i</sup> N.H. R. CRIM. PROC. 5(c), 10(d).

<sup>j</sup> N.H. REV. STAT. ANN. § 169-B:12 (2019); N.H. R. CRIM. PROC. 4(g)(2), 5(c), 10(d). In both circuit court and superior court, an adult defendant can plead guilty, not guilty, or with the consent of the court *nolo contendere*. N.H. REV. STAT. ANN. § 605:6 (2019); N.H. R. CRIM. PROC. 4(g)(2), 10(d), 11. “If a defendant refuses to plead or if a court refuses to accept a plea of guilty, the court shall enter a plea of not guilty.” N.H. R. CRIM. PROC. 4(g)(2), 10(d). In superior court, if an attorney already represents the defendant then a plea of not guilty is automatically entered on behalf of the defendant. N.H. R. CRIM. PROC. 10(d).

be addressed, including bail, “until his or her counsel is present.”<sup>k</sup>

So, although a defendant in superior court who is in-custody at the time of the arraignment “shall be entitled to a bail hearing” at the arraignment,<sup>l</sup> in fact the defendant can only have a bail hearing at the time they first appear before the court if they either have an attorney present or waive their right to have an attorney present – else they must wait until a later date to have the court consider reducing their bail or changing their conditions of pretrial release.

For an adult defendant who pleads not guilty at arraignment (or has a not guilty plea entered for them by the court): in circuit court, the case is scheduled for trial; while in superior court, the case is scheduled for a dispositional conference.<sup>m</sup> In a juvenile delinquency proceeding, the adjudicatory hearing must be held within 21 days of arraignment for a child who is in-custody and within 30 days of arraignment for a child who is out-of-custody.<sup>n</sup>

An indigent defense system attorney is present *during* the arraignment for in-custody adult defendants in the superior court and for in-custody juvenile defendants in the circuit court, but only for the limited purpose of representing the defendant *during* the arraignment. When an in-custody adult defendant is scheduled to have an arraignment in superior court, the superior court notifies the NHPD branch office that provides representation at that superior court location (and also the responsible prosecutor's office). Typically there are several in-custody adult defendants scheduled for arraignment at the same court session. The NHPD branch office assigns one or more of its attorneys to be present and represent the in-custody adult defendants *during* the arraignment (representing every defendant who appears without an attorney, without regard to whether the defendant is indigent or not indigent).<sup>o</sup> The NHPD branch office tries to

assign enough of its attorneys to be present so that each attorney is only responsible for three defendants during an arraignment court session. That an NHPD attorney represents a defendant for the limited purpose of the arraignment does not mean the defendant will receive appointed counsel for the entirety of their case, nor that the NHPD attorney who represented them during the arraignment will continue to represent them at any time after the arraignment.

For all other defendants, the NHPD's policy is to not have any indigent defense system attorney present in the courtroom during the arraignment (except in the very rare instance where a defendant has already applied for and received an appointed attorney in advance of the arraignment taking place). However, the NHPD Laconia office and the NHPD Orford office continue to provide an attorney during out-of-custody adult arraignments in the superior court locations they serve. The absence of attorneys during arraignment works a particular hardship for in-custody adult defendants in the circuit court, because they must choose between either: having a bail hearing on the date they first appear for arraignment but doing so without an attorney, or having an attorney represent them during a bail hearing but waiting until a later date for that hearing to occur. As numerous criminal justice stakeholders affirm, it is more common that in-custody adult defendants in circuit court *do not* ask for a lawyer at the time of their arraignment because they hope the judge will release them from jail that day, and if the defendant wants a lawyer then the proceeding is stopped.

For all indigent defendants who request appointed counsel at their arraignment, whether in-custody or out-of-custody and whether in circuit court or in superior court, the court appoints the New Hampshire Public Defender to represent the defendant through conclusion of their case, but the defendant does not know the identity of the attorney who will represent them and in fact no

<sup>k</sup> N.H. R. CRIM. PROC. 5(c). Despite the defendant being told that no action can occur on their bail, the court can reduce or increase any defendant's bail or conditions of bail without any attorney being present for the defendant; it is just that the defendant has a right to a further bail hearing at a later time with counsel present. N.H. R. CRIM. PROC. 5(c), (f), (g).

<sup>l</sup> N.H. R. CRIM. PROC. 10(a).

<sup>m</sup> N.H. REV. STAT. ANN. § 592-B:8 (2019); N.H. R. CRIM. PROC. 4(g)(2), 10(d).

<sup>n</sup> N.H. REV. STAT. ANN. § 169-B:14 (2019).

<sup>o</sup> If the NHPD branch office is aware that there is a conflict

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with the NHPD representing a defendant (or co-defendants), it notifies the CCAO and the CCAO tries to secure a contract counsel attorney or an assigned counsel attorney to appear at the arraignment. Because in-custody arraignments must occur within 24 hours of arrest, excluding weekends and holidays, the CCAO is not always able to find an available contract counsel attorney or assigned counsel attorney to cover the arraignment session, so an NHPD branch office attorney does so.

specific individual attorney has yet been assigned to their case. The process of assigning a specific attorney to represent a specific defendant can take between one day and many weeks, during which the indigent defendant is not actively represented by any attorney. Nonetheless, the deadlines for

discovery and filing of motions have already begun.<sup>p</sup>

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<sup>p</sup> N.H. REV. STAT. ANN. § 592-B:6 (2019); N.H. R. CRIM. PROC. 12, 15; N.H. FAM. DIV. R. 3.3.

## B. Determining whether a case is assigned to the NHPD or sent to the CCAO for assignment

The NHPD public defender program must represent every defendant who receives appointed counsel, unless the NHPD is not available for one of two reasons:

- a conflict of interest as defined by the *Rules of Professional Conduct*; or
- caseloads exceeding the contractual limits imposed by the judicial council.<sup>262</sup>

If the NHPD is available, then the NHPD assigns the case to a branch office attorney (attempting to do so within 24 hours of receiving the “notice of eligibility and appointment”). (See section C below – “How the NHPD assigns cases to an individual attorney.”) The NHPD keeps track in *defenderData* of every case for which it receives a notice of appointment from a court and is available, assigning the case to an NHPD attorney.

If the NHPD is not available, then the NHPD sends the case to the CCAO for assignment to a contract counsel attorney if one is available, and if a contract counsel attorney is not available then assignment to an assigned counsel attorney.<sup>263</sup> The NHPD does not keep track of or report to the judicial council the number of or identifying information for the cases in which it receives a notice of appointment from the courts but immediately declares itself to be unavailable. Because the NHPD refers these cases to the CCAO, the CCAO (and thus the judicial council) should have this information. (See section D below – “How the CCAO assigns cases to an individual attorney.”)

The first step, then, in assigning a specific attorney to represent an indigent defendant is for the NHPD to determine whether it is available or not available.

### 1. Conflicts under the Rules of Professional Conduct

Each and every defendant has a right to effective representation that is free from conflicts of interest.<sup>264</sup> Nearly 80 years ago, the United States Supreme Court stated in *Glasser v. United States*: “‘assistance of counsel’ guaranteed by the Sixth Amendment contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests.”<sup>265</sup>

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<sup>262</sup> N.H. REV. STAT. ANN. §§ 604-A:2(II), 604-B:3, 604-B:6 (2019). “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶ 1 (for the term of July 1, 2019 through June 30, 2021).

<sup>263</sup> N.H. REV. STAT. ANN. § 604-A:2(II) (2019).

<sup>264</sup> See, e.g., *Wood v. Georgia*, 450 U.S. 261, 271 (1981) (“Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest.”); *Cuyler v. Sullivan*, 446 US 335, 346 (1980) (“Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial.”); *Glasser v. United States*, 315 U.S. 60, 70 (1942).

<sup>265</sup> *Glasser v. United States*, 315 U.S. 60, 70 (1942).



The legislature, court rules, and the judicial council contract all deem the NHPD unavailable to represent an indigent defendant if to do so would violate the *New Hampshire Rules of Professional Conduct*.<sup>266</sup> Pursuant to the *New Hampshire Rules of Professional Conduct*, there are three ways in which a lawyer can have a conflict of interest in a defendant's case:<sup>267</sup>

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

Generally, unless the client(s) gives "informed consent," a lawyer cannot represent a client if the lawyer has a conflict of interest.<sup>268</sup> In most instances, if one lawyer in a law firm is disqualified from representing a client due to a conflict of interest, then all of the lawyers in that same law firm are also disqualified from representing that client,<sup>269</sup> and the New Hampshire Supreme Court held in 2007 that the entire New Hampshire Public Defender law firm is a single law firm under this rule.<sup>270</sup>

In 1985, the New Hampshire Supreme Court established the procedure that attorneys and trial courts must follow whenever an attorney simultaneously represents two or more codefendants in the same case.<sup>271</sup> The court directed:

[I]n all future criminal cases involving multiple representation that both counsel and the trial court be responsible for making a record indicating that counsel has investigated the possibility of conflict of interest, has discussed the possibility with each client, and has determined that conflict is highly unlikely. Similarly counsel and the court will be responsible for making a record of each client's informed consent to dual representation; that consent must rest on the client's understanding that he is entitled to counsel representing him alone. The trial court should address the issue on the record as early in the proceedings as is practicable, and must refuse to allow dual representation unless the record indicates convincingly that the potential for conflict is very slight.<sup>272</sup>

In 1998, the court extended that instruction to situations where an attorney simultaneously represents a defendant and a state's witness in the same case.<sup>273</sup>

When an NHPD branch office receives a "notice of eligibility and appointment" in a case, the NHPD has an extensive and detailed written process that the branch office is supposed to follow

<sup>266</sup> N.H. REV. STAT. ANN. §§ 604-A:2(I), 604-B:3 (2019); N.H. R. CRIM. PROC. 5(I); N.H. FAM. DIV. R. 3.2; "Agreement" between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶ 1, and Exh. A-1, ¶ 2 (for the term of July 1, 2019 through June 30, 2021).

<sup>267</sup> N.H. R. PROF'L CONDUCT 1.7, 1.9.

<sup>268</sup> N.H. R. PROF'L CONDUCT 1.7, 1.9.

<sup>269</sup> N.H. R. PROF'L CONDUCT 1.10.

<sup>270</sup> *State v. Veale*, 154 N.H. 730, 919 A.2d 794, 796-98 (N.H. 2007).

<sup>271</sup> *Hopps v. State Board of Parole*, 127 N.H. 133, 500 A.2d 355 (N.H. 1985).

<sup>272</sup> *Hopps v. State Board of Parole*, 127 N.H. 133, 140, 500 A.2d 355 (N.H. 1985).

<sup>273</sup> *State v. Mountjoy*, 142 N.H. 648, 650-51, 708 A.2d 682 (N.H. 1998).

to determine whether the *Rules of Professional Conduct* require it to declare itself not available for that case.<sup>274</sup> The NHPD's process to identify conflicts is supposed to occur immediately upon receiving a case appointment, with the branch office attempting to identify the names of co-defendants, informants, and potential state or defense witnesses within 24 hours whenever possible, in order to determine whether any of those names are current or former clients of the NHPD.<sup>275</sup> According to its written policy, the NHPD will always decline a case due to conflict in any of three circumstances:

- when there are two or more clients who are involved in the same matter or case;
- when there are two or more clients whose cases are unrelated but whose legal interests are potentially adverse; or
- when a client is represented by an NHPD attorney who previously represented a person involved as a potential witness in the case (unless the case can be transferred to another NHPD attorney who does not have privileged information from or about the former client).<sup>276</sup>

In practice, when a branch office receives a "notice of eligibility and appointment" in a case, the office administrator runs a basic conflicts check using the readily available data systems, focused on whether there are codefendants in the case and the names of those codefendants. The NHPD only represents one client among multiple codefendants in a single case and declares a conflict for the other codefendants, referring the other codefendants' cases to the CCAO.<sup>277</sup> Each single defendant case and the case of one defendant in a multi-defendant case is assigned to a specific branch office staff attorney or subcontractor attorney (*see* discussion at pages 93-97 of how the NHPD assigns cases.)

The NHPD attorney to whom the case is assigned is responsible for conducting further conflicts checks as discovery and additional information about the case is received. This more extensive conflicts check is what allows the NHPD to know whether the NHPD is simultaneously representing: two defendants in different cases but who have potentially adverse interests; or a defendant and a potential state's witness in the same case. This also allows the NHPD to know whether a client whom the NHPD represented in the past may potentially be a state's

<sup>274</sup> NEW HAMPSHIRE PUBLIC DEFENDER, NHPD ATTORNEY POLICIES AND PROCEDURES § I (no date).

<sup>275</sup> NEW HAMPSHIRE PUBLIC DEFENDER, NHPD ATTORNEY POLICIES AND PROCEDURES § I.B.1. (no date).

<sup>276</sup> NEW HAMPSHIRE PUBLIC DEFENDER, NHPD ATTORNEY POLICIES AND PROCEDURES § I (no date).

<sup>277</sup> If a NHPD branch office receives a "notice of eligibility and appointment" for two or more codefendants in the same case, the managing attorney chooses which case to keep and which to refer to the CCAO. There are three primary factors used to decide which case to keep: whether any codefendant is an existing client of a branch office attorney; the in-custody or out-of-custody status of the codefendants; and the seriousness of the charge(s) against each codefendant.

The New Hampshire Public Defender has adopted a Rule 1.9(c) compliance policy in cases that are not substantially related in which a "neutral attorney" orders the former client's files sealed and prohibits any communication between the attorney who represented the former client and the attorney who represents the new client. In two cases where the State sought disqualification of the Public Defender because one of its attorneys had previously represented an individual who was a state's witness in the new case, the New Hampshire Superior Court denied disqualification and referenced with apparent approval the Public Defender's Rule 1.9(c) compliance policy. See *State of New Hampshire v. Gordon Perry*, Nos. 97-S-777 - 780 (Merrimack County Superior Court (Nadeau, J.) April 10, 1998); *State of New Hampshire v. Eric Smalley*, No. 01-S-1280 (Merrimack County Superior Court (McGuire, J.) January 29, 2002).

witness against or have interests adverse to a defendant whom the NHPD currently represents. However, during 2020, the NHPD reminded all its branch offices of its existing conflict policies and changed its internal conflict forms, resulting in its branch offices refraining from declaring a conflict based on this more extensive conflicts check unless and until it becomes clear that a case is almost definitely going to trial.<sup>278</sup> Instead, the potentially conflicting cases or clients are assigned to separate NHPD attorneys, or in a situation involving a past client to an attorney without knowledge of the past case or client, and everyone in the office is instructed not to talk to or share information with the attorney to whom the case is assigned. Numerous NHPD staff attorneys describe the problem, saying:

- NHPD attorneys are trying to predict whether a person whom the NHPD represents or has represented in the past will actually testify against another NHPD client if their case goes to trial.
- If an NHPD office identifies a potential conflict of interest, instead of sending the case to the CCAO, the office assigns the case to a different attorney – the office does not impute the conflict of interest of one attorney to the entire office or the entire NHPD.
- The NHPD’s new policy is a function of the NHPD trying to accept as many cases as it possibly can, often as a result of pressure from the courts for it to do so.
- NHPD attorneys should not be waiting until the eve of trial to declare a conflict.

In other words, the NHPD is accepting assignment (or failing to withdraw when a conflict of interest is identified) in some cases of indigent defendants where the *Rules of Professional Conduct* and New Hampshire Supreme Court case law prohibit the NHPD from representing the client. The indigent defendants in these cases are not aware that an actual or potential conflict of interest exists, nor is the trial court made aware. As a result of this change in NHPD policy, when the NHPD does decide a defendant’s case is going to trial and declares the conflict it has had all along, the defendant’s case must be referred to the CCAO and re-assigned to a new attorney (a contract counsel attorney or an assigned counsel attorney) to represent the defendant.

The NHPD’s failure to timely act on conflicts of interest under the *Rules of Professional Conduct* means that some indigent defendants are represented by an attorney with divided loyalty, and the cases of some indigent defendants are re-assigned to a new attorney on the eve of trial. It also means that the NHPD reports handling a higher number of cases, for a longer period of time than it should, because these cases should have been referred to the CCAO much sooner than they are.

The NHPD tracks in *defenderData* the number of and identifying information of the cases in which it initially accepted assignment but then at a later date referred to the CCAO for reassignment due to a conflict of interest. The NHPD does not report this information to the judicial council, and the judicial council does not require the NHPD to report this data.

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<sup>278</sup> The NHPD refutes this assertion, stating: “In 2020, NHPD merely updated the Form A that attorneys are required to complete to align with its existing conflict policy. The updated Form A requires the attorney to provide additional information about the case and listed witnesses to ensure greater protections to NHPD clients. NHPD’s conflict policy has been in place in its current form for more than ten years. The claim that NHPD was pressured by the courts to accept more cases is also false.”

## 2. Excessive caseloads under the judicial council contract

The legislature and the judicial council contract both deem the NHPD unavailable to represent an indigent defendant at any time that the caseloads of NHPD attorneys have reached the caseload limits set out in the contract.<sup>279</sup>

The judicial council contract requires that each full-time NHPD staff attorney shall not have a caseload of more than 70 open and active cases at any time.<sup>280</sup> For full-time NHPD trial attorneys assigned a mixed caseload (as they all are), among the maximum 70 open and active cases there is a further limit of not more than:<sup>281</sup>

- 35 felonies, and including no more than 2 first-degree murder, second-degree murder, and manslaughter;<sup>282</sup>
- 35 misdemeanors;
- 20 juvenile delinquencies; and
- 16 other, and including no more than 2 civil commitment of sexually violent predator.<sup>283</sup>

Prior to this evaluation, the judicial council did not monitor or enforce these contractual caseload limits, other than through its conversations with the NHPD executive director about the NHPD's caseloads. The judicial council did not require the NHPD to report, at any time, the open and active cases assigned to each NHPD attorney, instead relying on the NHPD executive director to "monitor the caseloads of attorneys."<sup>284</sup> During this evaluation, the judicial council began requiring the NHPD to provide a list of cases assigned to each NHPD attorney, broken down by type of case.

The NHPD maintains its caseload data in its *defenderData* system and can report, on any given day, the actual number of open and active cases, by type of case, that are assigned to each NHPD staff attorney (and each NHPD subcontractor). There are some known problems with NHPD's *defenderData* caseload reports that make the reported caseloads for each attorney (and for the NHPD overall) less than completely reliable. Some of the data problems result in overcounting the cases of each attorney:

- While the NHPD reliably enters new cases into *defenderData* when they are assigned to an attorney, the NHPD attorneys are often behind on closing cases in the data system, and

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<sup>279</sup> N.H. REV. STAT. ANN. § 604-B:6 (2019); "Agreement" between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶¶ 1, 9, and Exh. A-1 (for the term of July 1, 2019 through June 30, 2021).

<sup>280</sup> "Agreement" between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A-1, ¶ 5 (for the term of July 1, 2019 through June 30, 2021).

<sup>281</sup> "Agreement" between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A-1, ¶ 5 (for the term of July 1, 2019 through June 30, 2021).

<sup>282</sup> "Agreement" between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A-1, ¶ 6 (for the term of July 1, 2019 through June 30, 2021).

<sup>283</sup> "Agreement" between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Ex. A-1, ¶ 10 (for the term of July 1, 2019 through June 30, 2021).

<sup>284</sup> "Agreement" between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Ex. A-1, ¶ 4 (for the term of July 1, 2019 through June 30, 2021).

the busier the attorneys are, the longer it takes for them to enter closed case information.

- Some of the open cases are those assigned to NHPD subcontractor attorneys. Because NHPD subcontractor attorneys are paid in a flat sum (typically in advance) for a batch of cases assigned to them, there is little incentive for them to send timely notice to the NHPD when they close a case, and then someone in the relevant branch office must enter the information into the *defenderData* system.

Some of the data problems result in undercounting the cases of each attorney:

- Each docket number counts as one case, so the NHPD counts as a single case those cases where two attorneys are assigned, such as homicides where two attorneys must be assigned or cases where a more senior attorney co-counsels with a less experienced attorney.

During this evaluation, the NHPD produced reports of the open and active cases assigned to each NHPD staff attorney and each NHPD subcontractor on day one of fiscal years 2018 through 2021 and on July 16, 2021 near the start of FY 2022.<sup>285</sup> The data contained in these reports show that there is a long-standing problem at the NHPD of its attorneys having per-attorney open caseloads that exceed the judicial council's contract limits. As the table on page 91 shows, the number of NHPD attorneys (including staff attorneys and subcontractor attorneys) who, on day one of the fiscal year, have caseloads in excess of the contract limits has increased each year from FY 2018 through FY 2022. Not only is the raw number of attorneys with contractually excessive caseloads increasing, but so too is the overall percentage of the attorneys: 49% in FY 2019; 50% in FY 2020; 60% in FY 2021; and 75% in FY 2022.

It is widely known throughout the NHPD that NHPD attorneys consistently carry open and active caseloads in excess of the contractual limits. For example:

- One attorney who has been with the NHPD since 2015 said of a particular branch office, "I can't remember the last time anybody had only 70 open cases."
- An attorney who has been with the NHPD for 10 years says, "In my career at NHPD, attorneys' open caseloads have always been at or over the contractual caseload limit."
- One attorney who has been with the NHPD for 18 years doesn't remember ever having less than 80 to 130 open cases.

It is difficult to determine why the open and active caseloads of NHPD staff attorneys are rising so much and so quickly, because the number of attorneys on NHPD staff is fairly steady and the number of new cases assigned to the NHPD has dropped fairly dramatically (from 26,723 new cases assigned during FY 2019; to 22,526 new cases assigned during FY 2020; to 17,776 new cases assigned during FY 2021). (*See* discussion of NHPD caseloads at pages 151-157.)

Because the judicial council contract imposes caseload limits on *each* NHPD staff attorney, one might reasonably conclude that the NHPD would not assign an additional case to an

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<sup>285</sup> The caseload snapshot reports that the NHPD provided for each year show all open NHPD cases on the date reported. This includes open cases for: branch office staff attorneys; subcontractor attorneys; appellate division attorneys; central administration attorneys; and attorneys who had terminated their employment at the NHPD but whose cases had not yet been re-assigned.

**NUMBER OF NHPD ATTORNEYS WITH OPEN CASELOADS EXCEEDING CONTRACT STANDARD AT START OF FISCAL YEAR, FOR FY 2018 THROUGH FY 2022**

Fiscal year	Number of NHPD attorneys (staff & subcontractor) with open cases	NHJC contract maximum	Homicide	Felony	Misdemeanor	Juvenile delinquency	Other	Civil commitment	ALL case types
			NHJC 2	NHJC 35	NHJC 35	NHJC 20	NHJC 15	NHJC 2	NHJC 70
FY 2018	118 attorneys	Total open NHPD cases	5	1,928	1,890	295	892	0	5,010
		<b>Attorneys exceeding NHJC standard</b>	0	0	0	1	7	0	0
FY 2019	130 attorneys	Total open NHPD cases	10	3,139	2,794	396	1,581	2	7,922
		<b>Attorneys exceeding NHJC standard</b>	0	24	20	2	38	0	52
FY 2020	133 attorneys	Total open NHPD cases	20	3,202	3,149	360	1,641	1	8,373
		<b>Attorneys exceeding NHJC standard</b>	0	20	25	2	47	0	66
FY 2021	144 attorneys	Total open NHPD cases	21	3,829	3,998	342	1,823	0	10,013
		<b>Attorneys exceeding NHJC standard</b>	2	38	51	1	54	0	87
FY 2022	128 attorneys	Total open NHPD cases	18	4,060	4,368	338	1,591	0	10,375
		<b>Attorneys exceeding NHJC standard</b>	0	58	58	2	43	0	96

attorney who has reached the contractual limit. That is not, however, the approach taken by the NHPD. Instead, the NHPD continues to assign cases to attorneys with caseloads in excess of the contractual limit, on the theory that the NHPD attorneys “are the best providers of indigent defense services in the state.” As a result, individual NHPD staff attorneys feel that they have no ability to limit their open caseloads, even when they are overwhelming. All managing attorneys try to limit new case assignments to any office attorney who is feeling especially overburdened, but this just leaves a larger number of cases that must be assigned to the other attorneys in the office.

Rather than apply the contractual caseload limits to each NHPD attorney, the NHPD monitors the open and active cases assigned to each NHPD branch office. The managing attorney of each branch office is responsible for notifying NHPD central administration if the managing attorney decides that the open and active cases in the branch office are threatening to become unmanageable. The branch office managing attorney and the director of legal services together compile a description of the current caseloads in the effected office and make a plan for how to alleviate the situation.

Managing attorneys suggest that they are discouraged from seeking to limit assignment of new cases. For example, one managing attorney stated: “It’s not a tool that the administration like to use.” It is a “last resort.”

The NHPD’s first response is to shift some cases to attorneys in other branch offices, either by temporarily assigning an attorney to the overburdened branch office, or by reassigning cases from the overburdened branch office to other staff attorneys or subcontractor attorneys. For example, in the Newport office with only four attorneys, during FY 2020 the office had only three attorneys for about 36 weeks (because of a series of 12-week family leaves), so a Concord office attorney was temporarily assigned to work in Newport to alleviate attorney caseloads. During FY 2021, for several months the Nashua branch office took 50 new assignments each month from the Manchester branch office, to alleviate the attorney caseloads in the Manchester office.

When the individual open and active caseloads of *every attorney* in a given branch office actually exceed the contractual caseloads limits, then the NHPD executive director considers closing *that branch office* to intake of new cases in some fashion. In the smaller branch offices such as Keene, Littleton, and Newport, with only three to six attorneys, even a slight uptick in case assignments or having a single attorney out on leave can quickly lead to every attorney having an open caseload in excess of the contractual limits. In March 2021, every attorney in the mid-sized Dover office reportedly had approximately 150 or more open cases.

The NHPD executive director might decide, for example, for the branch office to accept only a specific limited number of new cases from a specific court location, or to decline all new cases of a specific type. The most extreme possibility is that the branch office declines to accept any new cases; this is referred to as an NHPD office being “closed to intake.” Before any NHPD branch office limits its acceptance of new cases or is closed to intake entirely, the NHPD executive director discusses the possibility with both the NHPD board of directors and the judicial council’s executive director. The judicial council contract requires the NHPD to consult with the judicial council executive director before “closing off or reducing case intake.”<sup>286</sup>

From at least 2013 through 2019 the NHPD never limited or closed intake of cases in any branch office, but it began to do so in February 2020, as shown in the table on page 93.

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<sup>286</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A-1, ¶ 4 (for the term of July 1, 2019 through June 30, 2021).

**NHPD RESTRICTED INTAKE OF CASES  
FEBRUARY 2020 THROUGH FEBRUARY 2022**

NHPD office	Dates intake limited / closed	Status as of Feb. 2022
	Feb. 19, 2020 – Mar. 13, 2020	
Nashua	Mar. 11, 2021 – Apr. 5, 2021	
	Aug. 2, 2021 – Oct. 26, 2021	
	Dec. 20, 2021 -	remains restricted
Dover	Mar. 2, 2021 – June 30, 2021	
	Dec. 20, 2021 -	remains restricted
Laconia	Apr. 5, 2021 – Sept. 12, 2021	
	Dec. 20, 2021 -	remains restricted
Orford	Apr. 5, 2021 – Aug. 31, 2021	
	Jan. 24, 2022 -	remains restricted
Concord	Aug. 9, 2021 – Oct. 25, 2021	
	Dec. 20, 2021 -	remains restricted

Even though the NHPD restricted the new cases it accepts in each of these branch offices, each branch office *continues to accept* all new cases of clients it currently represents, all juvenile delinquency cases, and all sentence-related matters in the cases of past clients. The branch offices also continue to staff in-custody felony arraignments in the superior court, representing all defendants *during* those arraignments.

When the NHPD lifts its restrictions on new cases assigned to a given branch office, that does not mean the attorney caseloads in that branch office have come below the contractual caseload limits.

### C. How the NHPD assigns cases to an individual attorney

When the NHPD determines that it is available to accept a case – not precluded by a conflict of interest and not precluded by contractually excessive caseloads – then it assigns the case to a branch office staff attorney or a subcontractor attorney. The judicial council contract requires the NHPD executive director to determine the appropriate mix of cases for each attorney “based upon the experience level of the staff attorney and the concentration of case types in the geographic area served by the office in which the attorney works.”<sup>287</sup> The NHPD executive director has delegated this responsibility to the branch office managing attorneys primarily and for homicide cases to the director of litigation.<sup>288</sup>

<sup>287</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A-1, ¶ 5 (for the term of July 1, 2019 through June 30, 2021).

<sup>288</sup> Like all other cases, when a court appoints counsel to an indigent defendant who is charged with a homicide, the court sends the “NEA” form to the NHPD branch office responsible for handling cases in that court. The NHPD branch office refers that “NEA” form to the NHPD director of litigation. The NHPD director of litigation decides which attorneys to assign to each homicide case taking into consideration several factors. For example, (1) two



Each branch office managing attorney is responsible for assigning cases to the office's individual staff attorneys and subcontractor attorneys (except homicide cases, which are assigned by the NHPD director of litigation), including themselves. The managing attorneys attempt to achieve an equitable distribution of cases among the attorneys in their office. There are substantial variations across offices in the number of staff attorneys and subcontractor attorneys, the number of court locations served and their distance from the branch office, and the types of cases to be assigned on any given day, so each managing attorney takes an individualized approach to assigning cases.

For the NHPD's "new hire" attorneys (*see* discussion at pages 57-58), in theory, managing attorneys are supposed to: slowly assign cases so that "new hire" attorneys have only a small number of misdemeanor and juvenile delinquency cases during their first six months of employment; then add assignments to low-level felonies so that they reach a "full" (contractual maximum) caseload by the end of their first year of NHPD employment; and finally assign them more serious felonies during their second and third years of practice only as their managing attorney considers them ready. In practice, NHPD staff attorneys report that they begin to receive case assignments during their first or second week of employment and typically have per-attorney open caseloads nearing or even exceeding the judicial council contract limits<sup>289</sup> within just a few months of being hired directly out of law school or a judicial clerkship. For example:

- One "new hire" attorney reported having a "full caseload" of cases other than felonies within a few months of being hired, and including all levels of felonies during the first year.
- Another "new hire" attorney received drug possession felonies within a few months of being hired. The attorney says the NHPD "eases you into things at a pace a little quicker than you are comfortable with, which is a good thing."
- Another "new hire" attorney was immediately assigned felonies because of having interned at the NHPD while in law school and having previous experience as an investigator.
- A fourth "new hire" attorney had 80 cases within four months of being hired and 100 cases within six months of being hired.

The NHPD's *defenderData* reports confirm this anecdotal information. (*See* "new hire" attorney caseload data in appendix B.)

Managing attorneys assign a mixture of types of cases to every staff attorney (while assignments to subcontractor attorneys are only of the types defined in their specific subcontract). There is no NHPD attorney who, for example, handles only juvenile delinquency cases or only sexual assault cases or only homicide cases. For most staff attorneys, their assigned cases include non-homicide

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attorneys must be assigned to each homicide case; (2) the NHPD attempts to assign attorneys located near where the defendant is detained, if the defendant is detained; (3) the NHPD attempts to assign a lead attorney with a significant amount of trial experience; and (4) the NHPD tries to ensure that an NHPD attorney does not have more than one or two homicide cases at the same time, except for a small number of NHPD attorneys who carry more homicide cases and fewer other cases.

<sup>289</sup> "Agreement" between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A-1, ¶ 5 (for the term of July 1, 2019 through June 30, 2021).

felonies, misdemeanors, juvenile delinquencies, and the other less-frequently-arising case types, but there are some exceptions. For example:

- In the Concord office, all attorneys have adult felonies, misdemeanors, and probation violations, and each attorney additionally has either juvenile delinquency cases or homicide cases or is assigned to the drug treatment court.
- In the Dover office, all attorneys have adult cases in both superior court and circuit court, but juvenile delinquency cases are only assigned to the staff attorneys who prefer them.
- In the Laconia office, the one part-time (80%) attorney is assigned to only "major cases," while all other attorneys have a mix of all case types.
- In the Nashua office, one attorney's caseload is heavily weighted toward juvenile delinquency cases, and one attorney is assigned most of the office's cases that involve immigration issues.
- In the Orford office, one attorney is not assigned any juvenile delinquency cases, and only the three most-experienced attorneys are assigned aggravated felonious sexual assault cases (but one of those most-experienced attorneys began at the NHPD in the new hire class of FY 2019).
- In the Stratham office, two attorneys are assigned to all of the early case resolution cases and one of those attorneys is assigned to all specialty courts, so they are not assigned to felonies or juvenile delinquencies. A different attorney is assigned to only some felony cases and predominantly juvenile delinquency cases.

Managing attorneys typically assign cases from all of the court locations served by the branch office to every staff attorney (while assignments to subcontractor attorneys may be limited to specific court locations depending on the terms of their subcontract). The NHPD does not usually assign individual attorneys to only cases arising out of a single court location, but again there are some exceptions. For example, the Stratham office provides representation in seven court locations with long travel times between them, so the managing attorney tries to assign each staff attorney to cases in a specific circuit court location and when possible the court location nearest where the attorney lives in order to minimize travel time. The Orford office managing attorney also considers drive-time from the attorney's residence to the court location in assigning cases, all other things being equal.

Managing attorneys in all of the branch offices tend to follow certain rules of thumb in assigning individual cases. Generally, and barring any unique circumstances:

- Any new case, of any type at any court location served by the relevant branch office, involving a defendant already being represented by an attorney in the office is assigned to that same attorney. (When a single defendant has two or more cases pending at the same time in court locations served by different NHPD branch offices, this can cause the defendant to be represented by a different NHPD attorney in each case.)
- As required by the NHPD's new November 2020 policy, any parole violation case involving a defendant already being represented by an attorney in the office is assigned to that same attorney. (Until November 2020, all parole violation cases were assigned to Concord office attorneys because of the office's proximity to the New Hampshire State Prison, regardless of whether an attorney in another NHPD office had an open case with

that defendant.)

- If a branch office attorney previously represented the defendant, the case is assigned to that same attorney.

For cases that do not fall into any of these categories, all managing attorneys analyze the *defenderData* reports of office attorneys' open caseloads to try to make an equitable distribution of work, taking into consideration:

- The type of case and the experience necessary to provide effective representation.
- The court proceedings scheduled in the case and the existing court schedules of office attorneys.
- Whether there are circumstances in the case or of the defendant that are likely to make the case more difficult or take longer than other cases of the same type, such as a defendant exhibiting mental illness or addiction, or a case with extensive financial records or that is highly publicized.
- Desires expressed by staff attorneys for the types of cases they would like to be assigned.

The managing attorneys in the Manchester and Nashua offices also apply a “weighted case credit system” in assigning cases. At some point in the past, the NHPD executive director considered whether it might be possible to assign cases to NHPD attorneys in a way that takes into consideration the amount of time attorneys must devote to things other than representing individual clients and also the relative amount of time an attorney typically devotes to specific types of cases on a more granular level than just felony, misdemeanor, or delinquency – what many refer to as a “weighted case credit system.” The NHPD executive director decided it would be “extraordinarily difficult” to formally implement such a system to assign cases, but at the same time decided it would be helpful for NHPD central administration to use such a system to project staffing and resource needs. Although such a system exists and is used by NHPD central administration, it has not been formalized into policy and many, if not most, NHPD attorneys are not even aware that it exists.<sup>290</sup>

The most critical difficulty that most managing attorneys face is not in assigning new cases, but rather it is when they are faced with re-assigning cases because a staff attorney goes on leave or terminates employment with the NHPD. When any one attorney goes on leave or is terminated, the managing attorney must reassign *all* of that attorney's caseload at the same time. So, in an office where attorneys are all carrying an average open caseload of 100 cases or more, the managing attorney has little choice but to divide that caseload among the other already overloaded attorneys in the office. One partial solution that the NHPD has used is to subcontract a private law firm to take over those cases, and this can be particularly effective in a situation where the attorney leaving the NHPD is going into private practice and willing to subcontract to complete their own open cases. For example, two Laconia office attorneys left their employment with the NHPD on December 2, 2019 and subcontracted with the NHPD on December 6, 2019 to continue representing clients “through final disposition of the client's case or cases” in cases to which the two attorneys had been assigned while they were employees of the NHPD. Of course not every attorney who leaves NHPD employment is in a position to or desires to subcontract.

<sup>290</sup> See BERRY DUNN, NEW HAMPSHIRE PUBLIC DEFENDER OPERATIONAL ASSESSMENT, at 9-10 (Oct. 9, 2020).

## NHPD attorneys assigned to juvenile delinquency cases

State law requires the judicial council to establish eligibility requirements that attorneys must meet before they can be assigned to a juvenile delinquency proceeding: the judicial council “shall establish training, experience, and other qualifications for attorneys to represent minors in such proceedings,” taking into consideration national standards including those of the American Bar Association and the Institute of Judicial Administration’s Juvenile Justice Standards.<sup>a</sup> The judicial council standard, adopted pursuant to this statute, says that an attorney appointed to represent an indigent defendant in a juvenile delinquency case “must have criminal trial experience, must possess a thorough understanding of the juvenile justice system and must demonstrate a comprehensive knowledge of the array of social service resources available to minors locally and regionally.”<sup>b</sup>

Judges are required by statute to assign attorneys to represent indigent defendants in juvenile delinquency cases in compliance with the judicial council standards,<sup>c</sup> but there is no mechanism for judges to follow this mandate because they do not select the individual attorney who is assigned to represent an indigent defendant in a juvenile delinquency case (or in any type of case).

The judicial council contract with the NHPD requires the NHPD to assign juvenile delinquency cases only to attorneys who meet the judicial council standard.<sup>d</sup> Because the NHPD assigns juvenile delinquency cases to “new hire” attorneys during their first few months of employment, it does not seem possible that the assigned “new hire” attorneys could meet the judicial council requirements. The judicial council does not require

the NHPD to report the identity and qualifications of the NHPD attorneys assigned to represent indigent defendants in juvenile delinquency cases.

Juvenile delinquency cases make up only a small percentage of the cases assigned to NHPD attorneys during any given year – 2,900 juvenile delinquency cases out of 34,644 total cases during FY 2019; 1,965 out of 22,526 during FY 2020; and 1,538 out of 17,776 during FY 2021. (See appendix D.) In some branch offices there are almost no juvenile delinquency cases in the court locations where they provide representation. Because the NHPD always assigns some juvenile delinquency cases to every “new hire” attorney, very few juvenile delinquency cases are available to be assigned to more experienced attorneys. Anecdotally, NHPD attorneys refer to a “three-year rule” under which most NHPD attorneys are intended to be “phased out of juvenile cases” after three to five years at the NHPD. This is a disappointment to attorneys who would like to focus their practice on juvenile representation, and some attorneys leave employment at the NHPD for this reason. It is only in the largest branch offices serving court locations with a relatively high number of juvenile delinquency cases (usually Manchester, Nashua, and Stratham) that an experienced NHPD staff attorney can be assigned any significant number of juvenile delinquency cases. There is only one experienced NHPD attorney, in the Nashua office, whose juvenile delinquency cases constitute more than 50% of the attorney’s overall caseload.

<sup>a</sup> N.H. REV. STAT. ANN. § 604-A:10(V) (2019).

<sup>b</sup> N.H. REV. STAT. ANN. § 592-B:6 (2019); N.H. R. CRIM. PROC. 12, 15; N.H. FAM. DIV. R. 3.3.

<sup>c</sup> NEW HAMPSHIRE JUDICIAL COUNCIL, JUDICIAL COUNCIL ELIGIBILITY STANDARDS FOR CONTRACT COUNSEL AND ASSIGNED COUNSEL, at 1 (no date).

<sup>d</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A-1, ¶ 8 (for the term of July 1, 2019 through June 30, 2021).

## D. How the CCAO assigns cases to an individual attorney

If the NHPD is not available, then the NHPD sends the case to the CCAO for assignment to a contract counsel attorney if one is available, and if a contract counsel attorney is not available then assignment to an assigned counsel attorney.<sup>291</sup> The judicial council contract requires the NHPD to “operate and administer the Conflict Case Administrator Office” to “distribute conflict cases to contract attorneys and assigned counsel.”<sup>292</sup> The judicial council assures that “[t]he CCA[O] will assign conflict cases in an orderly, fair and transparent manner.”<sup>293</sup>

The CCAO administrators say they send many cases back to the NHPD based on their own assessment that there is no conflict of interest to exclude the NHPD. The CCAO administrators report sending 42 cases back to the NHPD during the first four months of FY 2021, and by so doing believe they saved \$22,000 from the cost of the judicial council’s contract counsel program.

### 1. Assignment to contract counsel attorney

When the CCAO does not disagree with the NHPD’s decision to decline a case, the CCAO is initially responsible for identifying a contract counsel attorney who is available to be assigned to the case (excluding homicide cases). This is because state law requires that a contract attorney be appointed “if such an attorney is available” whenever the NHPD cannot be appointed.<sup>294</sup>

There are no written guidelines or procedures for the CCAO administrators to follow. The CCAO begins by contacting any attorney who holds a judicial council contract for the court location where the case is pending. (*See* table at pages 47-49 showing contract counsel for FY 2021 and the court locations in which they are available.) The judicial council instructs the CCAO to first contact any contract counsel attorney who currently or previously represented the defendant (except in homicide-related cases or for cases arising outside of the court locations for which the attorney has a contract with the judicial council), but the CCAO personnel understand that they may exercise broad discretion in assigning cases including by assigning cases to the attorneys whom they believe will be most effective. The CCAO administrators email their chosen contract counsel attorney, providing information about the case and requesting a response within 24 hours. Contract counsel attorneys typically respond within one to two days, either accepting or declining the assignment. The CCAO administrators continue contacting contract

<sup>291</sup> *See* N.H. REV. STAT. ANN. § 604-A:2(II) (2019).

<sup>292</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶ 11 (for the term of July 1, 2019 through June 30, 2021).

<sup>293</sup> NEW HAMPSHIRE JUDICIAL COUNCIL, JUDICIAL COUNCIL PLAN FOR THE PARTICIPATION OF THE PRIVATE BAR IN COURT APPOINTED CRIMINAL CASES I (Sept. 9, 2014). The Conflict Case Administrator Office “opened in 2012 for the purpose of consolidating the assignment of conflict cases in the indigent-defense system to contract attorneys and assigned counsel. Previously, that task had been performed by clerks and court assistants in the various courts throughout New Hampshire. Consolidation of those responsibilities in the CCA produced many advantages for the indigent accused, for the courts, and for the Council, . . .” NEW HAMPSHIRE JUDICIAL COUNCIL, 22ND BIENNIAL REPORT JULY 1, 2011 – JUNE 30, 2013, at 11 (Mar. 2014).

<sup>294</sup> N.H. REV. STAT. ANN. § 604-A:2(II) (2019).

counsel attorneys who hold a judicial council contract for the court location where the case is pending until one of them accepts the assignment or all have been determined to be unavailable.

In some court locations there are very few contract counsel attorneys, and they may all have a conflict of interest with any given case. Cases of defendants who are held in the state prison can be difficult to assign, because visiting the state prison is especially time-consuming and contract counsel attorneys are *not* paid for the time it takes them to travel to and from the prison and are *not* reimbursed for their mileage expenses.<sup>295</sup>

## 2. Assignment to assigned counsel attorney

If none of the attorneys who hold a judicial council contract for the court location where the case is pending are available to accept the assignment (and in all homicide cases in which the NHPD is unavailable), then the CCAO is responsible for identifying a private attorney who is willing to be assigned the case – referred to by the judicial council as an “assigned counsel” attorney. State law provides that if neither the NHPD nor a contract counsel attorney are available, then the court may appoint “any qualified attorney.”<sup>296</sup> The judicial council’s executive director or the CCAO, depending on the type of case and court location in which it is pending, calls private attorneys until one agrees to accept the assignment.

For misdemeanor or low-level felony cases in courts located in Hillsborough or Merrimack counties, the CCAO calls private attorneys directly until they identify one who is willing to accept the assignment. The judicial council allows this because there are many private attorneys who practice in those courts and having the CCAO contact them allows for clients to be provided with representation more quickly.

For major felony cases anywhere in the state, and for all cases in courts located outside of Hillsborough or Merrimack counties, the CCAO notifies the judicial council’s executive director of the need for an assigned counsel attorney, and the judicial council’s executive director calls private attorneys until one agrees to accept the assignment.

It can sometimes take up to two weeks to identify an assigned counsel attorney who is willing to be assigned to a given case. During this time, despite the defendant having been told by the court that the NHPD is appointed, the indigent defendant is not being represented.

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<sup>295</sup> See “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021,” ¶ 2 (sample).

<sup>296</sup> N.H. REV. STAT. ANN. § 604-A:2(II) (2019).

## “Felonies First” and its effects on the indigent defense system

The “Felonies First” program discussed here was in effect throughout the course of this evaluation. Taking effect on January 1, 2024, the circuit court - district division will again have jurisdiction over felony complaints prior to their being bound over to the superior court.\* This in essence repeals the “Felonies First” program, such that the circuit court, rather than the superior court, will conduct arraignments and preliminary examinations on felony complaints.

\* Act permitting arraignments for felonies and preliminary examinations to be heard in circuit court, 2022 N.H. Legis. Serv. ch. 268 (HB1597-FN).

Between January 1, 2016 and October 1, 2017, the “Felonies First” program was implemented in all superior court and circuit court - district division locations.<sup>a</sup> Where previously all criminal cases had begun in the circuit court, now felonies (and directly related misdemeanors and violations) are directly filed into and are within the exclusive jurisdiction of the superior court<sup>b</sup> (except, for offenses alleged to have occurred prior to the date of implementation of “Felonies First” in a given county, all criminal offenses are first filed into circuit court as they previously were<sup>c</sup>). As statutorily required,<sup>d</sup> the judicial council issued three reports (the last dated February 16, 2019) about implementation of the program.<sup>e</sup>

Virtually all criminal justice system stakeholders have personal and professional opinions about the

changes wrought to the system by “Felonies First.” Some stakeholders believe that “Felonies First” has not achieved some of its expressly stated goals (such as reducing the time from felony case filing to disposition), while others believe there were always unstated ulterior objectives (such as forcing county attorneys to triage felony arrests and/or leading the legislature to statutorily reduce some felonies to misdemeanors).

There is nothing within the procedural changes implemented by “Felonies First” that appears to violate or impede the right to counsel of indigent people as protected through U.S. Supreme Court case law or national standards. The “Felonies First” changes do, though, have effects on the courts, prosecutors, and appointed counsel.

**Number of criminal cases and prosecutor workloads.** “Felonies First” does not appear to have had any direct effect on how many people get arrested, but it may have had an effect on which prosecutor makes the charging decision about felony arrests.

Before “Felonies First,” felony cases were processed in circuit court from arrest until an indictment was returned (or waived, or a probable cause finding was made by a judge) when they moved to superior court. While the attorney general or the county attorney can always choose to control the prosecution of any criminal case in either the circuit court or the superior court, for the most part municipal prosecutors control the prosecution of criminal cases in the circuit court locations. For felony arrests prior to “Felonies First,” this meant that a municipal prosecutor usually decided whether a felony arrest should

<sup>a</sup> N.H. REV. STAT. ANN. § 592-B:2 (2019); Order (N.H. Oct. 17, 2016) (implementation of the “Felonies First” project). The dates of implementation in each county are:

- Cheshire County Superior Court, January 1, 2016
- Strafford County Superior Court, January 1, 2016
- Belknap County Superior Court, July 1, 2016
- Merrimack County Superior Court, January 1, 2017
- Carroll County Superior Court, April 1, 2017
- Coos County Superior Court, April 1, 2017
- Grafton County Superior Court, April 1, 2017
- Hillsborough County Superior Court-Northern Division, September 1, 2017
- Hillsborough County Superior Court-Southern Division, September 1, 2017
- Rockingham County Superior Court, October 1, 2017
- Sullivan County Superior Court, October 1, 2017

N.H. REV. STAT. ANN. § 592-B:2 (2019); Order (N.H. Oct. 17, 2016) (implementation of the “Felonies First” project).

<sup>b</sup> N.H. REV. STAT. ANN. §§ 592-B:1, 592-B:2 (2019).

<sup>c</sup> N.H. REV. STAT. ANN. § 592-B:2(III) (2019).

<sup>d</sup> N.H. REV. STAT. ANN. § 592-B:2 (2019).

<sup>e</sup> NEW HAMPSHIRE JUDICIAL COUNCIL, REPORT ON FELONIES FIRST (Feb. 16, 2019); NEW HAMPSHIRE JUDICIAL COUNCIL, REPORT ON FELONIES FIRST (Oct. 16, 2017); NEW HAMPSHIRE JUDICIAL COUNCIL, REPORT ON FELONIES FIRST (Jan. 1, 2017).

lead to a felony prosecution or a misdemeanor prosecution or no prosecution at all, and county attorneys did not become involved in the decision-making unless and until a felony case arrest was unable to be disposed by the municipal prosecutor during its pendency in the circuit court.

After “Felonies First,” felony cases (and their directly related misdemeanors and violations) are processed in superior court from arrest through disposition. Each county attorney, acting under the supervision of the attorney general, is responsible for the prosecution of all cases in the superior court, and so the county attorneys are today involved in the decision-making about the prosecution (if any) arising out of every felony arrest. This increased the workload of county attorneys and decreased the workload of municipal prosecutors.

**Time from arrest to disposition of cases and judicial workloads.** Before “Felonies First,” all misdemeanors were always in circuit court, and felony cases were in circuit court until an indictment was returned (or waived, or a probable cause finding was made by a judge) when they moved to superior court. This means every criminal case had to be handled to some extent by whatever number of circuit court judges there are across the state, which can be illustrated as:

~ 36 circuit court judges:	All misdemeanors from arrest to disposition
	All felonies from arrest to indictment
~ 22 superior court judges:	All felonies after indictment to disposition

After “Felonies First,” most misdemeanors are always in circuit court and handled by whatever number of circuit court judges there are across the state, while all felonies (and directly related misdemeanors and violations, and any misdemeanors that a prosecutor chooses to directly file into superior court) are always in superior court and handled by whatever number of superior court judges there are across the state, illustrated as:

~ 36 circuit court judges:	Most misdemeanors from arrest to disposition
~ 22 superior court judges:	All felonies from arrest to disposition
	Some misdemeanors from arrest to disposition

This “Felonies First” change shifted a lot of the criminal case workload from the circuit court judges to the superior court judges. Because there are fewer superior court judges, this in theory slowed down how quickly cases in superior court could get from arrest to disposition, while in theory it sped up how quickly cases in circuit court could get from arrest to disposition. But the time available to each circuit court judge and each superior court judge to hear criminal cases is determined by the administrative judges of the respective courts, using a weighted caseload system that allows more judicial hours for felonies than for misdemeanors and based on the workload data from each of the court locations.

**Workloads of NHPD branch office attorneys.**

All cases start at arraignment, and indigent defendants are most often “without counsel” at arraignment, because the arraignment is when the defendant fills out and turns in to the court the paperwork to request appointed counsel.

- NHPD branch offices provide one or more attorneys to be present during in-custody felony arraignments. Before “Felonies First” these arraignments were in the (approximately) 31 circuit court locations; after “Felonies First” these arraignments are in the 11 superior court locations. This means the NHPD branch offices have fewer court locations to staff each week for in-custody felony arraignments.
- NHPD attorneys generally do not appear at out-of-custody felony arraignments and do not appear at any misdemeanor arraignments. Although the NHPD in the past staffed out-of-custody felony arraignments, they stopped doing that well before the pandemic and unrelated to “Felonies First.”

After arraignment, the courts appoint the NHPD to represent indigent defendants, then the NHPD branch offices assign an individual NHPD attorney to each case (unless the NHPD declares a conflict necessitating assignment of a contract counsel



attorney or assigned counsel attorney). Most NHPD attorneys are assigned a mix of cases – some felonies in superior court, and some misdemeanors and juvenile delinquencies in circuit court. As explained, cases in superior court in theory may be taking longer from appointment of counsel to disposition than they did before “Felonies First,” while cases in circuit court may be moving more quickly from appointment of counsel to disposition than they did before “Felonies First.” With the presently available data it is not possible to determine how this affects the overall caseloads and workloads of the NHPD as a whole or of the individual NHPD attorneys, especially since there are more circuit court cases than superior court cases overall.

**Workloads and compensation of contract counsel attorneys and assigned counsel attorneys.** The NHPD is rarely able to determine that it has a conflict in a given case until after arraignment. As a result, contract counsel attorneys and assigned counsel attorneys are rarely assigned to any case until after the arraignment. Once assigned, the attorney must travel to the location of the court where the case is pending.

*Misdemeanors.* Before “Felonies First,” all misdemeanors were always heard in the circuit court and those misdemeanors in which the NHPD had a conflict were available for assignment to the individual contract/assigned counsel attorneys who accepted cases in the specific circuit court location in which the case was pending.

After “Felonies First,” misdemeanors that are directly related to a felony commence in the superior court and are assigned with their directly related felony to the individual contract/assigned counsel attorneys who accept cases in the superior court location in which the case is pending. This theoretically results in fewer conflict misdemeanor case assignments in the circuit court locations.

*Felonies.* Before “Felonies First,” all felonies (other than those originating through indictment rather than through arrest) were initially heard in the circuit court. Those felonies in which the NHPD had a conflict were available for assignment to the individual contract/assigned counsel attorneys

who accepted cases in the specific circuit court location in which the case was pending. If the conflict felony was disposed during its pendency in the circuit court, the contract/assigned counsel attorney would be paid in full for felony representation even if the case was dismissed or resolved as a misdemeanor. For contract counsel the felony I flat fee compensation was \$2,490 and the felony II flat fee compensation was \$825, which represented a higher amount of earnings per case for those that could be relatively quickly resolved while in the circuit court than for those that moved into the superior court and required more attorney time. By contrast, assigned counsel were paid the same hourly rate as today, of \$100 per hour for designated serious felonies and \$60 per hour for most felonies, and rarely reached the maximum payable fee for a felony case that was resolved in the circuit court. If a conflict felony case that had been assigned to a contract counsel attorney was not disposed in the circuit court, upon its transfer to the superior court, the case might have to be reassigned to a different contract counsel attorney, depending on whether the original contract counsel attorney was under contract with the judicial council to accept cases in the superior court location to which the case was transferred.

After “Felonies First,” all felonies (and their directly related misdemeanors and violations) originate in the superior court, where they remain through disposition of the case. Those felonies in which the NHPD has a conflict are available for assignment to the individual contract/assigned counsel attorneys who accept cases in the specific superior court location in which the case is pending. To whatever extent felony cases take longer from arrest to disposition than they previously did, this increases the caseloads of contract/assigned counsel attorneys who are assigned these cases. Many stakeholders believe that felony cases are less likely to resolve quickly after “Felonies First,” and to whatever extent this is true (discussed below), contract/assigned counsel attorneys are paid less per felony case on average. This is because contract counsel are paid the same flat fee compensation for a felony regardless of how little or how much time they must devote to the case, and assigned counsel are more likely to reach the maximum payable fee in a felony case that takes longer to resolve and thus be unpaid

for additional hours beyond those allowed by the maximum payable fee.

**Outcomes for indigent defendants arrested on felonies.** Some criminal defense attorneys believe that “Felonies First” has, overall, resulted in worse outcomes for defendants arrested on felonies. Some other stakeholders believe that the criminal defense attorneys simply dislike the manner in which prosecution is structured in New Hampshire and that the criminal defense attorneys dislike having to change the strategies and tactics they employ in representing their clients.

*Obtaining a misdemeanor disposition on a felony arrest.* As explained, before “Felonies First,” felony arrests were generally the responsibility of a municipal prosecutor in the circuit court from arrest until such time as the case was bound over to the superior court through indictment or waiver of indictment. While within the control of a municipal prosecutor, many felony arrests would be diverted or resolved as a misdemeanor in the circuit court – sometimes with the knowledge of the county attorney and sometimes without. If a person arrested on a felony pled guilty to a lesser-included misdemeanor in the circuit court, then that would most often preclude the defendant from ever being charged with the related felony.

After “Felonies First,” all felony cases (and their directly related misdemeanors and violations) are processed in superior court by the county attorney from arrest through disposition. Each county attorney, acting under the supervision of the attorney general, determines which felony arrests to initially prosecute as a felony and which felony arrests to refer to the municipal prosecutor for charging as a misdemeanor.

Defense attorneys can still use their knowledge, skill, and experience to demonstrate to and convince a county attorney that a felony arrest should be diverted for treatment or more properly charged as a misdemeanor. But many defense attorneys believe that county attorneys are not in as good a position to consider their arguments as were municipal prosecutors, for various reasons such as: county attorneys are elected and so must worry about public perceptions of their decision, while municipal prosecutors have no such concerns; and/or municipal prosecutors

have a better sense of the characteristics and circumstances of each individual defendant and the needs of the community, while county attorneys lack similar local knowledge. It is difficult if not impossible to assess the true effect that “Felonies First” had on the early disposition of felony arrests, because the extent to which municipal prosecutors made decisions without the assent of the county attorney varied greatly: some county attorneys and municipal prosecutors had good working relationships and the municipal prosecutor would not do anything without the agreement of the county attorney; some county attorneys and municipal prosecutors had bad working relationships and the municipal prosecutor would do whatever they pleased without regard to the desires of the county attorney; and some county attorneys were personally overseeing some or all cases in the circuit court locations anyway.

*Getting a “no probable cause” finding from a judge on a felony arrest.* Before “Felonies First,” the circuit court had jurisdiction over every felony case until indictment (or waiver of indictment, or a finding of probable cause at a preliminary hearing). At arraignment, a preliminary hearing was automatically scheduled in every felony case,<sup>f</sup> at which the circuit court judge would determine whether there was or was not probable cause to show that the charged offense was committed and that it was committed by the charged defendant. Even though preliminary hearings were automatically scheduled, they could be waived by the defendant or the date for holding them could be extended. If the preliminary hearing took place, the legal result of a circuit court judge finding no probable cause at a preliminary hearing was that the complaint was dismissed and the defendant was released from custody and/or bail obligations, but the county attorney could still indict the defendant on a felony, so the only true immediate legal benefit was for an in-custody defendant who had not been able to bail out of jail. A more tactical result of a no probable cause finding was that it might tend to undermine the prosecutor's confidence in securing a felony conviction, and so it might help the defense attorney convince the prosecutor to work out a reasonable plea agreement for the defendant. There are other

<sup>f</sup> By statute, within 10 days of arraignment for an in-custody defendant or within 20 days of arraignment for an out-of-custody defendant; in practice, usually within 21 to 30 days of arrest.

potential benefits and risks to a defendant from having a preliminary hearing, all of which the attorney must consider and advise the defendant about, so that the defendant can make an informed decision about whether to seek or waive a preliminary hearing.

After “Felonies First,” the superior court has jurisdiction over every felony case from arrest through disposition. Preliminary hearings are not automatically scheduled, and instead the defendant must file a motion requesting a preliminary hearing. (Nothing in U.S. Supreme Court case law, New Hampshire case law or statutes, or national standards on the provision

of the right to counsel says a felony defendant must automatically receive a preliminary hearing without the need to request one). If the defendant files a motion requesting a preliminary hearing, the court first rules on that motion, deciding whether probable cause is shown on the face of the paperwork in the case or that a hearing is necessary to determine whether there is probable cause. If the court grants a preliminary hearing, then one is scheduled.<sup>9</sup> Everything else about preliminary hearings is exactly the same as it was before “Felonies First.”

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<sup>9</sup> By statute, within 10 days of the motion being filed for an in-custody defendant or within 20 days of the motion being filed for an out-of-custody defendant.

## Chapter V

# Sufficient funding & compensation

The U.S. Supreme Court explained in *Cronic* that “[t]he right to the effective assistance of counsel” means that the defense must put the prosecution’s case through the “crucible of meaningful adversarial testing.”<sup>297</sup> For this to occur, an indigent person must be represented by an attorney who has the resources necessary to challenge the prosecution’s case. If the attorney lacks the necessary resources to challenge the state’s case – “if the process loses its character as a confrontation between adversaries”<sup>298</sup> – this is a structural impediment that results in the constructive denial of the right to counsel.

In New Hampshire, once an individual attorney is assigned to an indigent defendant’s case, that attorney must represent the defendant (whether adult or child) “at every stage of the proceedings until the entry of final judgment,”<sup>299</sup> unless authorized by a court to withdraw.<sup>300</sup> The attorney has a constitutional duty to provide effective assistance of counsel.<sup>301</sup>

While the attorney must decide in each case “what arguments to pursue, what evidentiary objections to raise, and what agreements to conclude regarding the admission of evidence,”<sup>302</sup> it is the defendant’s decision about “whether to plead guilty, waive the right to a jury trial, testify in one’s own behalf, and forgo an appeal.”<sup>303</sup> To aid the defendant in making these decisions and to effectively represent the defendant, the *New Hampshire Rules of Professional Conduct* require the attorney to:

- “at a minimum: (1) gather sufficient facts regarding the client’s problem from the client, and from other relevant sources; (2) formulate the material issues raised, determine applicable law and identify alternative legal responses; (3) develop a strategy, in consultation with the client, for solving the legal problems of the client; and (4)

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<sup>297</sup> *United States v. Cronic*, 466 U.S. 648, 656-57 (1984) (“The right to the effective assistance of counsel is thus the right of the accused to require the prosecution’s case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted – even if defense counsel may have made demonstrable errors – the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.”).

<sup>298</sup> *United States v. Cronic*, 466 U.S. 648, 656-57 (1984).

<sup>299</sup> N.H. REV. STAT. ANN. § 604-A:3 (2019).

<sup>300</sup> *See* N.H. R. SUP. CT. 47; N.H. R. CRIM. PROC. 5(h),(i),(j); N.H. FAM. DIV. R. 3.11, 3.12; “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶ 1, and Exh. A-1, ¶ 1 (for the term of July 1, 2019 through June 30, 2021); “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021,” Performance by Contractor - Term (sample).

<sup>301</sup> *E.g.*, *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (“the right to counsel is the right to the effective assistance of counsel”).

<sup>302</sup> *Gonzalez v. United States*, 553 U.S. 242, 248 (2008).

<sup>303</sup> *McCoy v. Louisiana*, 584 U.S. \_\_\_, 138 S. Ct. 1500, No. 16-8255 at 6 (2018); *Jones v. Barnes*, 463 U.S. 745, 751 (1983). *See* N.H. R. PROF’L CONDUCT 1.2.

undertake actions on the client’s behalf in a timely and effective manner including, where appropriate, associating with another lawyer who possesses the skill and knowledge required to assure competent representation,”<sup>304</sup>

- “act with reasonable diligence and promptness;”<sup>305</sup> and
- communicate with the client promptly and “explain the legal and practical aspects of a matter and alternative courses of action to the extent that such explanation is reasonably necessary to permit the client to make informed decisions regarding the representation.”<sup>306</sup>

For any attorney to fulfill their constitutional, statutory, and ethical duties to effectively represent an indigent defendant, the attorney must have resources of both time and money. The U.S. Constitution holds the State of New Hampshire responsible for ensuring adequate resources for the right to counsel under the Sixth and Fourteenth Amendments.<sup>307</sup>

This chapter explains the fiscal resources that are necessary to provide effective representation to indigent defendants. The next chapter explains the temporal resources that are necessary to provide effective representation to indigent defendants.

## A. Understanding the fiscal resources necessary for effective representation

The American Bar Association’s *Standards for Criminal Justice* explain that attorneys must have adequate resources and support (including secretarial, investigative, and expert services) and adequate facilities and equipment (such as computers, telephones, photocopying equipment, and office space to meet with clients) in order to render effective assistance of counsel.<sup>308</sup> All national standards require that: “Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses.”<sup>309</sup> Therefore, an attorney needs three types of resources to effectively represent each client.

- *Law office overhead.* For an attorney to be available to represent clients each day, certain expenses must be paid. These include office rent, furniture and equipment, computers and

<sup>304</sup> N.H. R. PROF’L CONDUCT 1.1.

<sup>305</sup> N.H. R. PROF’L CONDUCT 1.3.

<sup>306</sup> N.H. R. PROF’L CONDUCT 1.4.

<sup>307</sup> *Gideon v. Wainwright*, 372 U.S. 335, 341-45 (1963) (“[T]hose guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment. . . . [A] provision of the Bill of Rights which is ‘fundamental and essential to a fair trial’ is made obligatory upon the States by the Fourteenth Amendment. . . . [R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. . . . The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”).

<sup>308</sup> AMERICAN BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE – PROVIDING DEFENSE SERVICES, std. 5-1.4 cmt. (3d ed. 1992).

<sup>309</sup> AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, principle 8 cmt. (2002).

cellphones, telephone and internet and other utilities, office supplies including stationery, malpractice insurance, state licensing and bar dues, and legal research materials, plus the cost of staff such as a secretary or legal assistant. All of these expenses, commonly referred to as “overhead,” must be incurred before a lawyer represents a single client.<sup>310</sup>

- *Case-related expenses.* Once an attorney is designated to represent a specific client in a specific case, there are additional expenses that must be paid. These are expenses that the attorney would not incur but for representing that client, and they include, for example, postage to communicate with the client and witnesses and the court system, long-distance and collect telephone charges, mileage and other travel costs to and from court and to conduct investigations, preparation of copies and exhibits, costs incurred in obtaining discovery, and the costs of hiring necessary investigators and experts in the case. These costs vary from case to case; some cases requiring very little in the way of expense, other cases costing quite a lot. The individual expenses that are necessary, though, must be paid for in every client’s case.
- *Fair lawyer compensation.* This is the attorney’s pay.

In 1983, the New Hampshire Supreme Court provided a helpful way of understanding the distinction between an attorney’s compensation and other necessary expenses:

Legal fees . . . represent compensation paid to an attorney for the professional services rendered, both in court and out of court, in preparing for the defense of the indigent client he was appointed to represent. . . . In common parlance, the compensation paid an attorney is a ‘fee’; this is in contradistinction to the recovery of ‘costs’ or ‘expenses’ incident to the litigation, which reimburses the attorney for reasonably incurred out-of-pocket expenses in defense of the case.<sup>311</sup>

The government is responsible for providing the resources needed in each indigent person’s case. It can do so by providing a government paid-for building stocked with all the necessary supplies and equipment and a budget for investigation, experts, and support staff. Or it can do so by paying or repaying the appointed attorneys for these expenses. What government *cannot* do, as has been held by state supreme courts all across the country, is place the burden of paying for the indigent defense system onto the appointed attorneys.<sup>312</sup>

<sup>310</sup> “The 2012 Survey of Law Firm Economics by ALM Legal Intelligence estimates that over 50 percent of revenue generated by attorneys goes to pay overhead expenses,” NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, RATIONING JUSTICE: THE UNDERFUNDING OF ASSIGNED COUNSEL SYSTEMS 8 (Mar. 2013), and overhead tends to be a higher percentage of gross receipts as a law office gets smaller. See ALM LEGAL INTELLIGENCE, 2012 SURVEY OF LAW FIRM ECONOMICS, Executive Summary at 4 (showing overhead ranging from 38.9 percent of receipts in the largest law firms to 47.2 percent in smaller law offices).

<sup>311</sup> State v. Robinson, 123 N.H. 665, 668 (N.H. 1983).

<sup>312</sup> See, e.g., Wright v. Childree, 972 So. 2d 771, 780-81 (Ala. 2006) (determining assigned counsel are entitled to a reasonable fee in addition to overhead expenses); DeLisio v. Alaska Superior Court, 740 P.2d 437, 443 (Alaska 1987) (concluding that “requiring an attorney to represent an indigent criminal defendant for only nominal compensation unfairly burdens the attorney by disproportionately placing the cost of a program intended to benefit the public upon the attorney rather than upon the citizenry as a whole;” and that Alaska’s constitution “does not

In 1978, the New Hampshire Supreme Court noted that “the people of New Hampshire decided,” in 1966, that the cost of “providing indigent persons with legal representation in criminal cases . . . should be borne by the State,” and that the language of the state’s constitution “plainly requires that the cost of services rendered by attorneys on behalf of indigent defendants be borne by the government of this State.”<sup>313</sup> Just five years later, in 1983, the court explained:

The right to counsel, as guaranteed by the sixth amendment and part I, article 15 of our own constitution, would be meaningless if counsel for an indigent defendant is denied the use of the working tools essential to the establishment of a tenable defense because there are no funds to pay for these items. The State must provide the defense with these tools.

. . . [L]awyers have no more obligation to pay the needed expenses of a criminal defense (e.g., expert witness fees, costs associated with scientific tests, investigative costs, or deposition costs) than any other class of citizens . . .

. . . [T]he failure to reimburse an attorney who spends his own funds to purchase the reasonably necessary tools of defense is a taking of his financial resources which violates the State and Federal Constitutions. The public has the responsibility to pay for the administration of criminal justice, and the legislature or the courts have no right or legitimate reason to attempt to spare the public the expense of providing for the costs associated with the defense of an indigent by thrusting those expenses upon an individual citizen who happens to be an attorney.<sup>314</sup>

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

<sup>313</sup> *Smith v. State*, 118 N.H. 764, 768, 769 (N.H. 1978) (internal citations omitted).

<sup>314</sup> *State v. Robinson*, 123 N.H. 665, 669 (N.H. 1983) (internal citations omitted).

## B. Indigent defense system funding & expenditures

The State of New Hampshire provides all funding for the indigent defense system through a general fund appropriation to the judicial council.<sup>315</sup> By October of every even-numbered year (preceding the biennial legislative session<sup>316</sup>), the judicial council must submit an “efficiency expenditure request” requesting state appropriation to fund its responsibilities, with expenditures broken down for the first and second fiscal years of the coming fiscal biennium and identifying the source of funding for all expenditures.<sup>317</sup> For example, the judicial council submitted its appropriations request for the FY 2020 - FY 2021 biennium in the fall of 2018, then the legislature adopted the state’s operating budget in June of 2019, and the appropriations became available for expenditure on July 1, 2019.

The following table shows the amounts spent by the state through the judicial council during FY 2016 through FY 2021 for: the contract to provide the public defender program; all contract counsel attorneys; all assigned counsel attorneys; all case-related expenses; and training for contract counsel attorneys.<sup>318</sup> These appropriations are for both the trial and appellate level of all cases in which attorneys are appointed to represent indigent defendants.

### STATE FUNDING TO THE JUDICIAL COUNCIL FOR INDIGENT DEFENSE SERVICES, FY 2016 THROUGH FY 2021

	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021
	Actual	Adjusted Authorized	Actual	Adjusted Authorized	Actual	Adjusted Authorized
Public defender program	\$19,541,710	\$20,127,961	\$21,189,719	\$22,215,177	\$23,119,355	\$23,751,832
Contract counsel	\$1,811,153	\$1,799,600	\$2,163,835	\$1,980,000	\$1,759,367	\$2,030,000
Contract counsel – training	0	0	0	0	\$1,758	\$3,000
Assigned counsel *	\$1,305,598	\$940,000	\$1,729,981	\$1,380,000	\$1,449,091	\$1,480,000
Ancillary non-counsel service **	\$872,711	\$930,000	\$1,379,971	\$930,000	\$1,879,899	\$1,030,000

\* Assigned counsel funding has two components: attorney compensation in adult criminal and juvenile delinquency cases (assessed in this evaluation); and attorney compensation in representation of parents in abuse and neglect cases (outside the scope of this evaluation). The amounts shown in the table are for both.  
 \*\* Ancillary non-counsel service is those expenses referred to by the judicial council as “services other than counsel” and discussed in this report as “case-related expenses.”

<sup>315</sup> N.H. REV. STAT. ANN. §§ 494:3, 604-A:1 (2019). *See, e.g.*, NEW HAMPSHIRE OPERATING BUDGET, 2020-2021 BIENNIAL, pp. 308-12; NEW HAMPSHIRE JUDICIAL COUNCIL, 22ND BIENNIAL REPORT JULY 1, 2011 – JUNE 30, 2013, at 6-7 (Mar. 2014).

<sup>316</sup> The legislature assembles in two-year sessions that begin on the first Wednesday of December in even numbered years. N.H. CONST. pt. II, art. 3.

<sup>317</sup> N.H. REV. STAT. ANN. §§ 9:1, 9:4(I), 9:4(IV), 9:4-a (2019). The “efficiency expenditure request” is defined as “the cost of providing the services authorized and funded in the preceding biennium, considering and incorporating changes in the population and other factors outside the control of the department, . . .” N.H. REV. STAT. ANN. § 9:4(II) (2019). Its purpose is to identify the expenditures necessary to “fund current statutory requirements” and desired changes to statutes & rules “that will provide improved quality of services to the citizens of New Hampshire as a result of improved department efficiencies and performance.” N.H. REV. STAT. ANN. § 9:4(III) (2019).

<sup>318</sup> Figures for FY 2016 & FY 2017 are from STATE OF NEW HAMPSHIRE, 2018-2019 BIENNIAL BUDGET REQUEST, at 874-911. Figures for FY 2018 & FY 2019 are from STATE OF NEW HAMPSHIRE, 2020-2021 BIENNIAL BUDGET REQUEST, at 801-848. Figures for FY 2020 & FY 2021 are from STATE OF NEW HAMPSHIRE, 2022-2023 BIENNIAL BUDGET REQUEST, at 862-898.



From the funds appropriated by the state, the judicial council must pay, in the case of each indigent defendant (adult and child): the compensation to the appointed attorney; and the cost of “investigative, expert and other services and expenses, including process to compel the attendance of witnesses,” whenever a court finds those expenses to be “necessary for an adequate defense before the courts of this state.”<sup>319</sup>

If the initial state appropriation is insufficient to pay for the judicial council’s statutorily required responsibilities during a fiscal year, the judicial council goes first to the legislature’s fiscal committee to request the necessary additional funding.<sup>320</sup> If the fiscal committee approves, then the governor and council can authorize the needed additional funding to the judicial council “from any money in the treasury not otherwise appropriated.”<sup>321</sup>

The manner in which the judicial council uses the state-appropriated funding to compensate the attorney for representing an indigent defendant and to pay the other necessary expenses in that defendant’s case operates differently for cases handled by each of the three parts of the state’s indigent defense system.

- For indigent defendants represented by the NHPD, state law requires the judicial council to pay for the cost of operating the public defender program according to the terms of the judicial council’s two-year contract with the NHPD.<sup>322</sup> The judicial council contract requires the NHPD to pay for all attorney compensation, overhead costs, and case-related expenses out of the contract funds that the judicial council pays to the NHPD,<sup>323</sup> but for the most part the judicial council delegates to the NHPD the authority to determine what personnel, overhead, and expenses to provide and how much to pay for them. The NHPD’s staff attorneys are salaried, while the NHPD’s subcontractor attorneys are paid a flat fee per case in the same manner as contract counsel attorneys. In some instances, the judicial council pays for certain case-related expenses incurred by the NHPD in addition to the contract funding.
- For indigent defendants represented by contract counsel attorneys, the judicial council pays the contract counsel attorneys according to the terms of the judicial council’s one-year contract that it awards to each contract counsel. The judicial council pays contract counsel a flat fee at the time a case is assigned (with some possibility of additional compensation), and contract counsel attorneys must pay for all of their required overhead and some case-related expenses (costs of legal research, travel, and communications). What remains after contract counsel pay these costs is the attorney’s pay. For other case-related expenses, the judicial council pays when ordered to do so by a court.
- For indigent defendants represented by assigned counsel attorneys, the judicial council pays the assigned counsel attorneys as ordered by a court, at an hourly rate and with a maximum possible fee per case as provided by rules of the New Hampshire Supreme

<sup>319</sup> N.H. REV. STAT. ANN. § 604-A:1 (2019).

<sup>320</sup> N.H. REV. STAT. ANN. § 604-A:1-b (2019).

<sup>321</sup> N.H. REV. STAT. ANN. § 604-A:1-b (2019).

<sup>322</sup> N.H. REV. STAT. ANN. § 604-B:4 (2019).

<sup>323</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, ¶¶ 1.8, 5, 7.1, and Exh. B (for the term of July 1, 2019 through June 30, 2021).

Court. Assigned counsel attorneys must pay for all of their own overhead. For any case-related expenses, the judicial council pays when ordered to do so by a court.

For numerous reasons – because of differences in how attorney compensation, overhead, and case-related expenses are paid; and because of the different reporting requirements and judicial council record-keeping for each of the three parts of the state’s indigent defense system; and because the judicial council has never been sufficiently staffed – the judicial council, and through it the policymakers and taxpayers of New Hampshire, does not have sufficient information to accurately project the necessary fiscal components of representing indigent defendants. All of this information is necessary for policymakers and justice system stakeholders to understand in order to plan for the future needs of New Hampshire’s indigent defense system and ensure adequate fiscal resources to provide effective representation to each indigent defendant.

## 1. Judicial council funding of case-related expenses

For FY 2020 and FY 2021, the State of New Hampshire appropriated \$2,060,000 to the judicial council for the cost of paying the reasonably necessary case-related expenses of all indigent defendants,<sup>324</sup> referred to in statutes and by the judicial council as “services other than counsel” or “ancillary non-counsel service.” These case-related expenses can include, if needed in any given case, for example: experts to consult with the defense, examine and/or diagnose the defendant, and/or testify; investigators; social workers; translators to enable the attorney to communicate with the defendant and potential witnesses; the cost of issuing and serving subpoenas; and travel, communication, and copying costs, among other out-of-pocket expenses the appointed attorney may reasonably incur in defense of their appointed client. The manner in which an appointed attorney obtains the “services necessary to an adequate defense” of their assigned client varies depending on whether the attorney is an NHPD staff attorney, an NHPD subcontractor attorney, a contract counsel attorney, or an assigned counsel attorney. (*See* side bar explaining the process for an attorney to obtain “services necessary to an adequate defense” of their assigned client, at page 114.)

The amount that the state initially appropriates to the judicial council to make all court-ordered payments and reimbursements for case-related expenses necessary to the representation of indigent defendants consistently turns out to be significantly insufficient each year. The following table shows the state’s initial appropriation to the judicial council and the judicial council’s actual expenditures for case-related expenses of indigent defendants in FY 2018 through FY 2021.

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<sup>324</sup> NEW HAMPSHIRE OPERATING BUDGET, 2020-2021 BIENNIAL, at 308-312. \$1,030,000 is appropriated for each fiscal year.

**APPROPRIATED FUNDING AND ACTUAL EXPENDITURES  
FOR CASE-RELATED EXPENSES, FY 2018 THROUGH FY 2021**

	Initial state appropriation	Actual judicial council expenditure	Additional funding required
FY 2018	\$930,000	\$1,379,971	\$449,971
FY 2019	\$930,000	\$1,931,238	\$1,001,238
FY 2020	\$1,030,000	\$1,879,899	\$849,899
FY 2021	\$1,030,000	\$1,514,350	\$484,350

As a result, each year the judicial council has to request the necessary additional funding from the legislature’s fiscal committee and then the governor and council, as authorized by statute.<sup>325</sup> To date, the state has always authorized the additional funding to the judicial council, but there is nothing that guarantees the additional state funding will always be made available, which means that NHPD attorneys, contract counsel attorneys, and assigned counsel attorneys could be left bearing the financial responsibility or service providers could go unpaid.

## 2. NHPD funding & expenditures

Because the NHPD is a non-profit law firm, all of the funding it receives must be spent on its corporate objective of providing professional legal assistance to indigent New Hampshire defendants<sup>326</sup> – there are no owners, like in a for-profit law office, who reap profits after all costs of operating the law firm are paid.<sup>327</sup> The NHPD board of directors is responsible for managing the business and affairs of the NHPD.<sup>328</sup>

The largest portion of the NHPD’s regular annual funding comes from the State of New Hampshire, although the NHPD can and does from time to time receive funding from other sources. All expenditures made by the NHPD are either for its overhead (including for compensating attorney employees and subcontractors) or case-related expenses on behalf of indigent defendants whom its attorneys are assigned to represent.

<sup>325</sup> See N.H. REV. STAT. ANN. § 604-A:1-b (2019).

<sup>326</sup> “Articles of Agreement of New Hampshire Public Defender,” art. 2 and By-Laws, art. III (as amended through Jan. 5, 1987).

<sup>327</sup> The NHPD’s corporate documents provide that: “[n]o part of the net earnings of the corporation shall inure to the benefit of any member, trustee, director, officer of the corporation, or any private individual . . . , and no member, trustee, officer shall be entitled to share in the distribution of any of the corporate assets upon dissolution of the corporation;” and “[i]n the event of dissolution, all of the remaining assets and property of the corporation shall after payment of necessary expenses thereof be distributed to such organizations as shall qualify under section 501(c)(3) of the Internal Revenue Code of 1954, as amended, or to the Federal government, or to a state or local government, for a public purpose, or to another organization to be used in such manner as in the judgment of a Justice of the supreme Court of the State of New Hampshire will best accomplish the general purposes for which this corporation was formed.” “Articles of Agreement of New Hampshire Public Defender,” arts. 3, 5B, 5D, and By-Laws (as amended through Jan. 5, 1987).

<sup>328</sup> “Articles of Agreement of New Hampshire Public Defender,” art. 2 and By-Laws, art. IV (as amended through Jan. 5, 1987).

*a. Funding from sources other than the State of New Hampshire*

Nothing prohibits the NHPD from receiving funds from a source other than the State of New Hampshire. The judicial council does not have authority to direct how the NHPD spends any funds it receives from other sources, and it does not appear to have any authority to require the NHPD to explain how it spends those funds.

**Interest income.** Because the judicial council advances funds to the NHPD each six months,<sup>329</sup> the NHPD earns some amount of interest on those funds. The NHPD reported to the judicial council that it earned a total of \$45,844.73 in interest income during FY 2020 and FY 2021 combined.<sup>330</sup> The NHPD retains the interest it earns (as long authorized by the New Hampshire house finance committee); that earned interest is not included in calculating any refund that the NHPD must make to the judicial council at the end of its two-year judicial council contract.<sup>331</sup>

**Federal funding.** As a result of the covid-19 pandemic, during the FY 2020 – FY 2021 biennium, the NHPD received two types of funding through the federal government. The NHPD reports that it “received \$271,855 in Federal Cares Act funds to offset the expense of IT equipment needed to effectively work remotely during the pandemic.” The NHPD also reports that it received a Paycheck Protection Program loan of \$3.2 million through the U.S. Small Business Administration, and the NHPD learned in 2021 that it is not required to repay this loan. The funds that the NHPD received from the federal government during FY 2020 and FY 2021 were not reflected in the NHPD’s annual financial reports to the judicial council,<sup>332</sup> but the judicial council was aware of the federal funding and asked the NHPD about it, and its existence was formally reported to the judicial council through the NHPD’s independent auditor’s report for FY 2020 and FY 2021.<sup>333</sup>

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<sup>329</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, ¶ 5 and Exh. B, ¶¶ 3, 5 (for the term of July 1, 2019 through June 30, 2021).

<sup>330</sup> NEW HAMPSHIRE PUBLIC DEFENDER, STATEMENT OF REVENUE AND EXPENDITURES (June 30, 2021); NEW HAMPSHIRE PUBLIC DEFENDER, STATEMENT OF REVENUE AND EXPENDITURES (June 30, 2020).

<sup>331</sup> See “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. B, ¶ 7 (for the term of July 1, 2019 through June 30, 2021).

<sup>332</sup> NEW HAMPSHIRE PUBLIC DEFENDER, STATEMENT OF REVENUE AND EXPENDITURES (June 30, 2021); NEW HAMPSHIRE PUBLIC DEFENDER, STATEMENT OF REVENUE AND EXPENDITURES (June 30, 2020).

<sup>333</sup> See NEW HAMPSHIRE PUBLIC DEFENDER, FINANCIAL STATEMENTS FOR THE YEARS ENDED JUNE 30, 2021 AND 2020 TOGETHER WITH INDEPENDENT AUDITOR’S REPORT (Nov. 8, 2021).

## The process for an attorney to obtain “services necessary to an adequate defense” of their assigned client

When an appointed attorney believes there are “services necessary to an adequate defense” of their appointed client, state law requires the attorney to apply to the court in which the case is pending to request authorization to obtain those services.<sup>a</sup> The attorney is allowed to file the application for funds *ex parte* and request that it be sealed “until the conclusion of the representation,” meaning that the prosecution is not privy to the contents of the application but only aware of the fact that the application has been made.<sup>b</sup> If the court finds that the services are necessary, “the court shall authorize counsel to obtain the necessary services on behalf of the defendant” and set the “reasonable compensation” to be paid for the service.<sup>c</sup> The superior court pre-authorizes appointed attorneys to expend up to \$500 per occurrence to obtain some specific services in criminal cases pending in the superior court, without first filing an application with the court but subject to the court’s subsequent approval.<sup>d</sup>

Once the service is obtained and generally not later than 60 days following disposition of a case, the appointed attorney files a claim with the court.<sup>e</sup> The court certifies the specific amount to be paid to the service provider (or reimbursed to the attorney for an expense the attorney has already paid), and upon receipt of that court certification the judicial council must pay for the service out of the funds appropriated to it for that purpose.<sup>f</sup> Rules of the New Hampshire Supreme Court place limits on the types of case-related expenses that a court can order the judicial council to pay.<sup>g</sup>

This procedure is how all contract counsel attorneys and assigned counsel attorneys obtain payment by or reimbursement from the judicial council for any case-related expenses on behalf of the indigent defendants whom they represent (with one possible exception for consulting with an expert about immigration law matters), and it is also how all NHPD subcontractor attorneys obtain case-related expenses other than for investigators (with the same possible exception for consulting with an expert about immigration law matters). The judicial council contract with each contract counsel imposes further requirements about some types of case-related expenses that contract counsel attorneys must incur and the types for which they can be reimbursed.<sup>h</sup>

The judicial council contract with the NHPD requires the NHPD to provide, out of the judicial council contract funding, all necessary case-related expenses on behalf of the indigent defendants who are assigned to be represented by any NHPD attorney.<sup>i</sup> Nonetheless, the NHPD uses the procedure explained above to obtain payment by or reimbursement from the judicial council (in addition to the judicial council’s contractual funding of the NHPD) for: experts (other than consulting with an expert about immigration law matters); translators; evaluations of defendants by a licensed drug and alcohol counselor; and the cost of a defendant’s transportation to obtain a competency evaluation.

<sup>a</sup> N.H. REV. STAT. ANN. § 604-A:6 (2019).

<sup>b</sup> N.H. REV. STAT. ANN. § 604-A:6 (2019).

<sup>c</sup> N.H. REV. STAT. ANN. § 604-A:6 (2019).

<sup>d</sup> N.H. Superior Court Administrative Order 2019-002 Amended (N.H. Super. Ct. Sept. 17, 2019). This pre-authorization is effective in all superior court locations since November 13, 2019. It authorizes attorneys to expend up to \$500 per occurrence for: investigation; translation; deposition stenography; non-expedited transcription of proceedings; and evaluation of a defendant by a licensed drug and alcohol counselor.

<sup>e</sup> N.H. REV. STAT. ANN. §§ 604-A:6, 604-A:8 (2019).

<sup>f</sup> N.H. REV. STAT. ANN. § 604-A:8 (2019).

<sup>g</sup> N.H. SUP. CT. R. 47, 48. Rule 47 by its express terms applies only to cases “in which assigned counsel is appointed to

represent indigent criminal defendants,” but the judicial council’s contract with contract counsel requires contract counsel attorneys to follow the same procedure as assigned counsel attorneys to obtain necessary case-related services. “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021,” ¶ 3 (sample). Rule 48 is broader and applies to all cases “in which counsel is appointed to represent indigent persons, other than criminal defendants.”

<sup>h</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021” (sample).

<sup>i</sup> See “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, ¶¶ 5, 5.2, 7.1, and Exh. A., ¶¶ 1, 2, 3, 4, 5, 7, and Exh. B., ¶ 1 (for the term of July 1, 2019 through June 30, 2021).

*b. Funding from the State of New Hampshire*

For FY 2020 and FY 2021, the State of New Hampshire appropriated \$46,871,187 to the judicial council for the total cost of operating the public defender program.<sup>334</sup> State law requires the judicial council to pay for the cost of operating the public defender program through the terms of the judicial council's contract with the NHPD.<sup>335</sup> For the period of July 1, 2019 through June 30, 2021, the judicial council contracted to pay the NHPD a total of not more than \$46,871,187,<sup>336</sup> in four installments of:

- \$11,559,677 for July 1, 2019 through December 31, 2019;
- \$11,559,678 for January 1, 2020 through June 30, 2020;
- \$11,875,916 for July 1, 2020 through December 31, 2020; and
- \$11,875,916 for January 1, 2021 through June 30, 2021.<sup>337</sup>

This is “the only and the complete” compensation that the judicial council can pay to the New Hampshire Public Defender.<sup>338</sup> Despite this contractual command, the NHPD does receive some additional funds from the judicial council for case-related expenses such as experts and translators (*see* discussion of case-related expenses at pages 111-112 and side bar explaining the process for an attorney to obtain “services necessary to an adequate defense” of their assigned client at page 114). The NHPD must refund to the state, within 80 days of the end of the two-year contract term, any amount it received from the judicial council that exceeds the operational expenses of the NHPD during the term of the contract.<sup>339</sup>

The judicial council is statutorily required to exercise “general supervision” over the NHPD in “fiscal and budgetary matters,”<sup>340</sup> and it does this by imposing certain reporting requirements on the NHPD. The NHPD must provide to the judicial council:

- quarterly, a statement of all expenses incurred in operating the NHPD;<sup>341</sup>
- annually:<sup>342</sup>
  - a statement of all NHPD operational expenses;
  - a copy of an annual audit by a certified public accountant; and
  - a complete inventory list and statement of value of the equipment in which the state

<sup>334</sup> NEW HAMPSHIRE OPERATING BUDGET, 2020-2021 BIENNIAL, at 308-312. \$23,119,355 is appropriated for FY 2020; and \$23,751,832 is appropriated for FY 2021.

<sup>335</sup> N.H. REV. STAT. ANN. § 604-B:4 (2019).

<sup>336</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, ¶ 1.8 and Exh. B (for the term of July 1, 2019 through June 30, 2021).

<sup>337</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. B, ¶¶ 3, 5 (for the term of July 1, 2019 through June 30, 2021).

<sup>338</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, ¶ 5.2 (for the term of July 1, 2019 through June 30, 2021).

<sup>339</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. B, ¶ 7 (for the term of July 1, 2019 through June 30, 2021).

<sup>340</sup> N.H. REV. STAT. ANN. § 604-B:5 (2019).

<sup>341</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. C, ¶ 2.E. (for the term of July 1, 2019 through June 30, 2021).

<sup>342</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. C, ¶¶ 2.F. through 2.J. (for the term of July 1, 2019 through June 30, 2021).

- retains a reversionary interest;<sup>343</sup> and
- at any time requested by the judicial council:<sup>344</sup>
  - “[a]ll records of NHPD regarding expenses of operation of NHPD;”
  - time records; and
  - a list of personnel, job descriptions, and salary levels.

Additionally, the judicial council contract for the FY 2020 - FY 2021 biennium required the NHPD to undergo a financial risk assessment during the first six months of FY 2020, with the report of that assessment to be provided to the judicial council.<sup>345</sup> The report of the financial risk assessment found that, until FY 2018, the NHPD had a director of administration & finance who oversaw the NHPD’s finances, accounting, human resources, IT, and office administrators.<sup>346</sup> When the person who held that position left the NHPD, the position was not filled and instead the NHPD transferred those responsibilities to others in the NHPD’s central administration.<sup>347</sup> (The judicial council had disagreed with the NHPD’s decision to eliminate the director of administration & finance position during FY 2018, and it was in large part because of that disagreement that the judicial council required a financial risk assessment of the NHPD during the FY 2020 – FY 2021 contract.) The NHPD’s business manager prepares the quarterly statements of revenue and expenditures that the NHPD provides to the judicial council.<sup>348</sup>

The table on page 117 shows the revenue and expenses reported by the NHPD to the judicial council in the NHPD’s quarterly unaudited financial reports for FY 2020 and FY 2021.

<sup>343</sup> The state retains a reversionary interest in “all equipment with a useful life of greater than two years, such as books, office equipment, telephones, desks and chairs” that NHPD purchased with funds provided under the contract. “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. C, ¶ 3 (for the term of July 1, 2019 through June 30, 2021).

<sup>344</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. C, ¶¶ 2.B. through 2.D. (for the term of July 1, 2019 through June 30, 2021).

<sup>345</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶ 12 (for the term of July 1, 2019 through June 30, 2021).

<sup>346</sup> See BERRYDUNN, NEW HAMPSHIRE PUBLIC DEFENDER OPERATIONAL ASSESSMENT, at 5 (Oct. 9, 2020).

<sup>347</sup> See BERRYDUNN, NEW HAMPSHIRE PUBLIC DEFENDER OPERATIONAL ASSESSMENT, at 5 (Oct. 9, 2020). Among other recommendations, the report of the financial risk assessment of the NHPD found that the NHPD should have a director of finance, explaining:

As a result of the DAF [director of administration and finance] position being eliminated, we found that an important oversight functions were also eliminated. While the day-to-day accounting functions have continued, the oversight of these functions and the financial reporting associated with more complex accounting treatments have not been performed. The Organization [NHPD] does not have an individual on staff with the knowledge of financial reporting in accordance with GAAP and ability to implement sound internal controls over financial reporting. This can be accomplished either through hiring an employee or outsourcing the key controls, reviews and tasks below to an independent third-party.

BERRYDUNN, NEW HAMPSHIRE PUBLIC DEFENDER OPERATIONAL ASSESSMENT, at 6 (Oct. 9, 2020). On October 29, 2020, the judicial council requested that the NHPD provide its plan for implementing the recommendations made in the report of the financial risk assessment. In November 2020, the NHPD board of directors made decisions about the report’s recommendations and implemented the report’s recommendations about finance and accounting in January 2021 by out-sourcing the recommended responsibilities to a certified public accountant who is not an employee of the NHPD.

<sup>348</sup> See BERRYDUNN, NEW HAMPSHIRE PUBLIC DEFENDER OPERATIONAL ASSESSMENT, at 5 (Oct. 9, 2020).

## NHPD REPORT TO JUDICIAL COUNCIL OF RECEIPTS AND EXPENDITURES, FY 2020 AND FY 2021

	FY 2020	FY 2021	Biennium total
<b>Support &amp; Revenue</b>			
Grant-State of New Hampshire	23,119,355.00	23,751,832.00	46,871,187.00
Interest Income	28,309.49	17,535.24	45,844.73
<b>TOTAL SUPPORT &amp; REVENUE</b>	<b>23,147,664.49</b>	<b>23,769,367.24</b>	<b>46,917,031.73</b>
<b>Expenses &amp; Encumbrances</b>			
Personnel Expenses *	19,750,754.44	20,218,170.56	39,968,925.00
Contract Services **	222,147.25	195,715.00	417,862.25
Non-Personnel Expenses			
Rent	1,358,225.33	1,382,274.65	2,740,499.98
Telephone	189,724.95	196,926.01	386,650.96
Travel	207,403.50	51,724.31	259,127.81
Repairs & Maintenance	196,809.81	263,536.34	460,346.15
Insurance – Malpractice & Property/Liability	53,528.03	56,151.47	109,679.50
Training	75,302.01	13,055.70	88,357.71
Office Supplies	49,200.34	64,749.92	113,950.26
Other Office Expense	374,057.27	512,353.80	886,411.07
Library Maintenance	47,774.55	23,205.83	70,980.38
Utilities	122,032.15	110,727.51	232,759.66
Dues & Licenses	76,342.02	84,586.01	160,928.03
Professional Services ***	35,957.50	64,449.32	100,406.82
Capital Expenditures	9,707.98	507,154.30	516,862.28
<b>TOTAL EXPENSES &amp; ENCUMBRANCES</b>	<b>22,768,967.13</b>	<b>23,744,780.73</b>	<b>46,513,747.86</b>
<b>BALANCE REMAINING</b>	<b>378,697.36</b>	<b>24,586.51</b>	<b>403,283.87</b>

\* Personnel Expenses is, for all NHPD employees: salaries & wages, payroll taxes, fringe benefits, and worker's comp insurance.

\*\* Contract Services is payments to NHPD subcontractor attorneys.

\*\*\* Non-Personnel Expenses – Professional Services includes annual audit by CPA, immigration consulting contract, and for FY 2020 the financial risk assessment.



## Past & future state funding of the contract public defender program

Over the 15 years since FY 2006, the state appropriation to the judicial council for the public defender program, operated by the NHPD, has increased from \$12,591,856 in FY 2006 to \$23,751,832 in FY 2021, as shown in the following table.

STATE APPROPRIATION FOR PUBLIC DEFENDER PROGRAM, FY 2006 THROUGH FY 2023

Fiscal year	Appropriation	Change from previous year
FY 2006	\$12,591,856	
FY 2007	\$13,380,147	\$788,291
FY 2008	\$16,580,646	\$3,200,499
FY 2009	\$17,929,754	\$1,349,108
FY 2010	\$18,447,997	\$518,243
FY 2011	\$18,957,447	\$509,450
FY 2012	\$18,779,447	(\$178,000)
FY 2013	\$18,875,447	\$96,000
FY 2014	\$18,875,447	\$0
FY 2015	\$19,541,710	\$666,263
FY 2016	\$19,541,710	\$0
FY 2017	\$20,127,961	\$586,251
FY 2018	\$21,189,719	\$1,061,758
FY 2019	\$22,215,177	\$1,025,458
FY 2020	\$23,119,355	\$904,178
FY 2021	\$23,751,832	\$632,477
FY 2022	\$23,751,832	\$0
FY 2023	\$23,751,832	\$0

The greatest portion by far of the NHPD's funding is spent on the compensation of attorneys to represent indigent defendants and the compensation of support personnel necessary for the attorneys to provide effective representation. (See table of NHPD expenditures at page 117.) When state funding to the NHPD increases, the NHPD generally applies most of that additional funding to hire additional attorneys and support personnel or to give modest pay increases – typically 2% or 3% cost-of-living raises – to existing personnel. Because most of the NHPD's

expenditures are for personnel, any decrease in funding from the state means that the NHPD must consider whether to let go of some personnel, not replace personnel who leave the NHPD, or decrease compensation or benefits to existing personnel.

The NHPD must always be projecting three to four years down the road about what it thinks the state funding will be for the public defender program (assuming the judicial council will award the next public defender program contract to the NHPD) in order to plan for the number of personnel it can employ and what it can pay them. For example, the judicial council submitted its appropriations request to the state for the FY 2020 - FY 2021 biennium in the fall of 2018. In February 2019, the judicial council issued its request for proposals to provide the public defender program for the coming biennium, and the NHPD signed its contract with the judicial council on May 30, 2019. Then the legislature adopted the state's operating budget in June of 2019, and the appropriations became available to the judicial council for expenditure to the NHPD public defender program on July 1, 2019 at the start of the two-year biennium that ended on June 30, 2021.

The process for funding the FY 2022 - FY 2023 biennium that ends June 30, 2023 began during the summer to fall of 2020, when the effects of the coronavirus pandemic in the U.S. were at an extreme. The judicial council once again awarded the public defender program contract to the NHPD for the FY 2022 - FY 2023 biennium,<sup>a</sup> and the state appropriated a stand-still budget (at the same amount as its FY 2021 appropriation) of \$23,751,832 for the public defender program in each fiscal year of the biennium. But even now, no one can be certain what effects the coronavirus pandemic will have on the state's fiscal resources and on the fiscal requirements of the justice system over the next several years.

<sup>a</sup> "Agreement" between the State of New Hampshire Judicial Council and the New Hampshire Public Defender (for the term of July 1, 2021 through June 30, 2023).

Many people who worked in New Hampshire's criminal justice system at the time of the 2008 economic recession vividly recall that the NHPD laid off personnel during 2010 and reduced some employment benefits for the remaining personnel, all ahead of the state actually decreasing its appropriation for the public defender program during FY 2012. There is "a lot of fear" among NHPD trial attorneys that there will, sooner or later, be similar layoffs and further loss of benefits as a result of the coronavirus pandemic.

As of the date of this report, the NHPD has not laid off any personnel as a result of the pandemic, and in fact the NHPD reports that it is struggling to

retain a sufficient number of attorneys and support staff. For example, the NHPD executive director reports that 20 NHPD attorneys (over 15% of the NHPD's attorney staff) tendered their resignations during the first 10 months of FY 2021 – perceived to be a result mostly of lower pay than that of other attorneys in the criminal justice system and without regular cost-of-living increases, heavy workloads, and the stress of returning to in-person work in the continuing pandemic environment. In an attempt to stave off further staff resignations, during May 2021 the NHPD made a one-time retention payment, of 3% of each employee's annual compensation, to every employee.

*c. NHPD expenditures for indigent defense services*

In exchange for the funds paid by the judicial council, the NHPD must provide:

- representation, “as is necessary and consistent with normal criminal defense,” in all cases to which it is assigned;<sup>349</sup>
- “all personnel necessary to perform the Services,” including an executive director, no fewer than 113 full-time equivalent trial attorneys and three full-time equivalent appellate attorneys, the personnel for the CCAO, and “other staff as is necessary to provide the services under this contract;”<sup>350</sup>
- the costs of the NHPD’s non-personnel operations, expressly including:
  - all costs of administering the NHPD that are “reasonably related to and necessary for the operation of NHPD;”<sup>351</sup>
  - operating the 10 existing branch office locations, including rent, office supplies, and “necessary equipment such as books, office equipment, computer hardware and software, telephones, desks and chairs;”<sup>352</sup>
  - comprehensive general liability insurance, workers’ compensation insurance, and professional liability insurance;<sup>353</sup> and
  - the cost “not to exceed \$25,000” of a “financial risk assessment by an independent certified public accountant firm that has been pre-approved by the Judicial Council,” occurring “during the first six months of FY20;” along with the cost of annual audits by a certified public accountant.<sup>354</sup>

The judicial council contract with the NHPD expressly prohibits the NHPD from spending judicial council funding for any purpose other than “the expenses of administration” that are “reasonably related to and necessary for the operation of NHPD.”<sup>355</sup>

The NHPD must meet these contractual obligations to the judicial council, but the NHPD board of directors is responsible for deciding *how* the NHPD does so, including the number and type of

<sup>349</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶¶ 1, 2 (for the term of July 1, 2019 through June 30, 2021).

<sup>350</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, ¶ 7.1, and Exh. A, ¶¶ 3, 5, 8, 11 (for the term of July 1, 2019 through June 30, 2021).

<sup>351</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. B, ¶ 1 (for the term of July 1, 2019 through June 30, 2021).

<sup>352</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, ¶ 5, and Exh. A, ¶¶ 3, 4 (for the term of July 1, 2019 through June 30, 2021). The office locations cannot be modified “without prior written approval from the Judicial Council.” “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶ 4 (for the term of July 1, 2019 through June 30, 2021).

<sup>353</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, ¶¶ 14, 15, and Exh. C, ¶¶ 4, 7 (for the term of July 1, 2019 through June 30, 2021).

<sup>354</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶ 12, and Exh. C, ¶¶ 2.H., 2.J. (for the term of July 1, 2019 through June 30, 2021).

<sup>355</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. B, ¶ 1 (for the term of July 1, 2019 through June 30, 2021).

personnel that the NHPD employs and subcontracts, how much it pays its personnel, and what non-personnel resources it provides and how much it pays for them.<sup>356</sup>

The NHPD's quarterly and annual financial reporting to the judicial council meets the requirements imposed by the judicial council contract, and it itemizes the NHPD's expenditures into functional categories commonly found in financial and accounting documents. But the financial reporting required by the judicial council and provided by the NHPD does not allow anyone to know: what the NHPD spends on attorney compensation, case-related expenses (including investigators, social workers, and immigration law experts), and overhead (including non-attorney support personnel); or how the NHPD's spending compares to that of contract counsel attorneys and assigned counsel attorneys – all information that is necessary for policymakers and justice system stakeholders to understand in order to plan for the future needs of New Hampshire's indigent defense system and ensure adequate fiscal resources to provide effective representation to each indigent defendant.

**NHPD overhead expenses.** From an accounting standpoint, every expenditure the NHPD makes is an overhead expenditure. But in understanding the provision of indigent defense services, overhead is those costs of operating a law firm (other than attorney pay and benefits) that are purchased without regard to any individual client. These include office facilities and utilities, equipment and supplies, insurance and accounting, licenses and dues, training, and those non-attorney support personnel whose work is not dedicated to the cases of individual indigent defendants.

The judicial council, and through it the policymakers and taxpayers of New Hampshire, have no way of knowing on an ongoing basis how much of the NHPD's judicial council funding is spent on overhead, as contrasted with case-related expenses, because the NHPD's regular fiscal reports to the judicial council group together into some line items some expenditures that are overhead with some expenditures that are case-related expenses. For example, the NHPD reports its spending on a line item for "telephone," which includes all telephone service as well as the costs paid to communicate with in-custody clients and long-distance charges incurred in specific cases. Likewise, the NHPD reports its spending on a line item for "other office expense," which includes overhead costs for software and recruiting and payroll services but also includes case-related expenses for web-based legal research and postage & freight charges incurred on behalf of individual clients' cases. As another example, the NHPD reports its spending on a line item for "professional services," which includes the NHPD's overhead costs for certified public accountant services but also includes case-related expenses of immigration law experts.

*Facilities, utilities, equipment, and supplies.* The judicial council contract requires the NHPD to operate the 10 branch office locations out of which trial-level representation is provided, and all of the costs related to those offices such as rent, equipment, and supplies.<sup>357</sup> The NHPD

<sup>356</sup> "Articles of Agreement of New Hampshire Public Defender," art. 2 and By-Laws, art. IV (as amended through Jan. 5, 1987).

<sup>357</sup> "Agreement" between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, ¶ 5, and Exh. A, ¶¶ 3, 4 (for the term of July 1, 2019 through June 30, 2021). The office locations cannot be modified "without prior written approval from the Judicial Council." "Agreement" between the State of New Hampshire

maintains separate office facilities for each of the 10 branch office locations as required by the judicial council contract, and it also has in Concord a suite of offices for central administration and a separate suite of offices for the appellate division (the IT division is co-located with the Manchester branch office). All NHPD staff consistently say the NHPD provides everything they need in their offices, including spaces to meet together with other office staff and spaces to meet privately for confidential attorney-client communications.

The NHPD uses *defenderData* for its case management system that maintains information about each client's case, including all discovery, documents, and correspondence, and attorneys can access the files remotely over the internet from the courthouses and from their homes. The NHPD provides a laptop/tablet to every staff attorney and investigator, and other non-attorney support personnel have desktop computers. The NHPD maintains a Westlaw account for legal research and each attorney has an individual account. All NHPD staff consistently report that the equipment and technology they are provided is "great" and the IT department provides "phenomenal" and fast support.

*Insurance and accounting.* The judicial council contract requires the NHPD to provide workers' compensation insurance, comprehensive general liability insurance, and professional liability insurance.<sup>358</sup> The judicial council contract also requires the NHPD to obtain an annual audit by a certified public accountant and to pay the cost "not to exceed \$25,000" of a "financial risk assessment by an independent certified public accountant firm that has been pre-approved by the Judicial Council," occurring "during the first six months of FY20."<sup>359</sup> The NHPD paid for each of these expenses as required by the judicial council contract.

*Licenses, dues, and training.* The judicial council does not mandate that the NHPD pay for any expenses of licenses, dues, or training. The NHPD board of directors determines spending for these items. As explained in chapter III, the NHPD devotes significant resources toward ensuring that its attorney employees receive regular training in the types of cases to which they are assigned, and the NHPD pays all costs for NHPD attorney employees to attend training programs provided by the NHPD and also to attend external training programs from time to time. The NHPD does not pay the dues of any employee related to any professional association (and the judicial council explains that it is the policy of the state's legislature to not appropriate funding for professional dues), however, to the extent the NHPD's financial circumstances allow, the NHPD reimburses attorneys for the annual professional conduct committee fee, the public protection fee, and the MCLE fund fee that they are assessed along with their annual bar association dues.

*Non-attorney support personnel.* The judicial council contract requires the NHPD to provide non-attorney staff "as is necessary to provide the services" for which the NHPD is responsible

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Judicial Council and the New Hampshire Public Defender, Exh. A, ¶ 4 (for the term of July 1, 2019 through June 30, 2021).

<sup>358</sup> "Agreement" between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, ¶¶ 14.1.1., 15, and Exh. C, ¶¶ 4, 7 (for the term of July 1, 2019 through June 30, 2021).

<sup>359</sup> "Agreement" between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶ 12, and Exh. C, ¶¶ 2.H., 2.J. (for the term of July 1, 2019 through June 30, 2021).

under the contract.<sup>360</sup> The only non-attorney staff that the judicial council contract expressly requires the NHPD to have are the staff to “operate and administer the Conflict Case Administrator Office” to “distribute conflict cases to contract attorneys and assigned counsel.”<sup>361</sup> Otherwise, the NHPD board of directors determines the number and types of non-attorney staff that it provides and how much it pays them.

Some non-attorney staff employed by the NHPD provide case-related services in the individual cases of indigent defendants whom NHPD attorneys represent, and so those personnel (investigators, social workers, and immigration law experts) are addressed below as part of case-related expenses. Other NHPD non-attorney staff provide support that is not dedicated to the case of any particular indigent defendant, and they are properly considered to be overhead (just as the secretary or receptionist in the office of a contract counsel or assigned counsel attorney is treated as overhead).

The NHPD board of directors approves the hiring of NHPD employees into job titles that carry a certain compensation and benefits.<sup>362</sup> At the start of FY 2021, the NHPD employed 77 non-attorney support personnel (other than investigators and social workers).<sup>363</sup> (See table of NHPD staffing at start of FY 2021 at page 38.)

The NHPD employed 11 non-attorney personnel in its central administration office and information technology department. Six of these 11 positions are directors, managers, or administrators for whom compensation is individually set by the NHPD board of directors.<sup>364</sup> These six directors, managers, and administrators received a raise effective July 1, 2019, and since that date they are paid a low of \$73,855 to a high of \$94,360 per year, depending on the individual employee’s job title.

The remaining five non-attorney personnel in central administration and the IT department, along with the other 66 non-attorney personnel employed by the NHPD, are office administrators, legal secretaries, office assistants II, and office assistants. Two are the CCAO administrators that the NHPD is required by the judicial council contract to provide. Two are in the appellate defender office. The remaining 62 are spread across the 10 branch offices. Only the office administrators

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<sup>360</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶ 3 (for the term of July 1, 2019 through June 30, 2021).

<sup>361</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶ 11 (for the term of July 1, 2019 through June 30, 2021).

<sup>362</sup> “Articles of Agreement of New Hampshire Public Defender,” art. 2 and By-Laws, art. IV (as amended through Jan. 5, 1987).

<sup>363</sup> The NHPD office directory for July 19, 2020 is the only complete listing of NHPD non-attorney staff provided by NHPD during this evaluation, so the number of non-attorney staff is as of July 19, 2020.

<sup>364</sup> These six positions are: director of investigations & interns, manager of administrative services, business manager, human resources administrator, IT manager, and IT network administrator. The NHPD director of investigations & internships and the NHPD manager of administrative services are both attorneys, but their positions at NHPD are, respectively, to direct support staff and to manage administrative services. As a result, they are both more properly considered as non-attorney staff for purposes of this evaluation. The manager of administrative services position was created in May 2020.

are paid a salary, while the other positions are paid an hourly rate. For each of these job titles, there is a range of 11 step-levels at which a person can be paid.

Office assistants last received a raise effective January 1, 2019, and since that date they are paid a low of \$9.39 to a high of \$15.13 per hour, depending on the step level at which the individual employee is paid. Office assistants II last received a raise effective January 1, 2019, and since that date they are paid a low of \$13.47 to a high of \$19.78 per hour, depending on the step level at which the individual employee is paid. Legal secretaries last received a raise effective January 1, 2019, and since that date they are paid a low of \$15.76 to a high of \$23.10 per hour, depending on the step level at which the individual employee is paid. Office administrators last received a raise effective January 1, 2019, and since that date they are paid a low of \$39,324 to a high of \$55,015 per year, depending on the step level at which the individual employee is paid.

**NHPD attorneys.** The judicial council contract requires the NHPD, “subject to the normal turnover of staff and the availability of qualified replacements,” to have no fewer than 113 FTE trial attorneys and three FTE appellate attorneys throughout the term of the FY 2020 - FY 2021 contract; these attorneys can be employees or subcontractors.<sup>365</sup> The only other attorney that the judicial council contract requires the NHPD to have is its executive director to supervise the public defender program.<sup>366</sup>

*NHPD-employed attorneys.* The judicial council contract prohibits attorneys who are employed by the NHPD from practicing law outside of representing their NHPD assigned clients.<sup>367</sup>

Throughout the FY 2020 - FY 2021 contract, the NHPD employed three attorney directors in its central administration:<sup>368</sup> the executive director, the director of legal services, and the director of litigation. None of these attorney directors regularly represent indigent defendants, although the director of litigation in very rare instances serves as the assigned attorney in a trial-level case. Instead their responsibilities are almost entirely supervisory and administrative. The executive director supervises the entire NHPD public defender program. The director of legal services oversees the day-to-day operations of all NHPD attorneys throughout the state. The director of litigation oversees training, homicide cases, and the NHPD litigation policy. These attorney directors last received a raise effective July 1, 2019, and since that date they are paid a low of \$100,360 to a high of \$109,969 per year, depending on the individual employee’s job title.

<sup>365</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶¶ 5, 7, 8, and Exh. C, ¶ 5 (for the term of July 1, 2019 through June 30, 2021).

<sup>366</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶ 3 (for the term of July 1, 2019 through June 30, 2021). The judicial council contract does not expressly state that the NHPD’s executive director must be an attorney, nor do the NHPD’s bylaws.

<sup>367</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶ 4 (for the term of July 1, 2019 through June 30, 2021).

<sup>368</sup> In addition to these three positions, two other attorneys work in the NHPD’s central administration office. The NHPD director of investigations & internships and the NHPD manager of administrative services are both attorneys, but their positions at NHPD are, respectively, to direct support staff and to manage administrative services. As a result, they are both more properly considered as non-attorney staff for purposes of this evaluation.

During the FY 2020 - FY 2021 contract, the NHPD employed between 115 and 133 attorneys in its 10 branch offices (*see* appendix A), including 10 managing attorneys and two assistant managing attorneys, and four attorneys in its appellate office including one managing attorney. All NHPD branch office and appellate office attorneys, including managing and assistant managing attorneys, directly represent indigent defendants.

The NHPD's staff attorneys last received a raise effective July 1, 2019, and since that date they are paid a low of \$52,950 to a high of \$86,510 per year,<sup>369</sup> depending on the step level at which the individual attorney is paid. The NHPD's "new hire" attorneys begin at step level one and the presumption is that, assuming satisfactory or better performance, the attorney will move to the next salary step level each year on the anniversary of their hire date until they reach step level eleven where their possible compensation maxes out. Each of the managing attorneys in the 10 trial-level branch offices and in the appellate division are additionally paid an annual stipend, which in FY 2018 was \$7,850, although NHPD managing attorneys report receiving approximately \$4,000 during FY 2021.

NHPD attorneys, like all NHPD employees, are eligible for the NHPD's health, disability, and life insurance plans. Most stakeholders consider the health insurance to be "good enough" but the employee portion of the health insurance premiums to be "very high." The NHPD offers a 401K retirement plan, and during an attorney's first three years of participation the NHPD matches half of the employee's contributions (up to a total combined contribution of 4% of the employee's salary). Each attorney is entitled to between two and four weeks of paid vacation each year, depending on the attorney's length of employment at the NHPD. The NHPD pays for attorneys' malpractice insurance and all costs of meeting New Hampshire's mandatory continuing legal education requirements. Even though NHPD attorneys are required to remain in good standing in the New Hampshire Bar Association, they are responsible for paying their own annual bar association dues, but to the extent the NHPD's financial circumstances allow, the NHPD reimburses attorneys for the annual professional conduct committee fee, the public protection fee, and the MCLE fund fee.

NHPD attorneys incur some out-of-pocket expenses in representing indigent defendants. The NHPD reimburses staff attorneys for mileage and tolls and pays a per diem when they are required to travel (although stakeholders say the mileage reimbursement rate and per diems are less than the federal government provides). Some say the NHPD does not reimburse attorneys for any charges incurred in telephone communications, while others say attorneys can be reimbursed for a portion of the cost of using their personal cell phones.

Stakeholders believe the starting salary of \$52,950 for NHPD staff attorneys is lower than that of public defenders in other states, for example one attorney observed that the starting salary

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<sup>369</sup> The NHPD occasionally though rarely employs part-time attorneys. At times during FY 2020 - FY 2021, between one and three of the NHPD branch office attorneys worked part-time, and the NHPD shows their part-time employment at either 80% or 73% (but it is unclear whether this represents a percentage of an attorney's full-time caseload or a full-time attorney's hours in a work-week). A full-time NHPD attorney is regularly scheduled to work 37.5 hours per week.



in 2017 for a public defender in Colorado was \$57,276.<sup>370</sup> For the most experienced attorneys who remain on staff at the NHPD for more than 10 years, there is no ability to receive increased compensation beyond \$86,510 per year other than through sporadic and unpredictable cost-of-living increases, which many say indicates these attorneys are not valued within New Hampshire's indigent defense system. As one attorney who has been on staff at the NHPD for nearly 20 years explained, "I didn't expect to make a lot of money [as a public defender], but I also didn't think I'd be making so little money for having the experience that I have."

Although NHPD staff attorneys reportedly "work a lot more than and are worth a lot more than they are paid," most say they are generally satisfied with their compensation because they never expected to be well-compensated as an indigent defense system attorney and noting that New Hampshire does not have a state income tax and their salaries allow for a comfortable standard of living. Stakeholders observe, however, that a noticeable number of attorneys leave the NHPD because of insufficient compensation, especially those attorneys who have significant law school debt and attorneys with children to raise.

From time to time the judicial council requests and the NHPD provides a report of the number of attorneys the NHPD employs at each salary step level, and this allows the judicial council to calculate the approximate cost of NHPD staff attorney' salaries, benefits, taxes, and insurance. But otherwise the judicial council, and through it the policymakers and taxpayers of New Hampshire, has no way of knowing on an ongoing basis how much compensation is paid to the public defender program attorneys who are assigned to represent indigent defendants, because the NHPD's regular fiscal reports to the judicial council include attorney compensation in the broader line item of personal expenses that includes all NHPD employees, and some benefits to NHPD attorneys (such as portions of annual bar dues, continuing legal education, and professional liability insurance) are likewise included in broader line items. The problem is exacerbated by the manner in which NHPD subcontract attorneys are paid.

*NHPD subcontractor attorneys.* As statutorily required,<sup>371</sup> the judicial council contract allows the NHPD (with pre-approval of the judicial council) to subcontract with private attorneys to provide representation to indigent defendants in cases to which the NHPD is appointed.<sup>372</sup> The NHPD executive director decides when it is necessary to subcontract with private attorneys to provide representation in NHPD cases and determines how many subcontracts are needed, for what period of time, and the branch office locations or court locations out of which those subcontractor attorneys receive cases. Each NHPD subcontract with a private attorney is unique,

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<sup>370</sup> See Colorado State Public Defender Douglas K. Wilson, *Letter to the editor: DA, reporter misrepresent public defender salaries*, THE ASPEN TIMES (Nov. 19, 2017), <https://www.aspentimes.com/opinion/letter-to-the-editor/da-reporter-misrepresent-public-defender-salaries/>.

<sup>371</sup> N.H. REV. STAT. ANN. § 604-B:4 (2019).

<sup>372</sup> "Agreement" between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶¶ 7, 8, and Exh. C, ¶ 5 (for the term of July 1, 2019 through June 30, 2021). The "workload of full-time salaried attorney staff" is used to determine the "equivalent" number of part-time attorney staff and/or subcontract attorneys necessary to perform the same workload. "Agreement" between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶ 8 (for the term of July 1, 2019 through June 30, 2021).

and so there are no across-the-board provisions that apply to every NHPD subcontract and the payments due under any given subcontract do not necessarily fall within a single fiscal year.

The judicial council contract requires the NHPD to pay trial-level subcontractor attorneys “on a caseload basis rather than on an hourly or per diem basis” and to tell the judicial council how each subcontractor is paid.<sup>373</sup> Although the language varies slightly, every NHPD subcontract pays subcontractor attorneys “according to the Contract Attorney Fee Schedule as established by the New Hampshire Judicial Council.” The judicial council compensation of contract counsel attorneys is explained in greater detail below, but it pays (for non-homicide cases) at the rate of \$300 per “unit,”<sup>374</sup> and accordingly so do the NHPD subcontracts. A unit is not a case and it is not an hour; rather, as the judicial council explains, it is merely a “monetary basis for compensation.”<sup>375</sup> The judicial council, and therefore the NHPD subcontracts, authorizes a specific number of units for each type of case that can be assigned to an attorney. The number of units authorized for a specific type of case multiplied by \$300 equals the compensation paid to the attorney for that case, as shown in the following table.<sup>376</sup> (NHPD subcontractor attorneys, like contract counsel attorneys, can in certain circumstances apply for additional compensation in a case through the award of extraordinary case credit. *See* discussion of extraordinary case credit at pages 138-140.)

**JUDICIAL COUNSEL CONTRACT ATTORNEY FEE SCHEDULE**

Case type	Unit value	Fee paid per case
Felony I	8.30	\$2,490
Felony II	2.75	\$825
Misdemeanor (Circuit Court)	1.00	\$300
Misdemeanor/Complaint (Superior Court)	1.50	\$450
Misdemeanor Appeal (from Circuit Court)	1.50	\$450
Juvenile Delinquency Proceeding	1.00	\$300
Juvenile Review (and related work)	0.33	\$99
Juvenile Sununu Youth Services Center review	1.00	\$300
Preparation of a Notice to Appeal	1.00	\$300
Habeas Corpus Petition (Superior Court)	1.00	\$300
Specialty Court Appearance	0.25	\$75
“Other” (VOP, sentence related Witness Rep, etc.)	0.75	\$225

<sup>373</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶¶ 4, 7 (for the term of July 1, 2019 through June 30, 2021).

<sup>374</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021,” App. B (sample).

<sup>375</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021,” App. B (sample).

<sup>376</sup> *See* “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021,” ¶ 1 and App. B (sample). The rate of \$300 per unit paid by the judicial council to contract counsel attorneys took effect for FY 2018 (an increase from \$275 per unit), but the number of units authorized for each type of case has been the same for quite some time (an exact date is not known).

Most often, the NHPD subcontracts for a private law firm to be assigned not more than a certain number of cases of specified types, with the cases to be assigned during a defined period of time. Occasionally, though, the NHPD subcontracts for the private law firm to provide representation in a list of existing NHPD cases that are identified in the subcontract. Either way, once a case is assigned to a subcontractor attorney, the NHPD subcontracts require the attorney to represent the client through disposition of the case, but typically allow that the attorney will be paid “full credit for all representation undertaken on behalf of clients, even when the representation cannot be conducted through final disposition, except in those instances in which withdrawal from a case occurs without the performance of substantive work on behalf of the client.”

The NHPD does not pay subcontractor attorneys as a case is assigned or as it is disposed. Instead, although the specific language varies, every NHPD subcontract calculates the total sum that will be due to the subcontractor attorney for the number of cases of specified types that the subcontractor attorney agrees to be assigned, multiplied by the units allowed for each case of a specific type, and multiplied again by \$300 per unit, then the NHPD pays the subcontractor in one or more lump sum payments during the term of the contract. The NHPD adjusts the final payment to the subcontractor to account for the actual cases that the subcontractor was assigned pursuant to the subcontract.

During the FY 2020 - FY 2021 biennial contract term, the NHPD was obligated by the subcontracts it executed to make payments to subcontractor attorneys as shown in the table on page 129.

In addition to the specific payments due to subcontractor attorneys as shown in the table on page 129, there are two NHPD subcontracts that appear to commit the NHPD to pay subcontractor attorneys during the FY 2020 - FY 2021 term but where the amount of the payment and/or the due date are not clearly specified in the subcontract.

In one unclear subcontract, the NHPD subcontracted with a private law firm of two attorneys to, beginning December 6, 2019, continue representing clients “through final disposition of the client’s case or cases” in a list of cases to which the two attorneys had been assigned while they were employees of the NHPD. Both attorneys left their NHPD employment on December 2, 2019. Understandably, there is no end date for performance of the contract, because it would be impossible to predict when all of the existing cases would be finally disposed. The NHPD agreed to pay the private law firm: \$100 per hour for work performed beginning December 6, 2019 in the one homicide case included in the subcontract; and \$300 per unit for work performed in all other (non-homicide) cases included in the subcontract. The subcontract does not specify the terms under which the subcontractor bills the NHPD or is paid by the NHPD for any of the non-homicide cases. The subcontract also does not address the fact that the attorneys had already been paid a salary as employees of the NHPD for whatever amount of work they had already done on the non-homicide cases during their employment at the NHPD through December 2, 2019; instead promising to pay the attorneys the full value of each non-homicide case that the judicial council pays to a contract counsel attorney in those case types (*see* discussion at page 96 of how this practice provides continuity of counsel).

**NHPD OBLIGATED PAYMENTS TO SUBCONTRACTOR ATTORNEYS  
FOR FY 2020 - FY 2021**

	Amount	Due date	
FY 2020	\$2,483.25	July 19, 2019	final payment subject to adjustment
	\$3,000.00	July 31, 2019	final payment subject to adjustment
	\$2,400.00	August 1, 2019	final payment subject to adjustment
	\$3,000.00	August 1, 2019	final payment subject to adjustment
	\$11,100.00	January 16, 2020	
	\$11,100.00	February 16, 2020	
	\$2,475.00	February 21, 2020	
	\$1,500.00	February 24, 2020	
	\$11,100.00	March 16, 2020	
	\$2,475.00	March 23, 2020	
	\$1,500.00	March 30, 2020	final payment subject to adjustment
	\$11,100.00	April 16, 2020	
	\$2,475.00	April 20, 2020	final payment subject to adjustment
	\$11,100.00	May 16, 2020	
	\$11,100.00	June 16, 2020	
<b>FY 2020 subtotal</b>	<b>\$87,908.25</b>		
FY 2021	\$11,100.00	July 16, 2020	
	\$11,100.00	August 16, 2020	
	\$11,100.00	September 16, 2020	final payment subject to adjustment
	\$11,100.00	October 15, 2020	
	\$11,100.00	November 15, 2020	
	\$11,100.00	December 15, 2020	final payment subject to adjustment
	\$11,100.00	January 31, 2021	final payment subject to adjustment
	\$11,100.00	February 15, 2021	
	\$11,100.00	March 15, 2021	
	\$2,325.00	March 15, 2021	
	\$2,350.00	April 1, 2021	final payment subject to adjustment
	\$3,000.00	April 2, 2021	final payment subject to adjustment
	\$11,100.00	April 15, 2021	final payment subject to adjustment
	\$1,500.00	April 30, 2021	
	\$3,000.00	May 7, 2021	final payment subject to adjustment
	\$1,500.00	May 14, 2021	final payment subject to adjustment
	\$3,000.00	June 4, 2021	final payment subject to adjustment
	\$59,415.00	June 14, 2021	only payment subject to adjustment
\$4,650.00	June 25, 2021		
<b>FY 2021 subtotal</b>	<b>\$191,740.00</b>		
<b>Total FY 2021 - FY 2021</b>	<b>\$279,648.25</b>		

In another unclear subcontract, the NHPD subcontracted with a private attorney to be assigned some number of felony II cases and up to two felony I cases in the Grafton Superior Court during the period of June 19 through August 19, 2019 (within FY 2019 and FY 2020). The total contract value is stated to be \$4,966.50 (made in two equal payments of \$2,483.25 on June 19 and on July 19, 2019), but the contract explains that this would be the payment “if performance under the contract meets expectations of thirty-three units.” The math does not add up.

The stated total expected work of 33 units, payable at \$300 per unit, would require a total contract payment of \$9,900, while the stated total contract value is only \$4,966.50. Alternatively, the stated total contract payment of \$4,966.50 would only pay for 16.56 units, while the stated total expected work is 33 units. This disparity might be at least partially explained by a paragraph in the subcontract that states that the subcontractor “shall receive 16.5 units between March 1, 2019 and June 3, 2019” (i.e., three months that preceded the effective date of the contract), and at \$300 per unit this would be a contract value of \$4,950 due for 16.5 units assigned to the subcontractor in months preceding the effective date of the contract.

In short, the only way to make sense of the subcontract in its entirety is if it is read to contemplate the subcontractor attorney having already been assigned 16.5 units of felony representation during months preceding the effective date of the contract, *plus* being assigned 16.5 units of felony representation during the term of the contract, for a total of 33 units of assigned felony representation. At \$300 per unit, the total due for 33 units would be \$9,900. After the subcontractor attorney received the two payments addressed in the contract that together total \$4,966.50, the subcontractor would still have been due payment of \$4,933.50. The subcontract does not explain when or how the NHPD would pay the subcontractor for the remaining balance due, or whether perhaps the subcontractor had already been paid \$4,933.50 for felony representation units before this subcontract was executed. Of course it could also be that there are simply many irreconcilable errors in this NHPD subcontract.

The NHPD reported to the judicial council that it spent, during the FY 2020 - FY 2021 biennial contract term, a total of \$417,862.25 for “contract services,” which the NHPD executive director identifies as reflecting only payments made by the NHPD to NHPD subcontractor attorneys.<sup>377</sup> The NHPD’s reported expenditures of \$417,862.25 for subcontractor attorneys during FY 2020 - FY 2021 exceed the specific payment commitments of \$279,648.25 made in NHPD subcontracts for that period by \$138,214. This difference may be accounted for by the two subcontracts that lack clear payment terms, or the NHPD may have agreed to pay subcontractors for extraordinary case credit in one or more cases.

NHPD subcontractor attorneys are responsible for paying for all of their own overhead costs, and the NHPD subcontracts expressly require the subcontractor attorneys to carry their own professional liability insurance.

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<sup>377</sup> NHPD spent \$222,147.25 in FY 2020 and \$195,715.00 in FY 2021 for payments to subcontractors.

For case-related expenses, NHPD subcontractor attorneys:

- can use the NHPD’s staff investigators (*see* discussion of NHPD staff investigators at page 132) by arranging for their services through the NHPD branch office managing attorney identified in the subcontract; and
- for all other “services necessary to an adequate defense” the attorney must file a motion to obtain the court’s authorization (*see* discussion of judicial council funding of case-related expenses at pages 111-112 and side bar explaining the process for an attorney to obtain “services necessary to an adequate defense” of their assigned client at page 114).

**NHPD case-related expenses.** The judicial council contract with the NHPD requires the NHPD to provide, out of the contract funding, all necessary case-related expenses on behalf of the indigent defendants who are assigned to be represented by any NHPD attorney.<sup>378</sup> Nonetheless, as previously explained, the NHPD receives additional payment by or reimbursement from the judicial council for: experts (other than consulting with an attorney about immigration law matters); translators; evaluations of defendants by a licensed drug and alcohol counselor; and the cost of a defendant’s transportation to obtain a competency evaluation. (*See* discussion of judicial council funding of case-related expenses at pages 111-112 and side bar explaining the process for an attorney to obtain “services necessary to an adequate defense” of their assigned client at page 114.)

In contrast to contract counsel attorneys and assigned counsel attorneys who must file a motion to obtain a court’s authorization for every case-related expense, the judicial council’s contract funding to the NHPD allows the NHPD to maintain a contract to consult with experts on immigration law, have investigators and social workers on staff, and pay for out-of-pocket expenses (such as toll telephone calls and postage and copying and mileage and legal research and transcription services). For all other case-related expenses, the NHPD must follow the same process as contract counsel and assigned counsel attorneys.

*Immigration law expert.* Out of judicial council funding, beginning January 1, 2021 the NHPD contracts with the National Immigration Project of the National Lawyers Guild (NIPNLG) to provide technical assistance on the immigration consequences of criminal convictions. The NHPD contracted to pay the NIPNLG \$1,000 per month for three months (January through March 2021) and \$1,250 per month for six months (April through September 2021), in exchange for the NIPNLG to consult on up to 10 requests for assistance each month. Even though the NHPD pays for this contract, in theory the NHPD allows contract counsel attorneys and assigned counsel attorneys to make requests for assistance to the NIPNLG through the contract. The judicial council avers that contract counsel attorneys have used the service, but the NHPD executive director believes that NHPD attorneys will most often use all of the 10 available requests each month.

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<sup>378</sup> See “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, ¶¶ 5, 5.2, 7.1, and Exh. A., ¶¶ 1, 2, 3, 4, 5, 7, and Exh. B., ¶ 1 (for the term of July 1, 2019 through June 30, 2021).

Prior to this contract, and for any requests beyond 10 per month during the contract, NHPD staff attorneys file a motion to obtain a court's authorization to hire an immigration law expert, just as the NHPD does to obtain other types of experts. (*See* discussion of judicial council funding of case-related expenses at pages 111-112 and side bar explaining the process for an attorney to obtain "services necessary to an adequate defense" of their assigned client at page 114.) The NHPD believes the contract with NIPNLG is a cost-effective use of judicial council funding, because the cost of immigration law experts under the contract is \$100 - \$125 per consultation, while the small number of immigration lawyers available to be hired as experts through a court authorization typically charge \$1,000 - \$2,500 per case.

*Investigators.* At the start of FY 2021, the NHPD employed 26 licensed private investigators, all deployed across its 10 branch offices.<sup>379</sup> (*See* table of NHPD staffing at start of FY 2021 at page 38.) The NHPD pays for the staff investigators out of the judicial council contract funds. The NHPD's investigators last received a raise effective January 20, 2020, and since that date they are paid a low of \$41,095 to a high of \$55,586 per year, depending on the step level at which the individual employee is paid. The NHPD's staff investigators say they feel that they are fairly compensated.

NHPD staff attorneys and subcontractor attorneys *never* file a motion to obtain a court's authorization to hire an investigator. Instead, the 26 investigators on the NHPD's staff are responsible for fulfilling all investigative needs in the cases of indigent defendants whom NHPD attorneys (both staff and subcontractor) are assigned to represent. NHPD staff investigators: locate and interview potential witnesses; serve subpoenas; locate and obtain documents and items of physical evidence; photograph and measure crime scenes; create exhibits for hearings and trial; and assist attorneys to prepare clients for trial. Because the NHPD has so few social workers on staff (*see* discussion of NHPD social workers at pages 132-133), the NHPD's staff investigators frequently help clients find and apply for treatment programs and create social histories of clients that attorneys use as mitigation in sentencing hearings – it typically takes an investigator between 20 to 40 hours to prepare a client's social history.

*Social workers.* At the start of FY 2021, the NHPD employed two social workers; one assigned to alternate between the Concord branch office and the Laconia branch office, and the other assigned to the Manchester branch office,<sup>380</sup> although in theory any branch office attorney can request their services. The NHPD pays for the staff social workers out of the judicial council contract funds. Social workers last received a raise effective March 12, 2020, and since that date they are paid a low of \$41,095 to a high of \$55,586 per year, depending on the step level at which the individual employee is paid. MSWs<sup>381</sup> last received a raise effective June 22, 2020, and since that date they are paid a low of \$52,776 to a high of \$65,016 per year, depending on the step level at which the individual employee is paid.

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<sup>379</sup> The NHPD office directory for July 19, 2020 is the only complete listing of NHPD non-attorney staff provided by NHPD during this evaluation, so the number of staff investigators is as of July 19, 2020.

<sup>380</sup> The NHPD office directory for July 19, 2020 is the only complete listing of NHPD non-attorney staff provided by NHPD during this evaluation, so the number of staff social workers is as of July 19, 2020.

<sup>381</sup> An MSW is a social worker who has attained the degree of Master of Social Work.

NHPD staff attorneys *never* file a motion to obtain a court’s authorization to hire a social worker. Instead, the two social workers on the NHPD’s staff are the only social workers to fulfill any needs in the cases of indigent defendants whom NHPD staff attorneys are assigned to represent. There is broad and loud desire for the NHPD to hire more social workers – at least one for every branch office.

In the absence of a sufficient number of social workers, NHPD staff attorneys must themselves help clients find and apply for treatment programs and create the social histories of their clients that are needed in bail proceedings and plea negotiations and as mitigation in sentencing hearings. One attorney explains that the criminal case is only a small portion of what many clients need help with; they need housing, mental health services, substance abuse treatment – all things a social worker is trained to assist with and an attorney is not. Multiple attorneys talked about the importance of mitigation work, saying it is often a necessary part of representing a client, but: “We are not trained on that at all. We assign it to investigators and they are not trained on it. It is a serious problem.” Worse yet, NHPD attorneys sometimes must rely on the jails to find needed treatment or housing for detained clients.

### 3. Contract counsel attorneys funding & expenditures

As authorized by statute,<sup>382</sup> each fiscal year the judicial council awards some number of one-year contracts to individual private attorneys, for-profit law firms, and/or a law school, to be available for assignment to the (non-homicide) cases of indigent people where the NHPD is unavailable.<sup>383</sup> For FY 2020 and FY 2021, the State of New Hampshire appropriated \$4,060,000 to the judicial council for the cost of providing contract counsel attorneys to represent indigent defendants in cases where the NHPD is unavailable, plus \$6,000 for training contract counsel attorneys.<sup>384</sup>

The number of contracts that the judicial council awards varies from year to year, as the judicial council attempts to have available for assignment a sufficient number of attorneys under contract to provide representation in each of the types of (non-homicide) cases for which indigent people are entitled to an appointed attorney and in each of the court locations where those cases are heard.<sup>385</sup> The table on page 134 shows the judicial council’s award of contracts for each fiscal year 2019 through 2021.

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<sup>382</sup> N.H. REV. STAT. ANN. § 604-A:2-b (2019).

<sup>383</sup> See NEW HAMPSHIRE JUDICIAL COUNCIL, JUDICIAL COUNCIL PLAN FOR THE PARTICIPATION OF THE PRIVATE BAR IN COURT APPOINTED CRIMINAL CASES 1 (Sept. 9, 2014); “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021,” App. B (sample).

<sup>384</sup> NEW HAMPSHIRE OPERATING BUDGET, 2020-2021 BIENNIAL, at 308-312. \$2,033,000 is appropriated for each fiscal year – \$2,030,000 for fees and \$3,000 for training..

<sup>385</sup> NEW HAMPSHIRE JUDICIAL COUNCIL, JUDICIAL COUNCIL PLAN FOR THE PARTICIPATION OF THE PRIVATE BAR IN COURT APPOINTED CRIMINAL CASES 1 (Sept. 9, 2014).



**JUDICIAL COUNCIL CONTRACTS FOR “CONTRACT COUNSEL”  
FY 2019 THROUGH FY 2021**

	FY 2019	FY 2020	FY 2021
Number of contracts	34	32	31
Number of attorneys	39	40	36
Authorized units of work	6,445	6,370	6,105
Projected cost	\$1,933,500	\$1,911,000	\$1,831,500

That a contract has been awarded does not guarantee that a contract counsel attorney will be assigned to *any* case during the term of the contract. Rather, it simply makes the contract counsel attorney eligible to be assigned cases in certain court locations if the NHPD is unavailable to accept a case in one of those court locations. So, the amount the judicial council actually spends for contract counsel each fiscal year depends on the number of (non-homicide) adult criminal and juvenile delinquency cases in which the courts appoint counsel to represent indigent people and the NHPD declares itself to be unavailable.

State law requires the executive director of the judicial council to authorize payments to contract counsel,<sup>386</sup> and those payments are made pursuant to the terms of the judicial council contract with each contract counsel. The judicial council pays every contract counsel \$300 per unit of work that is actually assigned to the contract counsel under the terms of the contract and completed to final disposition.<sup>387</sup> The rate of \$300 per unit paid by the judicial council to contract counsel took effect for FY 2018; an increase from \$275 per unit that had been in effect since 2005.<sup>388</sup>

Each contract establishes: the beginning and ending dates during which the contractor may be assigned cases; the identity of the attorneys who are allowed to perform the contract; the court locations in which the attorneys may be assigned; the maximum number of units of work the contractor is authorized to be assigned; the maximum compensation available to be earned; and whether the contractor is paid on a “monthly pro rata” or a “pay-as-you-go” basis.<sup>389</sup> Absent any adjustments (as explained below), the maximum compensation that is available for a contract counsel to earn is the maximum number of units of work the contractor is authorized to be assigned, multiplied by \$300. For both FY 2020 and FY 2021, the smallest contract awarded by

<sup>386</sup> N.H. REV. STAT. ANN. § 604-A:2-b (2019).

<sup>387</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021,” ¶ 5 and App. B (sample). If contract counsel is assigned a case under the contract and subsequently has to withdraw because “continued representation would violate the New Hampshire Rules of Professional Conduct,” then the judicial council pays the contract counsel attorney one-half of the normal compensation for that case. “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021,” ¶ 12 (sample). Otherwise, if contract counsel is assigned a case under the contract and fails to complete a case to final disposition, unless removed by the court, then the judicial council pays the contract counsel attorney nothing for that case. “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021,” ¶ 11 (sample).

<sup>388</sup> NEW HAMPSHIRE JUDICIAL COUNCIL, 23RD BIENNIAL REPORT JULY 1, 2015 – JUNE 30, 2017, at .pdf page 8 (Apr. 2018).

<sup>389</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021” (sample).

the judicial council authorized a contract counsel to be assigned 50 units for a maximum possible compensation of \$15,000, and the largest contracts authorized a contract counsel to be assigned 300 units for a maximum possible compensation of \$90,000.

Because the number and type of cases that will actually be assigned to a contract counsel each year is not known at the beginning of the fiscal year, the judicial council contract allows each contract counsel to choose whether: to be paid each month for the actual cases assigned during that month, referred to as “pay-as-you-go;” or to be paid equal monthly installments that together total the amount the contract counsel would be due under the contract if the contract counsel is actually assigned the full amount of work authorized by the contract, referred to as “monthly pro rata.”<sup>390</sup> For contract counsel who elect to be paid on a “monthly pro rata” basis, the judicial council “may hold or adjust payments” if the work actually assigned is less than 50% of that contracted, and as a practical matter the judicial council converts all contract counsel to “pay-as-you-go” for March through June of the contract term,<sup>391</sup> which allows the judicial council and the contract counsel to begin squaring up their accounts. All contract counsel must refund to the judicial council any unearned compensation, within 60 days of the judicial council giving notice to do so.<sup>392</sup>

The judicial council and the contract counsel keep track of the cases assigned under the contract through new open case reports and notification of eligibility and appointment of counsel “NEA” forms. (The number and type of cases actually assigned to each contract counsel is discussed in chapter VI.) Each month, the contract counsel must send to the judicial council a report identifying all of the cases they were assigned during the month under the contract.<sup>393</sup> As a practical matter, the CCAO keeps a running tally of all cases they assign to each contract counsel during a month and provides that report to the contract counsel. The contract counsel reviews the report compiled by the CCAO, adds any necessary information and supporting documentation, signs it, and sends it to the judicial council. The CCAO sends to the judicial council the “NEA” form that is generated by the court for each new assigned case.<sup>394</sup> A contract counsel forfeits the right to be paid for any case for which they fail to report the assignment within 60 days.<sup>395</sup>

Similarly, the judicial council and the contract counsel keep track of whether an assigned case has been completed to final disposition through closed case cards. For every case to which a contract counsel is assigned under the contract, they must submit a closed case card to the judicial council within 30 days of the final disposition or forfeit the right to be paid for that

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<sup>390</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021,” Payment Schedule and ¶ 4 (sample).

<sup>391</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021,” ¶ 4 (sample).

<sup>392</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021,” ¶ 5 (sample).

<sup>393</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021,” ¶ 33 and App. A (sample).

<sup>394</sup> *Cf.*, “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021,” ¶ 33 and App. A (sample) (requiring contract counsel to provide the NEA to the judicial council).

<sup>395</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021,” ¶ 9 (sample).

case.<sup>396</sup> When the judicial council receives the closed case card from the contract counsel, the judicial council closes the case in the judicial council’s database.

The judicial council keeps track of the payments it makes to each contract counsel (but without regard to the individual attorney who actually represented the indigent defendant) during the fiscal year. In some fiscal years, the amount the judicial council actually pays to all contract counsel collectively is more than that appropriated by the state, while in other years it is less. The following table shows the state’s initial appropriation to the judicial council and the judicial council’s actual expenditures for fees of contract counsel attorneys in FY 2018 through FY 2021.

**APPROPRIATED FUNDING AND ACTUAL EXPENDITURES  
FOR CONTRACT COUNSEL FEES, FY 2018 THROUGH FY 2021**

	Initial state appropriation	Actual judicial council expenditure	Additional funding required
<b>FY 2018</b>	\$1,980,000	\$2,163,835	\$183,835
<b>FY 2019</b>	\$1,980,000	\$1,958,224	(\$21,776)
<b>FY 2020</b>	\$2,030,000	\$1,759,367	(\$270,633)
<b>FY 2021</b>	\$2,030,000	\$2,128,902	\$98,902

*a. Actual judicial council compensation to contract counsel*

While the process for a contract counsel to be paid by the judicial council is the same for all, the amount that each contract counsel actually receives from the judicial council during a given fiscal year depends on the number and type of cases actually assigned to that contract counsel. The judicial council pays contract counsel a flat fee per case at the time the case is assigned, with the amount depending on the type of case. In certain circumstances, after spending at least 25 hours on a case and most often only after the case is disposed, a contract counsel may ask the judicial council to pay additional compensation for a case.

In exchange for the compensation that the judicial council pays to a contract counsel attorney for an assigned case, the contract counsel must represent the indigent defendant in each assigned case through final disposition of the case, including “in all criminal matters arising out of the factual transaction underlying the assigned case.”<sup>397</sup> (If an appointed case has been disposed and a court makes a new appointment of counsel in that same case, such as in hearings conducted after a sentence has been deferred or suspended, the contract counsel can be additionally paid an “other” case fee.)

<sup>396</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021” ¶ 10 and App. A (sample).

<sup>397</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021,” ¶¶ 11, 12, 18, 30 and App. B, App. C (sample).

**Automatic flat fee per case.** As previously explained, the judicial council pays contract counsel at the rate of \$300 per “unit.”<sup>398</sup> A unit is not a case and it is not an hour; rather, as the judicial council explains, it is merely a “monetary basis for compensation.”<sup>399</sup> The judicial council authorizes a specific number of units for each type of case that can be assigned to a contract counsel.<sup>400</sup> The number of units authorized for a specific type of case multiplied by \$300 equals the compensation paid to the contract counsel for that case, as shown in the following table.<sup>401</sup>

#### JUDICIAL COUNSEL CONTRACT ATTORNEY FEE SCHEDULE

Case type	Unit value	Fee paid per case
Felony I	8.30	\$2,490
Felony II	2.75	\$825
Misdemeanor (Circuit Court)	1.00	\$300
Misdemeanor/Complaint (Superior Court)	1.50	\$450
Misdemeanor Appeal (from Circuit Court)	1.50	\$450
Juvenile Delinquency Proceeding	1.00	\$300
Juvenile Review (and related work)	0.33	\$99
Juvenile Sununu Youth Services Center review	1.00	\$300
Preparation of a Notice to Appeal	1.00	\$300
Habeas Corpus Petition (Superior Court)	1.00	\$300
Specialty Court Appearance	0.25	\$75
“Other” (VOP, sentence related Witness Rep, etc.)	0.75	\$225

In other words, the judicial council pays a contract counsel attorney a flat fee to represent an indigent defendant in each assigned case, without regard to how little or how much time the contract counsel attorney must actually spend to effectively represent the indigent defendant in that case. The judicial council pays this flat fee to the contract counsel at the time the case is assigned (or based on anticipated assignments for monthly pro rata contracts), and in most circumstances this is the full and final payment to contract counsel for the case.

The judicial council is unsure when it arrived at the number of units it allocates to each type of case (the use of contract counsel attorneys was first implemented in New Hampshire in 1985, and neither the chair of the judicial council nor any of its existing staff were affiliated with the judicial council at that time). The judicial council says the unit method was based on the average time spent by the NHPD on each case type, minus expenses for administrative costs; so the unit value is supposed to denote the average amount of time spent on that case type. If a unit is meant to equal one hour, then it would be a straight-forward matter for the judicial council to say that it pays contract counsel \$300 per hour and allocate a specific number of hours for which contract counsel can be paid in each type of case assigned. Numerous stakeholders say that the flat fee

<sup>398</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021,” App. B (sample).

<sup>399</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021,” App. B (sample).

<sup>400</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021,” ¶ 1 (sample).

<sup>401</sup> See “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021,” ¶ 1 and Exh. B (sample).

the judicial council pays for each type of case is meant to be a rate of \$60 per hour (equal to the hourly rate paid to assigned counsel attorneys in all cases other than “major crime cases”<sup>402</sup>) – so, for example, the \$300 fee in a juvenile delinquency case or a circuit court misdemeanor case would be intended to compensate an attorney for five hours of work, while the \$2,490 fee in a felony I case would be intended to compensate an attorney for 41.5 hours of work. The judicial council’s executive director, however, is not aware of any intended equivalency between the compensation to contract counsel and the hourly rate compensation paid to assigned counsel attorneys.

Stakeholders also say the comparative flat fees paid for different types of cases often make little sense. For example, a contract counsel attorney is paid \$300 for a misdemeanor in a circuit court location but is paid \$450 for a misdemeanor in a superior court location, even though the potential penalty for a misdemeanor is exactly the same in both courts. A perhaps more striking incongruity is that a contract counsel attorney is paid \$825 for the lowest of adult felony cases that carries a possible sentence of a year and a day in jail, but is paid only \$300 for a juvenile delinquency case even though a child of any age can be prosecuted for a felony and can be committed to custody until the age of 18 and in certain circumstances until the age of 21.

However it is that the judicial council determined the amount of the flat fee that it pays to contract counsel in each type of case, stakeholders broadly agree that the judicial council does not pay contract counsel fair compensation for the amount of time necessary to provide effective representation to indigent defendants. More than one stakeholder describes the contract counsel pay as “pathetic.”

An attorney who typically tries three to four jury trials each year explains the problem. The judicial council pays \$825 for a felony II case. On average, the attorney estimates that the preparation time for a felony jury trial is at least 15 hours, plus a half-day (three to four hours) for jury selection and a full day (six to eight hours) for the trial, totaling 24 to 27 hours. In this scenario, the judicial council is paying the contract counsel attorney approximately \$30.55 to \$34.37 per hour, and the attorney is required by the judicial council contract to pay for overhead and some case-related expenses out of that compensation before earning any fee at all. (*See* discussion of contract counsel expenditures for indigent defense services at pages 140-143).

**Possible additional compensation in an “extraordinary case.”** The judicial council contract contains a provision that allows a contract counsel to ask the judicial council to pay additional compensation, beyond the flat fee, for an “extraordinary case.”<sup>403</sup> There are three circumstances in which the judicial council will consider a contract counsel’s request (filed not later than 60 days after close of the case) for additional compensation for an assigned case.

1. In a class A felony, a class B felony with bodily injury, or any type of case that had a pre-trial motion hearing that lasted more than one full in-court day (a day equals six hours); AND in which the attorney expends more than 25 hours out-of-court attorney time. If

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<sup>402</sup> N.H. R. SUP. CT. 47, 48.

<sup>403</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021,” App. D (sample).

the attorney applies for extraordinary case credits, the judicial council will automatically review the case.<sup>404</sup>

2. Any type of case that had a trial that lasted more than three full in-court days (a day equals six hours) from opening statement through closing argument; AND in which the attorney expends more than 25 hours out-of-court attorney time. If the attorney applies for extraordinary case credits, the judicial council will automatically review the case.<sup>405</sup>
3. Any case, but the contract attorney must “submit a written summary describing the case and setting forth in detail the reasons that review should be granted,” including a “detailed description” of the type of case, the number & severity of the charges, the total in-court and out-of-court attorney time expended, the complexity of legal issues compared to other cases of the same type, the number of court appearances made, the number & type of motions filed, the number of witnesses called, and the nature & extent of investigation performed. If the attorney applies for extraordinary case credits, the judicial council has discretion whether to review the case at all.<sup>406</sup> The judicial council’s executive director first passes that application to the executive director of the NHPD for his recommendation about whether to review the request. The NHPD’s executive director has never recommended that the judicial council decline to review a request.

When the judicial council agrees to review an attorney’s request, the judicial council’s indigent defense subcommittee decides, in its discretion, whether to award any additional compensation to the contract counsel for the assigned case. The indigent defense subcommittee considers five factors: the seriousness of the charge; the complexity of the legal and factual issues; the number and complexity of pre-trial motions filed; the number of in-court days that the attorney spent on pre-trial issues and trial; and the total number of hours the attorney spent on the case.<sup>407</sup> If the judicial council’s indigent defense subcommittee approves the contract counsel’s application for additional compensation for a case, then the actual amount of additional compensation it can authorize depends on the total number of hours the attorney spent on the case, as shown in the table on page 140:

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<sup>404</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021,” App. D, ¶ I (sample).

<sup>405</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021,” App. D, ¶ II (sample).

<sup>406</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021,” App. D, ¶ III (sample).

<sup>407</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021,” App. D, ¶ IV (sample).

**RANGE OF ADDITIONAL COMPENSATION AVAILABLE TO BE  
AWARDED BY THE JUDICIAL COUNSEL TO CONTRACT COUNSEL**

Total attorney hours	Possible additional compensation
<25	At discretion of judicial council
25-50	\$300 - \$2,400
51-70	\$2,100 - \$3,600
71-90	\$3,300-\$4,500
91-110	\$4,200 - \$5,700
111-130	\$5,400 - \$6,900
131-150	\$6,600 - \$7,800
>150	At discretion of judicial council

The judicial council says that additional compensation is only awarded in about 10 cases each fiscal year, in large part because contract counsel rarely apply. Most contract counsel attorneys say they rarely if ever apply for additional compensation for a host of interrelated reasons. As a practical matter, the judicial council is simply unlikely to award additional compensation in any case of any type unless the attorney spends more than 25 hours out-of-court time on the case, so a contract counsel attorney would have to keep track of their time in *every* case in order to be able to apply in those few cases that meet the criteria. Contract counsel say it takes hours to prepare an application for additional compensation, and because most contract counsel do not have much, if any, administrative support in their law offices, they have trouble seeing the value in devoting, for example, 10 hours of their time to preparing an application in the hope of possibly getting paid for the equivalent of that same 10 hours. Because the judicial council decision as to whether to award additional compensation is wholly discretionary, contract counsel attorneys are hesitant to invest all of the time necessary in keeping track of their time throughout a case and preparing an application, when the judicial council may not award them any additional compensation. Even when the judicial council awards additional compensation, contract counsel attorneys say the judicial council often does not pay them for the full number of hours they spent on the case.

*b. Contract counsel expenditures for indigent defense services*

As mentioned, for both FY 2020 and FY 2021, the largest contracts awarded by the judicial council authorized a contract counsel to be assigned up to 300 units for a maximum possible compensation of \$90,000 (before any possible additional compensation), and the smallest contract authorized assignment of up to 50 units for a maximum possible compensation of \$15,000. No matter how little or how much a contract counsel has the ability to be paid under their contract, the judicial council contract with each contract counsel requires the contract counsel to pay all costs necessary to:

- provide a space to meet with assigned clients that is conveniently located to the courts out of which the contract counsel's cases are assigned,<sup>408</sup>

<sup>408</sup> "New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021," ¶ 16 (sample).

- provide a means of “prompt and effective communication” with assigned clients including by telephone for in-custody clients;<sup>409</sup>
- retain the “substantive portions of the files” of assigned clients for at least six years;<sup>410</sup>
- attend 10 hours of continuing legal education in criminal defense or trial practice, including at least one hour in juvenile representation;<sup>411</sup>
- carry professional liability insurance of \$100,000/\$300,000;<sup>412</sup>
- remain a member in good standing of the New Hampshire Bar Association, and notify the judicial council immediately of any change in standing as a member of any bar association and within seven days of any complaint docketed by the attorney discipline office;<sup>413</sup> and
- provide office overhead (defined by the judicial council as including but not limited to “rent, wages and benefits, office supplies, telephone, utilities and library materials”), travel, and continuing legal education.<sup>414</sup>

*Overhead.* Some contract counsel attorneys do not have a brick-and-mortar office, because they cannot afford rent. For example, one contract counsel attorney, who is available for assignment to court locations in two counties, works from home and meets with clients at coffee shops.

Most contract counsel attorneys meet with their assigned clients in the available meeting rooms in the courthouses. When a circuit court location issued a memo about a year ago requiring lawyers to obtain permission from the court clerk to use a court conference room, this caused some concern, but fortunately the rule was never enforced.

Many contract counsel attorneys do not have any administrative support, such as a secretary or receptionist, because they say they cannot afford them. One contract counsel says the entire amount they are authorized under their contract will only pay one-half the salary of their paralegal.

*Case-related expenses.* As previously explained, when a contract counsel attorney believes there are “services necessary to an adequate defense” of their assigned client, state law and the judicial council contract require the attorney to apply to the court in which the case is pending to request authorization to obtain those services.<sup>415</sup> (*See* side bar explaining the process for an attorney to obtain “services necessary to an adequate defense” of their assigned client at page 114). If the court finds that the services are necessary, then once the service is obtained and generally not later than 60 days following disposition of a case, the contract counsel attorney

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<sup>409</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021,” ¶ 17 (sample).

<sup>410</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021,” ¶ 34 (sample).

<sup>411</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021,” ¶ 26 (sample).

<sup>412</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021,” ¶ 35 (sample).

<sup>413</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021,” ¶ 36 and App. A (sample).

<sup>414</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021,” ¶ 2 (sample).

<sup>415</sup> N.H. REV. STAT. ANN. § 604-A:6 (2019); “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021,” ¶ 3 (sample).



files a reimbursement claim with the court.<sup>416</sup> The court certifies the specific amount to be paid to the service provider or reimbursed to the attorney, and upon receipt of that court certification the judicial council must pay for the service out of the funds appropriated to it for that purpose.<sup>417</sup>

The difficulty about contract counsel securing these services for their assigned clients is that it takes attorney time to gather the information necessary and then apply to the court for authorization and then prepare the reimbursement claim. Contract counsel attorneys say that time spent preparing this paperwork cuts into the already insufficient flat fee they are paid by the judicial council for each case. As a result, contract counsel are less likely than NHPD attorneys (who are salaried) or assigned counsel attorneys (who are paid by the hour) to request necessary services on behalf of their indigent clients. One contract counsel attorney even admits to simply not paying bills he receives for things like copies of medical records or other documentary evidence.

More worrisome still is that the judicial council contract requires contract counsel attorneys to personally pay for all costs of travel, communications, and legal research incurred in representing the indigent clients assigned to them. Many contract counsel attorneys do not have a Westlaw or Lexis account to perform legal research for their assigned clients, because they say they cannot afford it.

Despite the contract requirement to provide a means of “prompt and effective communication” with assigned clients including by telephone for in-custody clients,<sup>418</sup> some contract counsel attorneys will not accept collect calls from their in-custody clients. For example, one attorney relies on jail personnel to help clients reach him; when a client wants to speak with him, the jail emails him and he calls the client at the jail. Other attorneys tell the CCAO they are unavailable when asked to represent a client who is in-custody. Some attorneys tell their clients to call the NHPD, then the NHPD transfers the call to the CCAO and the CCAO transfers the call to the contract counsel attorney or calls the attorney who then calls the client at the jail. The judicial council and its indigent defense subcommittee are fully aware of these problems. In fact, one law firm told the judicial council they would not serve as contract counsel if they had to accept collect jail calls, and the judicial council awarded a contract to the law firm anyway because the judicial council believes the law firm attorneys are “good lawyers” whom the judicial council did not want to lose from among the contract counsel attorneys.

Under the judicial council contract, contract counsel attorneys are not reimbursed for any of the travel costs, including mileage, that they incur in representing an assigned client. Case-related travel is frequently substantial in the northern and more rural areas of the state and for clients who are held in the state prison.

*Attorney pay.* Whatever remains from the compensation that the judicial council pays to a contract counsel attorney for an assigned case, after meeting all of the responsibilities required

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<sup>416</sup> N.H. REV. STAT. ANN. §§ 604-A:6, 604-A:8 (2019).

<sup>417</sup> N.H. REV. STAT. ANN. § 604-A:8 (2019).

<sup>418</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021,” ¶ 17 (sample).

by the contract, is the contract counsel attorney's personal pay for representing the indigent defendant in that case.

#### 4. Assigned counsel attorneys funding & expenditures

When the NHPD is unavailable and there is no contract counsel available for assignment to the case of an indigent person, the legislature authorizes the judicial council to pay "any qualified attorney" to represent the indigent person in that case.<sup>419</sup> Private attorneys appointed in these circumstances are referred to in statutes and by the judicial council as "assigned counsel."<sup>420</sup>

There is no pre-qualified list of assigned counsel attorneys who have agreed in advance to represent an indigent defendant in a case when asked to do so. Instead, when the NHPD is unavailable for a case and there is no contract counsel available, the judicial council's executive director or the CCAO, depending on the type of case and court location in which it is pending, calls private attorneys until one agrees to accept the assignment.

When an assigned counsel attorney is assigned a case, state law requires the court in which the case is pending to set the amount of "the compensation and reimbursement to be paid the counsel for services rendered and expenses incurred while representing the defendant,"<sup>421</sup> and the court makes that order according to rules adopted by the New Hampshire Supreme Court.<sup>422</sup> Assigned counsel attorneys must submit to the court their claims for compensable fees and expenses within 60 days of disposition of the case unless the judge allows a later submission,<sup>423</sup> and some judges allow attorneys to submit interim billing during the course of representing an indigent defendant. The judicial council must pay an assigned counsel attorney as ordered by the court.<sup>424</sup>

##### *a. Attorney pay and overhead*

The rules of the New Hampshire Supreme Court provide for an assigned counsel attorney to be paid \$100 per hour to represent an indigent defendant in "major crime cases (capital murder, homicide, aggravated felonious sexual assault, felonious sexual assault and first degree assault)" and \$60 per hour in all other assigned cases.<sup>425</sup> The hourly fee covers the attorney's pay and overhead – "there shall be no separate charge for overhead."<sup>426</sup> Unlike the judicial council's limitation on contract counsel attorneys, the rules allow assigned counsel attorneys in adult criminal cases to bill hours for their time spent traveling to and from meetings with an in-custody

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<sup>419</sup> N.H. REV. STAT. ANN. §§ 604-A:1, 604-A:2(II), 604-A:4 (2019).

<sup>420</sup> N.H. REV. STAT. ANN. §§ 604-B:5, 604-B:6 (2019); NEW HAMPSHIRE JUDICIAL COUNCIL, JUDICIAL COUNCIL PLAN FOR THE PARTICIPATION OF THE PRIVATE BAR IN COURT APPOINTED CRIMINAL CASES 1 (Sept. 9, 2014).

<sup>421</sup> N.H. REV. STAT. ANN. § 604-A:4 (2019).

<sup>422</sup> N.H. REV. STAT. ANN. §§ 604-A:4, 604-B:5 (2019); N.H. R. SUP. CT. 47, 48.

<sup>423</sup> N.H. REV. STAT. ANN. § 604-A:8(II) (2019); N.H. R. SUP. CT. 47(4), 48(4).

<sup>424</sup> N.H. REV. STAT. ANN. § 604-A:8(I) (2019).

<sup>425</sup> N.H. R. SUP. CT. 47(2), 48(2).

<sup>426</sup> N.H. R. SUP. CT. 47(1), 48(1).

client, but other travel time cannot be billed unless a court expressly authorizes it in advance in exceptional circumstances.<sup>427</sup>

The rules also set a cap on the amount of the fee in each type of case (the maximum fee includes any billing for paralegal hours at \$35 per hour and any billing for attorney fees at the applicable hourly rate of \$100 or \$60), although a court can authorize compensation beyond the fee cap “upon an express, written finding of good cause and exceptional circumstances.”<sup>428</sup> Otherwise, the maximum fees allowed to an assigned counsel attorney for representing an indigent defendant in trial-level adult criminal and juvenile delinquency cases, and the compensable attorney hours that flat fee compensation allows based on the applicable hourly rate (assuming no billing for paralegal hours), are:

**ATTORNEY COMPENSATION AUTHORIZED TO ASSIGNED COUNSEL ATTORNEYS BY NEW HAMPSHIRE SUPREME COURT RULE**

Type of case	Hourly rate	Maximum fee	Compensable hours under maximum fee
Capital murder, first degree murder, second degree murder, manslaughter	\$100	\$20,000	200
Aggravated felonious sexual assault, felonious sexual assault, first degree assault	\$100	\$8,000	80
Other felonies	\$60	\$4,100	68.33
Misdemeanors	\$60	\$1,400	23.33
Juvenile delinquency	\$60	\$1,700	28.33
Juvenile court review hearings	\$60	\$300	5

For FY 2020 and FY 2021, the State of New Hampshire appropriated \$2,960,000 to the judicial council for the compensation of assigned counsel attorneys to represent indigent defendants in cases where the NHPD is unavailable and there is no available contract counsel attorney.<sup>429</sup>

The amount the judicial council actually spends to compensate assigned counsel attorneys for representing indigent defendants depends on the number and types of cases in which the courts appoint counsel to represent indigent people, the NHPD is unavailable, and there is no available contract counsel. The number and type of cases that require an assigned counsel attorney varies from year to year.

- During FY 2019, one or more attorneys from 39 separate private law firms accepted 242 assignments to represent indigent defendants in the trial courts. Of these assignments, five were serious felonies payable at \$100 per hour.
- During FY 2020, one or more attorneys from 36 separate private law firms accepted 194 assignments to represent indigent defendants in the trial courts. Of these assignments, three were serious felonies payable at \$100 per hour.

<sup>427</sup> N.H. R. SUP. CT. 47(2)(a), 48(2)(a).

<sup>428</sup> N.H. R. SUP. CT. 47(2), 48(2).

<sup>429</sup> NEW HAMPSHIRE OPERATING BUDGET, 2020-2021 BIENNIAL, at 308-312. \$1,480,000 is appropriated for each fiscal year.

- During fiscal year 2021, one or more attorneys from 53 separate private law firms accepted 416 assignments to represent indigent defendants in the trial courts. Of these assignments, 13 were serious felonies payable at \$100 per hour.

Then, the amount of the judicial council spending depends further on the compensation that courts order the judicial council to pay to assigned counsel attorneys.

The following table shows the state’s initial appropriation to the judicial council and the judicial council’s actual expenditures for fees of assigned counsel attorneys in FY 2018 through FY 2021. Assigned counsel funding from the state to the judicial council has two components: attorney compensation in adult criminal and juvenile delinquency cases (assessed in this evaluation); and attorney compensation in representation of parents in abuse and neglect cases (outside the scope of this evaluation).

**APPROPRIATED FUNDING AND ACTUAL EXPENDITURES FOR ASSIGNED COUNSEL FEES, FY 2018 THROUGH FY 2021**

	Initial state appropriation	Actual judicial council expenditure			Additional funding required
		Total	Criminal and delinquency	Abuse and neglect	
FY 2018	\$1,380,000	\$1,729,981	\$541,665	\$1,158,342	\$349,981
FY 2019	\$1,380,000	\$1,697,613	\$432,128	\$1,265,788	\$317,613
FY 2020	\$1,480,000	\$1,449,091	\$271,240	\$1,146,604	(\$30,909)
FY 2021	\$1,480,000	\$1,291,116	\$188,929	\$1,017,959	(\$188,884)

*b. Case-related expenses*

As previously explained, when an assigned counsel attorney believes there are “services necessary to an adequate defense” of their assigned client, state law requires the attorney to apply to the court in which the case is pending to request authorization to obtain those services.<sup>430</sup> (See side bar explaining the process for an attorney to obtain “services necessary to an adequate defense” of their assigned client at page 114). The rules of the New Hampshire Supreme Court prohibit assigned counsel attorneys from being paid or reimbursed for some out-of-pocket expenses (telephone calls, photocopies, postage, and fax) they may necessarily incur in the trial-level cases of the indigent defendants they are assigned to represent.<sup>431</sup> Unlike the judicial council’s limitation on contract counsel attorneys, the rules allow assigned counsel attorneys to be reimbursed for the mileage they incur in representing their assigned clients.<sup>432</sup>

<sup>430</sup> N.H. REV. STAT. ANN. § 604-A:6 (2019).

<sup>431</sup> N.H. R. SUP. CT. 47(3)(g),(i), 48(3)(g),(i).

<sup>432</sup> N.H. R. SUP. CT. 47(3)(f), 48(3)(f).

## Chapter VI

# Sufficient time & caseloads

The U.S. Constitution holds the State of New Hampshire responsible for ensuring adequate resources for the right to counsel under the Sixth and Fourteenth Amendments.<sup>433</sup> For any attorney to fulfill their constitutional, statutory, and ethical duties to effectively represent an indigent defendant, the attorney must have resources of both time and money.

The preceding chapter explains the fiscal resources that are necessary to provide effective representation to indigent defendants. This chapter explains the temporal resources that are necessary to provide effective representation to indigent defendants.

The U.S. Supreme Court in *Powell v. Alabama* notes that the lack of “sufficient time” to consult with counsel and to prepare an adequate defense was one of the primary reasons for finding that the Scottsboro Boys were constructively denied counsel.<sup>434</sup> As one state supreme court observed over a quarter century ago, “as the practice of criminal law has become more specialized and technical, and as the standards for what constitutes reasonably effective assistance of counsel have changed, the time an appointed attorney must devote to an indigent’s defense has increased considerably.”<sup>435</sup>

Impeding counsel’s time “is not to proceed promptly in the calm spirit of regulated justice, but to go forward with the haste of the mob,” the *Powell* Court explained.<sup>436</sup> The lack of sufficient time may be caused by any number of things, including but not limited to payment arrangements that create financial incentives for lawyers to dispose of cases quickly rather than in the best interests of their clients, or excessive workloads. Whatever the cause, insufficient time to prepare and present an effective defense for each indigent defendant is a marker of the constructive denial of counsel.

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<sup>433</sup> *Gideon v. Wainwright*, 372 U.S. 335, 341-45 (1963) (“[T]hose guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment. . . . [A] provision of the Bill of Rights which is ‘fundamental and essential to a fair trial’ is made obligatory upon the States by the Fourteenth Amendment. . . . [R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. . . . The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”).

<sup>434</sup> *Powell v. Alabama*, 287 U.S. 45, 59 (1932).

<sup>435</sup> *State v. Wigley*, 624 So.2d 425, 428 (La. 1993).

<sup>436</sup> *Powell v. Alabama*, 287 U.S. 45, 59 (1932).

## A. Understanding the time necessary for effective representation

No matter how complex or basic a case may seem at the outset, no matter how little or how much time an attorney wants to spend on a case, and no matter how financial matters weigh on an attorney, there are certain fundamental tasks each attorney must do on behalf of every client in every criminal and juvenile delinquency case. Even in the simplest case, the attorney must, among other things:

- meet with and interview the client;
- attempt to secure pretrial release if the client remains in state custody (but, before doing so, learn from the client what conditions of release are most favorable to the client);
- keep the client informed throughout the duration of proceedings;
- request and review discovery from the prosecution;
- independently investigate the facts of the case, which may include learning about the defendant's background and life, interviewing both lay and expert witnesses, viewing the crime scene, examining items of physical evidence, and locating and reviewing documentary evidence;
- assess each element of the charged crime to determine whether the prosecution can prove facts sufficient to establish guilt and whether there are justification or excuse defenses that should be asserted;
- prepare appropriate pretrial motions and read and respond to the prosecution's motions;
- prepare for and appear at necessary pretrial hearings, and preserve the client's rights in those hearings;
- develop and continually reassess the theory of the case;
- assess all possible sentencing outcomes that could occur if the client is convicted of the charged crime or a lesser offense;
- negotiate plea options with the prosecution, including sentencing outcomes; and
- all the while prepare for the case to go to trial (because the decision about whether to plead or go to trial belongs to the client, not to the attorney).<sup>437</sup>

The time an appointed attorney can devote to accomplishing each of these tasks in each defendant's case depends on the total amount of time the attorney has available for all professional endeavors and the total amount of work the attorney must accomplish in that available time. This discussion is often framed in terms of "caseloads" or "workloads."

Caseload refers to the raw, quantifiable number of cases an attorney handles during a particular period of time. A lawyer's total annual caseload is the count of all indigent representation system cases in which the lawyer provided representation during a given year, starting with the number of cases the attorney had open at the beginning of the year and adding to that the number of cases assigned to the attorney during the year.

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<sup>437</sup> See, e.g., NATIONAL LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (1995).

In addition to considering the raw number of cases of each type that an attorney handles, the U.S. Department of Justice has advised, and national standards agree, that “caseload limits are no replacement for a careful analysis of a public defender’s *workload* . . .”<sup>438</sup> Workload includes the cases an attorney is appointed to handle within a given system (i.e., caseload), but it also includes the cases an attorney takes on privately, public representation cases to which the attorney is appointed by other jurisdictions, and other professional obligations such as obtaining and providing training and supervision.<sup>439</sup> Further, national standards agree that the lawyer’s workload must take into consideration “all of the factors affecting a public defender’s ability to adequately represent clients, such as the complexity of cases on a defender’s docket, the defender’s skill and experience, the support services available to the defender, and the defender’s other duties.”<sup>440</sup>

## B. Indigent defense system caseloads & workloads

The indigent defense system established by the State of New Hampshire is responsible for representing every defendant to which a court appoints an attorney, no matter how few or many defendants that might be. State law requires that, whenever a court appoints an attorney to represent an indigent defendant in a criminal case or a juvenile delinquency case, “the appointment shall be:”

- “first, appointment of the public defender program . . . if that office is available;”
- “second, in the event the public defender program is not available, appointment of a contract attorney . . . if such an attorney is available;” and
- “third, in the event that neither the public defender program nor a contract attorney is available, the appointment of any qualified attorney . . .”<sup>441</sup>

And state law further requires that the public defender program must represent every defendant who receives appointed counsel unless: the program has a conflict of interest as defined by the *Rules of Professional Conduct*; or the caseloads of the public defender program exceed the contractual limits imposed by the judicial council.<sup>442</sup>

<sup>438</sup> Statement of Interest of the United States at 9, *Wilbur v. City of Mount Vernon*, No. C11-1100RSL, ECF No. 322 (W.D. Wash. filed Dec. 4, 2013), <http://www.justice.gov/crt/about/spl/documents/wilbursoi8-14-13.pdf>; AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, principle 5 cmt. (2002).

<sup>439</sup> AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, principle 5 cmt. (2002).

<sup>440</sup> Statement of Interest of the United States at 9, *Wilbur v. City of Mount Vernon*, (W.D. Wash. filed Dec. 4, 2013) (No. C11-1100RSL), ECF No. 322, <http://www.justice.gov/crt/about/spl/documents/wilbursoi8-14-13.pdf>. See, e.g., Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 *Hastings L. J.* 1031, 1125 (2006); NATIONAL STUDY COMM’N ON DEFENSE SERVS., GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 5.1 (1976).

<sup>441</sup> N.H. REV. STAT. ANN. § 604-A:2(II) (2019).

<sup>442</sup> N.H. REV. STAT. ANN. §§ 604-A:2(II), 604-B:3, 604-B:6 (2019). See “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶ 1 (for the term of July 1, 2019 through June 30, 2021). Since July 1, 1981, New Hampshire has statutorily required that:

The allocation of cases between the public defender program and assigned counsel shall be in accordance with a plan adopted by the public defender program and approved by the judicial council. The plan shall establish caseload limits for defender attorneys in accordance with professional standards under the code of professional responsibility and shall provide for appointment of assigned counsel only where maximum caseloads have been reached or public defender attorneys are otherwise unavailable.

Within these statutory parameters, the state delegates to the judicial council the responsibility for administering and ensuring the effectiveness of the indigent defense system attorneys in every case of every indigent defendant.<sup>443</sup> As explained in chapter IV at pages 81-82, when any defendant (both adult or child) requests appointed counsel and a court determines the defendant is entitled to have counsel appointed,<sup>444</sup> the court appoints the NHPD to represent the defendant (in writing, by completing a notification of eligibility and appointment form, referred to colloquially as an “NEA”). The court clerk sends the “notice of eligibility and appointment” (by either email or fax)<sup>445</sup> to the NHPD branch office that is responsible for representing indigent defendants in that court location and in the type of case in which the defendant is accused.

That the NHPD has received an “NEA” form does not mean an NHPD attorney will be assigned to represent the indigent defendant. Instead, the NHPD must first determine whether it is available in the particular case of the particular indigent defendant. If the NHPD is available, then the NHPD assigns the case to an NHPD attorney (attempting to do so within 24 hours of receiving the “notice of eligibility and appointment”). If the NHPD is not available, then the NHPD sends the case to the CCAO for assignment to a contract counsel attorney if one is available, and if a contract counsel attorney is not available then assignment to an assigned counsel attorney.<sup>446</sup> (*See* discussion of determining whether a case is assigned to the NHPD or sent to the CCAO for assignment, at pages 85-93.)

The NHPD does not keep track of or report to the judicial council the cases in which it receives a notice of appointment from a court but immediately declares itself to be unavailable, and the judicial council does not require the NHPD to do so, and as a practical matter the judicial council has never been sufficiently staffed nor funded to compile and analyze this data. Because the NHPD refers these cases to the CCAO, the CCAO (and thus the judicial council) should know: when a court appoints counsel to represent each of these indigent defendants; and the amount of time that transpires between when the court appoints counsel and when an individual attorney is actually assigned to represent the individual indigent defendant in each case. The judicial council does not, however, compile data about the amount of time that transpires between a court appointing counsel and an individual attorney actually being assigned in any case. (*See* discussion at pages 157-160 of the caseloads & workloads of contract counsel attorneys and assigned counsel attorneys.)

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N.H. REV. STAT. ANN. § 604-B:6 (2019).

<sup>443</sup> N.H. REV. STAT. ANN. § 494:3(VI) (2019).

<sup>444</sup> A court must appoint counsel within 24 hours of receiving the *Request for a Lawyer* form, excluding weekends and holidays. N.H. R. CRIM. PROC. 5(b).

<sup>445</sup> If the defendant is in custody, the notice must be made by telephone, fax, or electronically; if the defendant is out of custody, notice must be made by telephone, electronically, or first-class mail. N.H. R. CRIM. PROC. 5(b). The “notice of eligibility and appointment includes notification that counsel has been appointed, contact information for the responsible NHPD branch office, contact information for the defendant, notice of whether the defendant is out-of-custody or detained, and the date of the next scheduled court proceeding.

<sup>446</sup> N.H. REV. STAT. ANN. § 604-A:2(II) (2019).



The NHPD keeps track, in its *defenderData* case management system, of every case for which it receives a notice of appointment from a court and assigns the case to an NHPD attorney. The judicial council does not require the NHPD to report the specific cases of indigent defendants for whom a court has appointed counsel and which are assigned to an NHPD attorney. The information that the judicial council does require the NHPD to report about the cases of these indigent defendants is explained below (*see* NHPD attorneys' caseloads & workloads, at pages 151-157).

The NHPD keeps track, in its *defenderData* case management system, of those cases that it initially accepts and assigns to an NHPD attorney, but at some subsequent point determines it has a conflict and so must withdraw and transfer the case to the CCAO for reassignment to a conflict counsel attorney or an assigned counsel attorney. The NHPD reports these cases to the judicial council as NHPD new opened cases during the quarter they are assigned to the NHPD, and then reports these cases as cases disposed by the NHPD when they are referred to the CCAO for reassignment. The CCAO, and through it the judicial council, counts these cases again when they are reassigned by the CCAO. The judicial council does not require the NHPD to report the number of cases from which it must withdraw due to a conflict of interest, so the overall number of cases handled by the indigent defense system is falsely inflated and the number of open cases per NHPD attorney is higher than it should be for longer than it should be.

The judicial council could, but does not, require the NHPD to send all "NEAs" to the judicial council. Despite the statutory requirement for the judicial council to administer the system of providing an attorney to represent each indigent defendant, the judicial council is not aware that counsel has been appointed or that an indigent defendant even exists until after the NHPD determines whether it is available in the case of that indigent defendant.

The manner and extent to which the judicial council oversees the caseloads and workloads of the attorneys who represent indigent defendants operates differently for cases assigned to each of the three parts of the state's indigent defense system. As a result, the judicial council, and through it the policymakers and taxpayers of New Hampshire, does not know on an ongoing basis: how much time is actually required to effectively represent each indigent defendant in each type of case; how many cases each indigent defense system attorney is handling in a given year; what other workload responsibilities each indigent defense system attorney has in a given year; nor whether each indigent defense system attorney is working with sufficient support to allow them to dedicate adequate time to each indigent defendant's case. This information is all necessary for policymakers and justice system stakeholders to understand in order to plan for the future needs of New Hampshire's indigent defense system and to ensure that there are a sufficient number of attorneys with sufficient time to provide effective representation to each indigent defendant.

## 1. NHPD attorneys' caseloads & workloads

Since 1987, the New Hampshire Public Defender non-profit law firm has operated the state's public defender program, pursuant to the statutorily required two-year contracts awarded by the judicial council.<sup>447</sup> The NHPD public defender program must represent every defendant (adult and child) who receives appointed counsel, unless the NHPD is not available for one of two reasons:

- a conflict of interest as defined by the *Rules of Professional Conduct*; or
- caseloads exceeding the contractual limits imposed by the judicial council.<sup>448</sup>

The judicial council does not itself keep track of the number and types of cases assigned to the NHPD as a whole, nor to the individual NHPD attorneys (both staff attorneys and subcontractor attorneys). Instead, the judicial council relies on the NHPD for all information about the NHPD's caseloads and workloads. The judicial council does not obtain the information necessary to determine whether the caseloads and workloads of NHPD staff attorneys and NHPD subcontractor attorneys allow those attorneys sufficient time to provide effective representation to the indigent defendants whom they are assigned to represent.

**Caseloads of individual NHPD attorneys.** The NHPD keeps track of the cases it has determined it is available to accept by entering them into its *defenderData* case management system along with the name of the NHPD attorney assigned to represent the defendant in the case. When an NHPD attorney closes a case, the attorney completes a closed case card that includes the date and manner in which the case was disposed and any sentence imposed, along with the attorney's estimate of the number of in-court and out-of-court hours devoted to the case, and the NHPD enters the information into its *defenderData* system. Despite this information being readily available to the NHPD at any moment, prior to this evaluation the judicial council did not require the NHPD to report to the judicial council the number of cases assigned to and disposed by each NHPD attorney. (During this evaluation, the judicial council began requiring the NHPD to provide a list of cases assigned to each NHPD attorney, broken down by type of case. The judicial council reports that their analysis of this data allowed them to authorize the NHPD to limit or close some branch offices to intake of new cases. *See* discussion at pages 88-93 regarding when the NHPD is unavailable due to excessive caseloads.)

The judicial council contract with the NHPD requires the NHPD to provide (to the judicial council, governor and council, and attorney general) quarterly written reports of: new cases accepted during the quarter and their progress; and cases disposed during the quarter, showing type and degree of offense, whether contested, and approximate time spent by the NHPD on the cases.<sup>449</sup> The NHPD submits these reports as required each quarter in a document entitled "Case

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<sup>447</sup> *See* N.H. REV. STAT. ANN. §§ 604-B:1, 604-B:4, 604-B:5 (2019); NEW HAMPSHIRE JUDICIAL COUNCIL, 22ND BIENNIAL REPORT JULY 1, 2011 – JUNE 30, 2013, at 9 (Mar. 2014).

<sup>448</sup> N.H. REV. STAT. ANN. §§ 604-A:2(II), 604-B:3, 604-B:6 (2019). "Agreement" between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶ 1 (for the term of July 1, 2019 through June 30, 2021).

<sup>449</sup> "Agreement" between the State of New Hampshire Judicial Council and the New Hampshire Public Defender,

Statistics,” but the information the NHPD is required to and does provide is insufficient for the judicial council to know the actual caseloads of NHPD attorneys as a whole, by branch office, or individually for any given period of time or on any day.

Each NHPD quarterly report shows the number of cases opened by the NHPD during the quarter, broken down by branch office and by case type. But the quarterly reports do not show the number of cases that were already open when the quarter began, so from the information provided, the judicial council cannot know the number of cases being handled by each branch office or by the NHPD as a whole during the quarter. The quarterly reports also do not show the number of attorneys in each branch office or in the NHPD as a whole, so from the information provided, the judicial council cannot know the average number of cases being handled by each NHPD attorney during the quarter. The quarterly reports do not show the number of cases opened and assigned to each NHPD attorney during the quarter.

Each NHPD quarterly report shows the number of cases closed by the NHPD during the quarter, broken down by branch office and by case type. For each type of case disposed, the quarterly reports also show: the average number of weeks between case opening and disposition for the case type; and the average number of NHPD attorney hours devoted to the case type. But the quarterly reports do not provide this more granular information broken down by branch office nor by individual NHPD attorney, and the reports do not show the actual amount of time devoted to each individual case or case type. Finally, each NHPD quarterly report provides detailed information about the method of disposition of cases closed during the quarter, broken down by branch office, for homicides, felonies, superior court misdemeanors, district court misdemeanors, and juvenile delinquencies, but not for any of the other types of cases handled by the NHPD.

**Time-keeping by NHPD attorneys.** The judicial council contract with the NHPD does not require the NHPD as a whole or the individual NHPD attorneys to keep track of the time they actually devote to each case they are assigned. The judicial council contract only requires the NHPD to report the “approximate time” that the NHPD spends on NHPD cases.<sup>450</sup>

NHPD attorneys do not typically keep track of the time they actually devote to each case they are assigned, although some individual attorneys may. Instead, most NHPD attorneys estimate the amount of in-court and out-of-court time they spent on an assigned case in order to provide that information on the closed case card for the case.

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Exh. C, ¶ 2.E. (for the term of July 1, 2019 through June 30, 2021). The judicial council contract with NHPD defines a “case” as:

a single charge; or, multiple related charges that occurred at the same time and place which are to be tried as one case regardless of the number of complaints; or, multiple charges that involve the same type of offense committed over a proximate period of time which are to be tried as one case regardless of the number of complaints.

“Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A-1, ¶ 3 (for the term of July 1, 2019 through June 30, 2021).

<sup>450</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. C, ¶ 2.E. (for the term of July 1, 2019 through June 30, 2021).

For a total of 60 days during May and June 2020, the NHPD board of directors, over the objection of the NHPD executive director, required all NHPD-employed attorneys (but not NHPD subcontractor attorneys) to track their time in detail. This was at the start of the covid-19 pandemic during a time when the courts were largely closed, and the impetus was for the NHPD to be able to show the legislature that the NHPD staff was working during the pandemic.

The NHPD director of legal services created a spreadsheet for the attorneys to use in keeping track of their time, but the NHPD did not provide instructions to the attorneys about *how* to track their time, including for example what time increments to use. As a result, NHPD attorneys all recorded their time differently, keeping track of different tasks and in different increments of time. The executive director determined, and most NHPD staff attorneys agreed, that it was inefficient, ineffective, and extremely difficult for the NHPD attorneys to maintain detailed time records and that the *defenderData* system is too cumbersome to use for that purpose.

The judicial council contract for the FY 2020 - FY 2021 biennium required the NHPD to undergo a financial risk assessment during the first six months of FY 2020, with the report of that assessment to be provided to the judicial council.<sup>451</sup> The resulting October 2020 report recommended, among other things, that the NHPD should:

institute a procedure for employees to track their time on a detailed level. This detailed tracking should include client work and non-client work. . . .

. . . For the purposes of caseload management, the weighing of cases and using these totals to assign future work is necessary on an on-going basis. However, time reporting is also a key aspect that is needed in order to provide the details surrounding employees hours in order to better manage and budget for the future.<sup>452</sup>

The NHPD board of directors discussed the possibility of requiring NHPD attorneys to contemporaneously record their time spent throughout a case, but members of the board are divided in their views; some think that time-keeping is a necessary and important part of providing representation, while others think detailed timekeeping is just a bureaucratic and needless task that takes time away from providing representation. Ultimately, the NHPD board of directors decided in November 2020 that the NHPD would “not implement[] granular, detailed timekeeping for individual cases at this time.”

**Workloads of NHPD attorneys.** The judicial council contract requires the NHPD, “subject to the normal turnover of staff and the availability of qualified replacements,” to have no fewer than 113 FTE trial attorneys throughout the term of the FY 2020 - FY 2021 contract; these attorneys can be employees or subcontractors.<sup>453</sup> Whatever the total number of trial-level cases

<sup>451</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶ 12 (for the term of July 1, 2019 through June 30, 2021).

<sup>452</sup> BERRYDUNN, NEW HAMPSHIRE PUBLIC DEFENDER OPERATIONAL ASSESSMENT, at 10 (Oct. 9, 2020).

<sup>453</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶¶ 5, 7, 8, and Exh. C, ¶ 5 (for the term of July 1, 2019 through June 30, 2021).

is that are assigned to the NHPD each year, all of these cases are distributed among the NHPD staff attorneys and subcontractor attorneys allocated to each branch office. But the caseloads and workloads do not fall equally on each NHPD attorney.

*NHPD-employed attorneys.* The judicial council does not regularly require the NHPD to report the number of attorneys actively employed by the NHPD in its 10 branch offices. During the FY 2020 - FY 2021 contract, the NHPD employed between 115 and 133 attorneys in its 10 branch offices (*see* appendix A), including 10 managing attorneys and two assistant managing attorneys, all of whom are assigned to represent indigent defendants. On any given day, some number of these NHPD staff attorneys are not available to represent any indigent defendants because they are out of the office on vacation, on sick leave, or on family medical leave.

The judicial council contract prohibits attorneys who are employed by the NHPD from practicing law outside of representing their NHPD assigned clients,<sup>454</sup> so every NHPD staff attorney devotes 100% of their available professional hours to their NHPD employment. Most NHPD attorneys work full-time (defined by the NHPD as 37.5 hours per week<sup>455</sup>), though at times during FY 2020 - FY 2021, between one and three of the NHPD staff attorneys worked part-time and the NHPD shows their part-time employment at either 80% or 73% (but it is unclear whether this represents a percentage of an attorney's full-time caseload or of a full-time attorney's hours in a work-week).

While every NHPD staff attorney devotes all of their professional hours to their NHPD employment, NHPD staff attorneys have significant time-consuming work requirements in addition to representing their assigned clients. The judicial council does not require the NHPD to report the number or percentage of hours that each NHPD staff attorney is required to devote to matters other than client representation, and the NHPD does not keep track of these hours. For example:

- Managing and assistant managing attorneys are responsible for the supervision of all staff, both attorneys and non-attorneys, in their branch office (*see* discussion at pages 73-75), and they are also responsible for all administrative duties including assigning cases to individual attorneys (*see* discussion at pages 93-97). Managing attorneys estimate spending at least three hours each week just on assigning cases. Managing attorneys do not keep track of the time they spend on administration (rather than on directly representing clients), but they say they spend “a great deal of time on managerial issues” and one managing attorney estimates that 30% of weekly hours are spent on management.
- All NHPD staff attorneys are required to attend at least 2 ½ days of annual NHPD-provided training, and many staff attorneys are expected to devote significant time to providing internal NHPD training and mentoring. For example, the eight NHPD attorneys who are designated as “trial skills trainers” each spend approximately 40 to 80

<sup>454</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶ 4 (for the term of July 1, 2019 through June 30, 2021). *See* N.H. REV. STAT. ANN. § 604-B:7 (2019) (“Public defenders shall serve in accordance with the terms of a contract entered into pursuant to RSA 604-B:4. Public defender responsibilities shall be exclusively concerned with rights of indigent criminal defendants.”).

<sup>455</sup> NEW HAMPSHIRE PUBLIC DEFENDER, EMPLOYEE MANUAL ¶ 2.9 (Mar. 28, 2019).

hours each year providing training for NHPD “new hire” attorneys. A senior attorney who is responsible for mentoring four “new hire” attorneys explains that mentoring responsibilities fall more heavily on the senior attorneys who likely carry caseloads of more serious cases. All NHPD staff attorneys are also required to attend weekly case conferences in their branch office. (*See* chapter III, page 69.) At any given time, multiple NHPD staff attorneys serve as co-counsel or second chair on cases to allow less experienced attorneys to learn new skills, and these cases are only counted in the primary attorney’s caseload.

- Most NHPD staff attorneys are responsible for covering some sessions of arraignments of in-custody adult defendants in the superior court and of in-custody juvenile defendants in multiple circuit court locations, where they must represent *during* the arraignment every defendant who appears without an attorney without regard to whether the defendant is indigent or not indigent. For example, the Littleton office staff attorneys rotate arraignment session responsibility, with one attorney assigned to cover in-custody felony arraignments every day; and when each grand jury returns indictments, then all of the staff attorneys are necessary. Each staff attorney in the Manchester office serves as the in-custody felony arraignment attorney for approximately two days each month, as does each staff attorney in the Nashua office.
- Some number of NHPD staff attorneys are responsible for serving on the “team” and attending all sessions of drug courts, mental health courts, or other specialty courts. The number of specialty courts in which a branch office must provide an attorney varies depending on the court locations served by each branch office. For example, one branch office estimates 20 hours of attorney time per week in the specialty courts for which they are responsible, another branch office estimates 14 to 18 hours per week in three specialty courts, a different branch office estimates 12 to 13 hours per week in two specialty courts, and two other offices each devote three hours on average each week to the single drug courts for which they are responsible. There is no court appointment designating the NHPD to represent the defendants in these specialty courts, so this representation is not counted as a case assignment.
- Because every NHPD staff attorney is assigned to a mixture of types of cases pending in multiple court locations, attorneys spend significant time driving between court locations, jails, and the branch office. The distance between these locations varies greatly, depending on the court locations served by each branch office. For example, an attorney in the Stratham office explains: “I regularly spend two hours a day in the car. It’s a tremendous amount of time. Our office is not near any courts. And you’re never going from court to the office and back; you go from one court to another.” (*See* chapter IV.C., pages 93-97.)

The judicial council does not regularly require the NHPD to report the number of support staff, such as a receptionist or secretary, that are available to assist the NHPD attorneys who are assigned to represent indigent defendants. At the start of FY 2021, the NHPD employed 62 non-attorney support personnel (office administrators, legal secretaries, and office assistants) across its 10 branch offices.<sup>456</sup> (*See* table of NHPD staffing at start of FY 2021 at page 38.) On any

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<sup>456</sup> The NHPD office directory for July 19, 2020 is the only complete listing of NHPD non-attorney staff provided

given day, some number of these NHPD support personnel are not available to assist attorneys because they are out of the office on vacation, on sick leave, or on family medical leave. The ratio of support personnel to attorneys varies slightly from office to office, but it roughly approximates one support person for every two attorneys on average.

The judicial council does not regularly require the NHPD to report the number of investigators or social workers who are available to assist the NHPD attorneys who are assigned to represent indigent defendants, nor the hours those investigators and social workers actually devote to NHPD cases. At the start of FY 2021, the NHPD employed 26 investigators and two social workers across its 10 branch offices.<sup>457</sup> (*See* table of NHPD staffing at start of FY 2021 at page 38.) On any given day, some number of these NHPD personnel are not available to assist attorneys because they are out of the office on vacation, on sick leave, or on family medical leave. The availability of these NHPD investigators and social workers varies depending on the branch office to which a case is assigned.

Many NHPD investigators report that they have an overwhelming number of cases on which to assist. In the absence of a sufficient number of social workers, NHPD investigators are often asked to help clients find and apply for treatment programs and to create social histories of clients that attorneys use as mitigation in sentencing hearings – it typically takes an investigator between 20 to 40 hours to prepare a client’s social history – in addition to fulfilling the investigative needs in all of the NHPD cases. Alternatively, NHPD attorneys must themselves help clients find and apply for treatment programs and create the social histories of their clients that are needed in bail proceedings and plea negotiations and as mitigation in sentencing hearings.

Numerous judges believe that more social workers in particular are necessary for the NHPD attorneys to provide effective assistance of counsel. As one judge explains, felony cases so frequently involve drugs or mental health issues that NHPD attorneys are “stuck in the world of having to identify treatment and resources.” Even when there are resources available in a county, “a lawyer’s best time is not served by having to make a million and one phone calls [to access social services]. . . . It’s a huge task if you have a big caseload and you’re trying to get everyone into treatment, and you’re worried about suppression, and preparing jury trials.”

*NHPD subcontractor attorneys.* NHPD subcontracted with eight separate private law offices to provide representation in NHPD cases at various times during FY 2019, FY 2020, and FY 2021, through a total of 19 separately executed subcontracts. In all but two of these subcontracts, the NHPD assigned cases to the NHPD subcontractor attorneys on a case-by-case basis; in the other two, the subcontractors were assigned to a specified list of cases. Just as for NHPD staff attorneys, the NHPD’s *defenderData* system shows at any moment the date on which a case is assigned to each subcontractor and subsequently the date when that case is disposed, but the

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by NHPD during this evaluation, so the number of non-attorney staff is as of July 19, 2020.

<sup>457</sup> The NHPD office directory for July 19, 2020 is the only complete listing of NHPD non-attorney staff provided by NHPD during this evaluation, so the number of non-attorney staff is as of July 19, 2020.

judicial council does not require the NHPD to report to the judicial council the number of cases assigned to and disposed by each NHPD subcontractor attorney.

Neither the judicial council nor the NHPD know the actual number or identity of the attorneys who represent indigent defendants in NHPD cases assigned to subcontractors, because the subcontracts do not specify the identity of the attorneys who are to perform the work. Although each subcontract prohibits the law firm from further subcontracting out the work, the law firm can assign the work to any attorney employed by the law firm.

The judicial council and the NHPD do not require NHPD subcontractor attorneys to report the hours that they actually devote to representing indigent defendants in the NHPD cases to which they are assigned pursuant to their subcontract. The NHPD subcontracts require the subcontractor to submit a closed case card following final disposition of each case. NHPD subcontractor attorneys do not typically keep track of the time they actually devote to each case they are assigned, although some individual attorneys may. Instead, most NHPD subcontractors estimate the amount of in-court and out-of-court time they spent on an assigned case in order to provide that information on the closed case card for the case.

All NHPD subcontractor attorneys are private attorneys who are free to also represent privately retained clients, to contract with the judicial council to accept assignments in the New Hampshire courts as contract counsel, to accept case-by-case assignments in the New Hampshire courts as assigned counsel, to accept appointed cases in the courts of other states or the federal government, and to engage in any other professional activities during their working hours. The judicial council and the NHPD do not require NHPD subcontractor attorneys to report the number or type of cases they handle beyond those to which they are assigned by the NHPD, nor to report other professional endeavors to which they devote their available working hours. The judicial council and the NHPD do not require NHPD subcontractor attorneys to report whether they have available support staff, such as a receptionist or secretary, to assist them.

## 2. Contract counsel attorneys' caseloads & workloads

As authorized by statute,<sup>458</sup> each fiscal year the judicial council awards some number of one-year contracts to individual private attorneys, for-profit law firms, and/or a law school, to be available for assignment to the (non-homicide) cases of indigent people where the NHPD is unavailable.<sup>459</sup> Each contractor (whether an individual attorney, a law firm, or a law school) designates an individual attorney who is responsible for overseeing the cases assigned pursuant to the contract and for certifying reports required by the judicial council.<sup>460</sup>

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<sup>458</sup> N.H. REV. STAT. ANN. § 604-A:2-b (2019).

<sup>459</sup> See NEW HAMPSHIRE JUDICIAL COUNCIL, JUDICIAL COUNCIL PLAN FOR THE PARTICIPATION OF THE PRIVATE BAR IN COURT APPOINTED CRIMINAL CASES 1 (Sept. 9, 2014); “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021,” App. B (sample).

<sup>460</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021,” Notices and Law Firm’s Designated Contact (sample).



The judicial council and the contract counsel keep track of the cases assigned under the contract<sup>461</sup> through new open case reports and notification of eligibility and appointment of counsel “NEA” forms. Each month, the contract counsel must send to the judicial council a report identifying all of the cases they were assigned during the month under the contract.<sup>462</sup> As a practical matter, the CCAO keeps a running tally of all cases they assign to each contract counsel during a month and provides that report to the contract counsel to sign and send on to the judicial council. The contract counsel must at the same time provide to the judicial council the “NEA” form that is generated by the court for each new assigned case.<sup>463</sup>

Similarly, the judicial council and the contract counsel keep track of whether an assigned case has been completed to final disposition through closed case cards. For every case to which a contract counsel is assigned under the contract, they must submit a closed case card to the judicial council within 30 days of the final disposition.<sup>464</sup> When the judicial council receives the closed case card from the contract counsel, the judicial council closes the case in the judicial council’s database.

Each contract identifies the individual attorneys who are allowed to provide representation in the cases assigned by the judicial council.<sup>465</sup> In most contracts, only one attorney is authorized to perform work under the contract, so all cases assigned by the judicial council are handled by that one attorney. In a few contracts each year though – for example, four of the 31 contracts awarded for FY 2021 – two or three attorneys are authorized to perform work under the contract, and the judicial council generally is not aware of which authorized attorney represents the indigent defendant in any particular assigned case or whether a single attorney handles all aspects of the case.

The judicial council does not require contract counsel attorneys to report the number of hours that they actually devote to representing indigent defendants in the cases to which they are assigned pursuant to their contract. The judicial council contracts require the contract counsel to submit a closed case card following final disposition of each case.<sup>466</sup> Contract counsel attorneys do not typically keep track of the time they actually devote to each case they are assigned, unless they anticipate applying for extraordinary case credit in the case. Instead, most contract counsel attorneys estimate the amount of in-court and out-of-court time they spent on an assigned case in order to provide that information on the closed case card for the case.

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<sup>461</sup> The judicial council contract provides extensive details about the definition of a “case” under the contract and about the types of cases that the judicial council assigns, but these contract provisions are related primarily to determining how much the contract counsel is paid. “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021,” App. B (sample).

<sup>462</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021,” ¶ 33 and App. A (sample).

<sup>463</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021,” ¶ 33 and App. A (sample).

<sup>464</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021” ¶ 10 and App. A (sample).

<sup>465</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021,” ¶ 14 and App. A (sample).

<sup>466</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021,” ¶ 10 and App. A (sample).

All contract counsel attorneys are private attorneys who are free to also represent privately retained clients, to subcontract with the NHPD to represent indigent defendants assigned by the NHPD, to accept case-by-case assignments in the New Hampshire courts as assigned counsel, to accept appointed cases in the courts of other states or the federal government, and to engage in any other professional activities during their working hours. The judicial council does not require contract counsel attorneys to report the number or type of cases they handle beyond those to which they are assigned by the judicial council, nor to report other professional endeavors to which the contract counsel attorneys devote their available working hours. The judicial council does not require contract counsel attorneys to report whether they have available support staff, such as a receptionist or secretary, to assist them. The judicial council does not require contract counsel attorneys to report whether they have on staff, or obtain through court authorization, necessary case-related assistance from investigators or social workers. In short, the judicial council does not obtain the information necessary to determine whether the caseloads and workloads of contract counsel attorneys allow those attorneys sufficient time to provide effective representation to the indigent defendants whom they are assigned to represent.

The only information the judicial council maintains on a regular basis is the number of cases of indigent defendants, by case type, that it assigns to each contract counsel (but not the individual attorneys under the contract) during each fiscal year. The judicial council has never been sufficiently staffed nor funded to compile and analyze additional pertinent information.

### 3. Assigned counsel attorneys' caseloads & workloads

As authorized by statute,<sup>467</sup> private attorneys are assigned on a case-by-case basis to represent indigent defendants whenever the NHPD is unavailable and there is no contract counsel available to be assigned to the case. The judicial council's executive director or the CCAO, depending on the type of case and court location in which it is pending, calls private attorneys until one agrees to accept the assignment.

The judicial council keeps track of the cases it assigns to assigned counsel attorneys through the notification of eligibility and appointment of counsel "NEA" forms that the courts generate for each new assigned case. The judicial council learns that a case handled by an assigned counsel attorney is closed when the assigned counsel attorney submits to the judicial council a court order requiring the judicial council to pay the assigned counsel attorney (generally approximately 60 days following disposition of the case). While assigned counsel attorneys must keep track of and report to the court the number of hours spent on each assigned case in order to get paid, the judicial council does not regularly maintain a record of the number of hours an assigned counsel attorney devotes to representing indigent defendants in the cases to which they are assigned by the judicial council.

All assigned counsel attorneys are private attorneys who are free to also represent privately retained clients, to subcontract with the NHPD to represent indigent defendants assigned by the

<sup>467</sup> N.H. REV. STAT. ANN. §§ 604-A:1, 604-A:2(II), 604-A:4 (2019).

NHPD, to serve as an authorized attorney under a judicial council contract to represent indigent defendants as a contract counsel attorney, to accept appointed cases in the courts of other states or the federal government, and to engage in any other professional activities during their working hours. The judicial council does not require assigned counsel attorneys to report the number or type of cases they handle beyond those to which they are assigned by the judicial council, nor to report other professional endeavors to which they devote their available working hours. The judicial council does not require assigned counsel attorneys to report whether they have available support staff, such as a receptionist or secretary, to assist them. The judicial council does not require assigned counsel attorneys to report whether they have on staff, or obtain through court authorization, necessary case-related assistance from investigators or social workers. In short, the judicial council does not obtain the information necessary to determine whether the caseloads and workloads of assigned counsel attorneys allow those attorneys sufficient time to provide effective representation to the indigent defendants whom they are assigned to represent.

The only information the judicial council maintains on a regular basis is the number of cases of indigent defendants, by case type, that it assigns to each assigned counsel attorney during each fiscal year. The judicial council has never been sufficiently staffed nor funded to compile and analyze additional pertinent information.

### **C. Measuring whether attorneys have sufficient time to provide effective representation to each indigent person**

To ensure that indigent defense system lawyers have adequate time to fulfill the duties they owe to each appointed client, national standards summarized in the *ABA Ten Principles of a Public Defense Delivery System* provide that an indigent defense system must control attorneys' workload.<sup>468</sup> Over the years since the *Gideon* decision, standards have developed both nationally and in many states against which to measure the caseloads and workloads of indigent defense system attorneys, in order to ensure that attorneys are not appointed to represent more defendants than they can effectively represent as required by the Sixth Amendment.

#### **1. The National Advisory Commission (NAC) caseload standards**

The first national standards for caseloads of attorneys appointed to represent indigent defendants were established by the National Advisory Commission on Criminal Justice Standards and Goals (NAC) in 1973, as part of an initiative funded by the U.S. Department of Justice.<sup>469</sup> *NAC*

<sup>468</sup> AMERICAN BAR ASS'N, *ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM*, principle 5 & cmt. (2002); NATIONAL STUDY COMM'N ON DEFENSE SERVS., *GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES* § 5.3 (1976).

<sup>469</sup> Building on the work and findings of the 1967 President's Commission on Law Enforcement and Administration of Justice, the Administrator of the U.S. Department of Justice Law Enforcement Assistance Administration appointed the National Advisory Commission on Criminal Justice Standards and Goals in 1971, with DOJ/LEAA grant funding to develop standards for crime reduction and prevention at the state and local levels. The NAC crafted standards for all criminal justice functions, including law enforcement, corrections, the courts, and the prosecution. Chapter 13 of the NAC's report sets the standards for the defense function. NATIONAL ADVISORY COMM'N

*Standard 13.12* prescribes that a single attorney should not handle in a year any more than the absolute maximum numerical caseload of:

- 150 felonies; or
- 400 misdemeanors; or
- 200 juvenile delinquencies; or
- 200 mental health proceedings; or
- 25 appeals.<sup>470</sup>

It is these NAC caseload maximums to which national standards refer when they say that “in no event” should national caseload standards be exceeded.<sup>471</sup>

The NAC caseload limits presume that each lawyer devotes 100% of their time to providing representation in their appointed cases.<sup>472</sup> When indigent representation system attorneys have managerial or supervisory responsibilities, this reduces the amount of their time that is available for representing clients, and so national standards require that for every ten attorneys who carry a full caseload there must additionally be one full-time supervisor.<sup>473</sup> When indigent representation system attorneys have to perform tasks that do not require legal credentials or experience, this reduces the amount of their time that is available for representing clients, and so national standards require that for every four attorneys who carry a full caseload there must additionally be at least one legal secretary/assistant.<sup>474</sup> When indigent representation system attorneys have to fulfill responsibilities in their appointed cases that require specialized skills the attorneys lack, this increases the amount of time the attorney must devote to each appointed case, and so

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ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, ch.13 (The Defense) (1973).

<sup>470</sup> NATIONAL ADVISORY COMM’N ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, ch.13 (The Defense), std. 13.12 (1973). This means a lawyer handling felony cases should not be responsible for more than a total of 150 felony cases in a given year, counting both cases the lawyer had when the year began and cases assigned to the lawyer during that year, and including all of the lawyer’s cases (public, private, and pro bono). The NAC standards can be prorated for mixed caseloads. For example, an attorney could have a mixed caseload over the course of a given year of 75 felonies (50% of a maximum caseload) and 200 misdemeanors (50% of a maximum caseload) and be in compliance with the NAC caseload standards.

<sup>471</sup> AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, principle 5 cmt. (2002) (“National caseload standards should in no event be exceeded.”). *See* NATIONAL STUDY COMM’N ON DEFENSE SERVS., GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 5.1 (1976).

<sup>472</sup> *See* NATIONAL ADVISORY COMM’N ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT OF THE TASK FORCE ON THE COURTS, ch.13 (The Defense), stds. 13.9, 13.14 (1973). *See also* NATIONAL LEGAL AID & DEFENDER ASS’N, MODEL CONTRACT FOR PUBLIC DEFENSE SERVICES ¶¶ VII.D., VII.F. (2000); AMERICAN BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE – PROVIDING DEFENSE SERVICES, std. 5-1.4 cmt. (3d ed. 1992); NATIONAL LEGAL AID & DEFENDER ASS’N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES § III-6 (1984); NATIONAL STUDY COMM’N ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 4.1 (1976).

<sup>473</sup> NATIONAL STUDY COMM’N ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 4.1 (1976).

<sup>474</sup> NATIONAL LEGAL AID & DEFENDER ASS’N, MODEL CONTRACT FOR PUBLIC DEFENSE SERVICES ¶¶ VII.D., VII.F. (2000). *See also* NATIONAL LEGAL AID & DEFENDER ASS’N, GUIDELINES FOR NEGOTIATING AND AWARDING GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES § III-8 (1984); NATIONAL STUDY COMM’N ON DEFENSE SERVS., GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 4.1 (1976).

national standards require that for every three attorneys who carry a full caseload there must be at least one investigator<sup>475</sup> and one social service caseworker.<sup>476</sup>

The NAC caseload limits were established and remain as absolute maximums. Since the adoption of the NAC caseload limits, increased complexity in forensic sciences and criminal justice technology have made correspondingly increased demands on the time attorneys must devote to each case in order to provide effective assistance of counsel. For these reasons, many criminal justice professionals argue that the caseloads permitted by the NAC standards are far too high and that the maximum caseloads allowed should be much lower.<sup>477</sup>

## 2. New Hampshire state standards

Policymakers in many states have recognized the need to set their own state caseload and workload standards. State standards are able to consider unique demands made on appointed attorneys in the local jurisdiction, such as the travel distance between the court and the local jail, or the prosecution's charging practices. State caseload standards are also able to address types of cases for which a state provides a right to counsel, but that are not contemplated by the NAC standards.

The State of New Hampshire has not established, through statute or court rule, any guidelines or requirements for the caseloads or workloads of indigent defense system attorneys.

### *a. NHPD attorneys*

State law requires the public defender program to adopt a plan, subject to the judicial council's approval, establishing caseload limits for public defender program attorneys "in accordance with professional standards under the code of professional responsibility."<sup>478</sup> As explained in chapter IV at pages 85-93, under the judicial council contract, NHPD attorney caseloads must comply with: (1) the *Rules of Professional Conduct*; and (2) the "Caseload Management Plan" that is "approved and monitored on a continuing basis by the Judicial Council."<sup>479</sup> The "Caseload Management Plan" is a part of the judicial council contract, and it requires that each full-time

<sup>475</sup> NATIONAL LEGAL AID & DEFENDER ASS'N, MODEL CONTRACT FOR PUBLIC DEFENSE SERVICES ¶¶ VII.D., VII.F. (2000); NATIONAL STUDY COMM'N ON DEFENSE SERVS., GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 4.1 (1976). *See also* AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE – PROVIDING DEFENSE SERVICES, std. 5-1.4 cmt. (3d ed. 1992); NATIONAL LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDED GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES § III-8 (1984).

<sup>476</sup> NATIONAL LEGAL AID & DEFENDER ASS'N, MODEL CONTRACT FOR PUBLIC DEFENSE SERVICES ¶¶ VII.D., VII.F. (2000). *See also* AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE – PROVIDING DEFENSE SERVICES, std. 5-1.4 cmt. (3d ed. 1992); NATIONAL LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDED GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES § III-8 (1984); NATIONAL STUDY COMM'N ON DEFENSE SERVS., GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 4.1 (1976).

<sup>477</sup> *See, e.g.*, AMERICAN COUNCIL OF CHIEF DEFENDERS, STATEMENT ON CASELOADS AND WORKLOADS (Aug. 24, 2007) ("In many jurisdictions, caseload limits should be lower than the NAC standards.")

<sup>478</sup> N.H. REV. STAT. ANN. § 604-B:6 (2019).

<sup>479</sup> "Agreement" between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶ 9 (for the term of July 1, 2019 through June 30, 2021).

NHPD staff attorney shall not have a caseload of more than 70 open and active cases at any time.<sup>480</sup> For full-time NHPD trial attorneys assigned a mixed caseload (as they all are), among the maximum 70 open and active cases there is a further limit of not more than:<sup>481</sup>

- 35 felonies, and including no more than 2 first-degree murder, second-degree murder, and manslaughter;<sup>482</sup>
- 35 misdemeanors;
- 20 juvenile delinquencies; and
- 16 other, and including no more than 2 civil commitment of sexually violent predator.<sup>483</sup>

The judicial council makes no effort to monitor or enforce these contractual caseload limits. The judicial council does not require the NHPD to report, at any time, the open and active cases assigned to each NHPD attorney, instead relying on the NHPD executive director to “monitor the caseloads of attorneys.”<sup>484</sup>

The NHPD maintains its caseload data in its *defenderData* system and can report, on any given day, the actual number of open and active cases, by type of case, that are assigned to each NHPD staff attorney (and each NHPD subcontractor), subject to some known problems with the caseload reports that make them less than completely reliable. During this evaluation, the NHPD produced reports of the open and active cases assigned to each NHPD staff attorney and each NHPD subcontractor on day one of fiscal years 2018 through 2021 and on July 16, 2021 near the start of FY 2022.<sup>485</sup> The data contained in these reports show that there is a long-standing problem at the NHPD of its attorneys having per-attorney open caseloads that exceed the judicial council’s contract limits. (See table at page 91.)

Despite the judicial council’s contractual limit on the maximum number of cases that can be assigned to each individual NHPD attorney, the NHPD continues to assign cases to NHPD attorneys after they have caseloads in excess of the contractual limit.

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<sup>480</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A-1, ¶ 5 (for the term of July 1, 2019 through June 30, 2021).

<sup>481</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A-1, ¶ 5 (for the term of July 1, 2019 through June 30, 2021).

<sup>482</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A-1, ¶ 6 (for the term of July 1, 2019 through June 30, 2021).

<sup>483</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Ex. A-1, ¶ 10 (for the term of July 1, 2019 through June 30, 2021).

<sup>484</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Ex. A-1, ¶ 4 (for the term of July 1, 2019 through June 30, 2021).

<sup>485</sup> The caseload snapshot reports that the NHPD provided for each year show all open NHPD cases on the date reported. This includes open cases for: branch office staff attorneys; subcontract attorneys; appellate division attorneys; central administration attorneys; and attorneys who had terminated their employment at the NHPD but whose cases had not yet been re-assigned.

### *b. Contract counsel attorneys*

The judicial council contract with each contract counsel states that an attorney authorized to represent indigent defendants pursuant to the contract “may not carry an indigent defense caseload which exceeds such workload guidelines as may be established by the Council from time to time during Contractor’s representation in cases undertaken during the term of” the contract.<sup>486</sup> The judicial council has not, however, established any caseload or workload guidelines or requirements for contract counsel attorneys. Beyond the contractual requirement that the contract counsel attorney’s “representation of indigent defendants under this Agreement shall at all times comply with the Rules of Professional Conduct or any similar code of ethics,”<sup>487</sup> there is nothing in the judicial council contract that limits the contract counsel attorney’s caseload or workload.

### *c. Assigned counsel attorneys*

The judicial council has not established any caseload or workload guidelines or requirements for assigned counsel attorneys.

## **D. Applying standards to the caseloads & workloads of indigent defense system attorneys**

In the absence of state standards, the NAC standards are the best tool available against which to measure what is known about the caseloads and workloads of New Hampshire’s indigent defense system attorneys. The NAC standards were developed to address the adult and juvenile cases at trial and appeal for which an indigent defendant is entitled to appointed counsel under the Sixth Amendment, and so do not set a caseload standard for the other types of cases in which New Hampshire provides a right to counsel. The Sixth Amendment Center conservatively applies the lowest-level NAC standard of 400 cases per attorney per year to these other case types.

### **1. NHPD attorneys**

The tables on pages 166-167 show the number of trial-level cases handled by the NHPD (including NHPD staff attorneys and NHPD subcontractor attorneys) during fiscal years 2019, 2020, and 2021, broken down by branch office and type of case, as reported by the NHPD to the Sixth Amendment Center during this evaluation.<sup>488</sup> It is not possible, from the information

<sup>486</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021,” ¶ 20 (sample).

<sup>487</sup> “New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021” ¶ 24 (sample).

<sup>488</sup> The NHPD produced to the Sixth Amendment Center:

- for cases open at the start of the fiscal year: reports by branch office and by individual attorney;
- for cases opened during the fiscal year: reports by branch office; and
- for cases closed during the fiscal year: reports by branch office.

The NHPD also produced to the Sixth Amendment Center reports of all individual NHPD staff attorneys employed in each branch office and the appellate division as of July 1, 2018, along with all subsequent dates of hire, dates of termination, dates of transfer among NHPD offices, and dates of any change in employment terms (i.e., whether

provided by the NHPD, to know the total number and type of cases handled by individual NHPD attorneys during a given year. The number of cases reported in the tables includes the cases already open at the start of the fiscal year plus the cases newly assigned to the NHPD during the fiscal year, to reflect the total cases handled by the NHPD during the fiscal year.

The tables also show the number of staff attorneys in each NHPD branch office at the start and end of the fiscal year. It is not possible, from the information provided by the NHPD, to know the number of NHPD subcontractor attorneys related to the NHPD cases in any given fiscal year.

In each table, the NAC standards are applied to the number of cases handled to show the number of FTE attorneys required.

Under the NAC standards applied to the NHPD cases in FY 2021, 116.09 FTE attorneys are required to handle the FY 2021 caseload, and national standards require the NHPD to additionally have 11.61 supervising attorneys (one full-time supervisor for every 10 FTE attorneys), for a total of 127.7 FTE attorneys,<sup>489</sup> all before taking into consideration the additional number of attorneys that are necessary to fulfill all other workload demands made on the time of the NHPD attorneys.

Including the three attorney directors in NHPD central administration, the NHPD had between 126 and 127 staff attorneys during FY 2021, although one or more positions were vacant at any given time and one to two of the staff attorney positions were less than full-time. As explained, however, the NAC standards require that an FTE attorney devote 100% of their time to directly representing clients, while NHPD staff attorneys have significant workload demands beyond their representation of indigent defendants. These workload demands reduce the amount of time that the NHPD staff attorneys have available to devote to the cases of the indigent defendants whom they are assigned to represent. As a result, a greater number of NHPD attorneys is required under national standards.

For a trial-level caseload that requires 127.7 FTE attorneys under the NAC standards, national standards require that the NHPD must also have at least:<sup>490</sup>

- 31.9 FTE legal secretaries/assistants (one full-time legal secretary/assistant for every four FTE attorneys);
- 42.6 FTE investigators (one full-time investigator for every three FTE attorneys); and
- 42.6 FTE social service caseworkers (one full-time social service caseworker for every three FTE attorneys).

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part-time or full-time, or promotion to managing attorney).

<sup>489</sup> NATIONAL STUDY COMM'N ON DEFENSE SERVICES, GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 4.1 (1976).

<sup>490</sup> NATIONAL LEGAL AID & DEFENDER ASS'N, MODEL CONTRACT FOR PUBLIC DEFENSE SERVICES ¶¶ VII.D., VII.F. (2000); NATIONAL STUDY COMM'N ON DEFENSE SERV'., GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 4.1 (1976). *See also* AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE – PROVIDING DEFENSE SERVICES, std. 5-1.4 cmt. (3d ed. 1992); NATIONAL LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDED GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES § III-8 (1984).



**NUMBER OF NHPD TRIAL-LEVEL CASES OPEN  
JULY 1, 2018 THROUGH JUNE 30, 2019 (FY 2019)**

Branch office	Homicide	Felony	Misdemeanor	Misdemeanor information	Juvenile delinquency	Misdemeanor appeal	Violation	Sentence related	Miscellaneous court representation	Probation violation	Parole violation	Other post-conviction	Civil commitment	ALL case types	NHPD STAFF ATTORNEYS	
															start of FY 2019	end of FY 2019
Concord	4	1,470	1,946	12	406	15	1	574	54	335	302	0	2	5,121	17	16
Dover	2	1,166	1,087	45	288	11	0	471	15	225	4	1	0	3,315	11	11
Keene	1	410	761	10	120	4	0	394	27	184	7	0	0	1,918	6	7
Laconia	2	1,382	1,132	12	177	6	0	142	49	186	13	2	0	3,103	10	10
Littleton	1	175	325	11	85	2	0	75	26	19	3	2	0	724	3	3
Manchester	7	2,735	2,409	37	519	6	0	923	71	300	50	0	2	7,059	23	24
Nashua	3	1,133	2,302	5	733	18	0	1,558	109	82	12	6	1	5,962	18	15
Newport	0	247	587	32	88	2	0	96	17	109	6	2	1	1,187	3	4
Orford	0	601	517	28	78	9	0	83	19	130	4	0	1	1,470	6	4
Stratham	3	1,821	1,235	18	406	12	0	886	60	334	8	2	0	4,785	21	20
ALL branch offices	23	11,140	12,301	210	2,900	85	1	5,202	447	1,904	409	15	7	34,644	118	114
Standard applied	NAC 150	NAC 150	NAC 400	NAC 400	NAC 200	NAC 25	400	400	400	400	400	400	NAC 200			
FTE attorneys required	0.15	74.27	30.75	0.53	14.50	3.40	0.00	13.01	1.12	4.76	1.02	0.04	0.04	143.58	118	115

**NUMBER OF NHPD TRIAL-LEVEL CASES OPEN  
JULY 1, 2019 THROUGH JUNE 30, 2020 (FY 2020)**

Branch office	Homicide	Felony	Misdemeanor	Misdemeanor information	Juvenile delinquency	Misdemeanor appeal	Violation	Sentence related	Miscellaneous court representation	Probation violation	Parole violation	Other post-conviction	Civil commitment	ALL case types	NHPD STAFF ATTORNEYS	
															start of FY 2020	end of FY 2020
Concord	6	1,350	1,837	10	369	15	3	523	52	318	295	2	0	4,780	16	18
Dover	3	1,084	1,102	37	215	11	0	458	12	215	11	0	0	3,148	11	11
Keene	1	357	769	9	109	2	0	318	22	150	7	0	0	1,744	7	6
Laconia	4	1,194	964	5	146	8	0	139	47	159	3	0	0	2,669	10	10
Littleton	0	158	367	4	79	5	0	56	25	21	2	1	0	718	3	3
Manchester	8	2,297	2,063	36	410	10	0	645	60	228	45	2	3	5,807	24	26
Nashua	2	1,012	1,766	5	520	15	0	1,237	88	71	8	3	0	4,727	15	19
Newport	0	270	543	29	59	3	0	54	14	83	4	1	0	1,060	4	4
Orford	1	577	555	17	89	5	0	116	18	177	3	1	0	1,559	4	7
Stratham	7	1,538	1,550	24	329	16	0	889	67	250	12	5	0	4,687	20	20
ALL branch offices	32	9,837	11,516	176	2,325	90	3	4,435	405	1,672	390	15	3	30,899	114	124
Standard applied	NAC 150	NAC 150	NAC 400	NAC 400	NAC 200	NAC 25	400	400	400	400	400	400	NAC 200			
FTE attorneys required	0.21	65.58	28.79	0.44	11.63	3.60	0.01	11.09	1.01	4.18	0.98	0.04	0.02	127.56	115	123

**NUMBER OF NHPD TRIAL-LEVEL CASES OPEN  
JULY 1, 2020 THROUGH JUNE 30, 2021 (FY 2021)**

Branch office	Homicide	Felony	Misdemeanor	Misdemeanor information	Juvenile delinquency	Misdemeanor appeal	Violation	Sentence related	Miscellaneous court representation	Probation violation	Parole violation	Other post-conviction	Civil commitment	ALL case types	NHPD STAFF ATTORNEYS	
															start of FY 2021	end of FY 2021
Concord	4	1,423	1,757	22	302	15	3	400	52	270	278	1	0	4,527	18	20
Dover	2	915	953	24	137	8	0	378	11	132	11	1	0	2,572	11	10
Keene	2	352	662	7	118	0	0	289	20	118	5	0	2	1,575	6	5
Laconia	4	985	822	7	131	9	1	207	23	124	7	1	0	2,321	10	11
Littleton	0	244	363	13	53	1	0	66	20	25	1	1	0	787	3	3
Manchester	6	2,266	1,894	39	322	8	0	449	62	227	59	2	2	5,336	26	26
Nashua	1	1,123	1,536	10	443	6	0	670	127	58	12	3	2	3,991	19	16
Newport	0	271	552	19	56	2	0	48	14	54	2	5	1	1,024	4	4
Orford	1	507	500	15	102	2	0	172	11	136	5	0	0	1,451	7	8
Stratham	6	1,368	1,546	22	216	13	0	747	71	198	15	2	0	4,204	20	20
ALL branch offices	26	9,454	10,585	178	1,880	64	4	3,426	411	1,342	395	16	7	27,788	124	123
Standard applied	NAC 150	NAC 150	NAC 400	NAC 400	NAC 200	NAC 25	400	400	400	400	400	400	NAC 200			
FTE attorneys required	0.17	63.03	26.46	0.45	9.40	2.56	0.01	8.57	1.03	3.36	0.99	0.04	0.04	116.09	123	122

A greater number of support staff is required under national standards to assist the NHPD staff attorneys with their additional workload duties. The NHPD had in its branch offices 62 legal secretaries/assistants (60 full-time and 2 part-time), 26 investigators, and 2 social workers, although one or more positions were vacant at any given time. To the extent that these non-attorney support resources are not available, an attorney requires more time to perform the work that would otherwise be performed by these personnel, and so a greater number of NHPD attorneys is required under national standards.

In considering the number of attorneys and non-attorney staff that are necessary at the NHPD under the NAC standards, it is important to consider the number of business days each year that NHPD personnel may be away from their jobs and therefore not devoting work hours to the representation of indigent defendants. Every NHPD employee is expected to be off work during 12 holidays each year, unless the New Hampshire Supreme Court orders court proceedings to be held;<sup>491</sup> and every full-time NHPD employee can take each year up to 15 days of sick leave (with carry-over up to a maximum of 40 days), annual leave of 15 to 20 days depending on length of employment (with carry-over of up to 10 days), and two personal days<sup>492</sup> – cumulatively allowing for up to 44 to 84 days off in a single year. All NHPD employees are also entitled to certain types of leave (whether paid or unpaid): bereavement leave; jury duty; personal leave; medical leave (only certain employees); federal family and medical leave; pregnancy disability and birth recovery leave; parental leave; military leave; and crime victim leave.<sup>493</sup>

## 2. Contract counsel & assigned counsel

For contract counsel attorneys and assigned counsel attorneys, the only information that the judicial council regularly maintains about their caseloads is the number of cases, by case type, that the judicial council assigns to them each year. The judicial council does not keep track of the number of cases these attorneys were assigned by the judicial council during previous years but which the attorneys have not yet disposed. The judicial council also cannot say with accuracy the identity of the individual attorney who represents an indigent defendant in a given case; instead, the cases can only be attributed to a specific law firm (although some law firms are a single attorney). Finally, many contract counsel also accept cases as assigned counsel, and vice versa.

The tables on pages 170-173 show the number of trial-level cases assigned by the judicial council to private law firms as either contract counsel or assigned counsel or both during fiscal years 2019, 2020, and 2021, broken down by type of case,<sup>494</sup> as reported by the judicial council to the Sixth Amendment Center during this evaluation. In each table, the NAC standards are applied to the number of new cases assigned to show the number of FTE attorneys required.

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<sup>491</sup> NEW HAMPSHIRE PUBLIC DEFENDER, EMPLOYEE MANUAL, §§ 7.4, 7.5, 7.16 (Mar. 28, 2019).

<sup>492</sup> NEW HAMPSHIRE PUBLIC DEFENDER, EMPLOYEE MANUAL, §§ 7.1, 7.2, 7.3 (Mar. 28, 2019).

<sup>493</sup> NEW HAMPSHIRE PUBLIC DEFENDER, EMPLOYEE MANUAL, §§ 7.6 through 7.14 (Mar. 28, 2019).

<sup>494</sup> Felony cases in these tables include both homicide and non-homicide cases. There were no assignments of civil commitment cases to any contract counsel or assigned counsel attorneys during these years.

Under the NAC standards applied to the new cases assigned by the judicial council to contract counsel and assigned counsel in FY 2021, 20.10 FTE attorneys are required to handle just those cases, *without considering* the unknown number of cases these law firms were assigned by the judicial council during previous years that had not yet been disposed. To account for these additional open cases, more FTE attorneys are required.

All contract counsel and assigned counsel are private attorneys who are free to also represent privately retained clients, to subcontract with the NHPD to be assigned NHPD cases, to accept appointed cases in the courts of other states or the federal government, and to engage in any other professional activities during their working hours. The judicial council does not require contract counsel attorneys or assigned counsel attorneys to report the number or type of cases they handle beyond those to which they are assigned by the judicial council, nor to report other professional endeavors to which the attorneys devote their available working hours. To whatever extent the attorneys devote professional hours to duties other than the New Hampshire indigent defendants they are assigned by the judicial council to represent, then more FTE attorneys are required.

For a trial-level caseload that requires 20.10 FTE attorneys under the NAC standards, national standards require that, to assist those attorneys, there must also be at least:<sup>495</sup>

- 2 FTE attorney supervisors (one full-time supervisor for every 10 FTE attorneys);
- 5 FTE legal secretaries/assistants (one full-time legal secretary/assistant for every four FTE attorneys);
- 6.7 FTE investigators (one full-time investigator for every three FTE attorneys); and
- 6.7 FTE social service caseworkers (one full-time social service caseworker for every three FTE attorneys).

Where these support resources are not available, an attorney requires more time to perform the work that would otherwise be performed by these personnel, and so more FTE attorneys are required.

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<sup>495</sup> NATIONAL LEGAL AID & DEFENDER ASS'N, MODEL CONTRACT FOR PUBLIC DEFENSE SERVICES ¶¶ VII.D., VII.F. (2000); NATIONAL STUDY COMM'N ON DEFENSE SERVS., GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES § 4.1 (1976). *See also* AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE – PROVIDING DEFENSE SERVICES, std. 5-1.4 cmt. (3d ed. 1992); NATIONAL LEGAL AID & DEFENDER ASS'N, GUIDELINES FOR NEGOTIATING AND AWARDED GOVERNMENTAL CONTRACTS FOR CRIMINAL DEFENSE SERVICES § III-8 (1984).

**COMBINED NUMBER OF CONTRACT COUNSEL CASES AND ASSIGNED  
COUNSEL CASES, ASSIGNED BY JUDICIAL COUNCIL DURING FY 2019**

58 Law firms	Felony	Misdemeanor	Juvenile delinquency	Other	ALL case types
	11	3	1	4	19
	22	17	2	7	48
	13	2	0	5	20
	29	62	3	36	130
	23	17	6	6	52
	52	54	6	20	132
	68	37	18	46	169
	74	58	3	41	176
	2	0	0	0	2
	67	68	4	82	221
	75	42	8	40	165
	81	23	2	23	129
	45	28	0	50	123
	57	85	0	32	174
	86	62	6	46	200
	13	14	0	6	33
	18	42	0	9	69
	38	17	3	16	74
	65	39	0	18	122
	85	45	0	42	172
	52	33	13	35	133
	87	23	8	44	162
	30	26	1	27	84
	84	30	9	30	153
	36	49	19	40	144
	42	32	6	12	92
	57	5	0	6	68
	67	46	6	25	144
	59	37	13	44	153
	84	55	3	35	177
	7	13	1	12	33
	15	24	0	15	54
	47	9	3	12	71
	18	23	1	11	53
	1	2	0	1	4
	6	6	1	3	16
	0	0	0	5	5
	1	2	0	3	6
	0	0	0	2	2
	0	3	0	2	5
	8	5	7	3	23
	1	0	0	2	3
	2	0	0	0	2
	8	2	0	3	13
	0	1	0	0	1
	0	0	1	0	1
	1	0	0	0	1
	0	3	1	1	5
	13	6	1	2	22
	0	0	1	0	1
	2	1	0	0	3
	0	1	0	0	1
	2	1	2	2	7
	0	1	1	1	3
	6	7	0	2	15
	1	1	2	3	7
	8	0	0	4	12
	6	3	1	2	12
<b>ALL law firms</b>	<b>1675</b>	<b>1165</b>	<b>163</b>	<b>918</b>	<b>3,921</b>
Standard applied	NAC 150	NAC 400	NAC 200	400	
<b>FTE attorneys required</b>	<b>11.17</b>	<b>2.91</b>	<b>0.82</b>	<b>2.30</b>	<b>17.19</b>

**COMBINED NUMBER OF CONTRACT COUNSEL CASES AND ASSIGNED COUNSEL CASES, ASSIGNED BY JUDICIAL COUNCIL DURING FY 2020**

52 Law firms	Felony	Misdemeanor	Juvenile delinquency	Other	ALL case types
	44	20	8	20	92
	5	8	0	5	18
	24	42	5	17	88
	11	7	0	5	23
	17	51	7	23	98
	20	27	4	9	60
	59	43	2	39	143
	67	58	11	49	185
	66	82	4	32	184
	71	47	4	38	160
	57	69	2	75	203
	71	47	9	56	183
	42	41	0	16	99
	44	32	1	19	96
	67	68	1	21	157
	69	67	6	42	184
	9	15	0	5	29
	21	42	1	10	74
	1	0	0	0	1
	20	16	4	13	53
	52	38	0	17	107
	51	35	0	59	145
	34	37	9	33	113
	59	20	3	35	117
	50	30	3	48	131
	20	12	3	15	50
	55	28	6	35	124
	27	44	8	29	108
	24	34	3	13	74
	57	4	0	10	71
	65	49	9	59	182
	47	42	9	28	126
	60	52	5	25	142
	6	1	3	8	18
	1	0	0	0	1
	1	0	0	0	1
	0	0	0	1	1
	0	0	1	0	1
	3	1	1	1	6
	4	3	0	4	11
	3	1	2	5	11
	3	4	1	2	10
	1	0	0	0	1
	1	0	0	0	1
	0	0	2	1	3
	2	8	1	0	11
	0	0	1	0	1
	0	0	0	3	3
	2	3	0	7	12
	5	0	2	2	9
	2	1	1	0	4
	10	0	0	2	12
<b>ALL law firms</b>	<b>1,430</b>	<b>1,229</b>	<b>142</b>	<b>936</b>	<b>3,737</b>
Standard applied	NAC 150	NAC 400	NAC 200	400	
<b>FTE attorneys required</b>	<b>9.53</b>	<b>3.07</b>	<b>0.71</b>	<b>2.34</b>	<b>15.66</b>

**COMBINED NUMBER OF CONTRACT COUNSEL CASES AND ASSIGNED  
COUNSEL CASES, ASSIGNED BY JUDICIAL COUNCIL DURING FY 2021**

69 Law firms	Felony	Misdemeanor	Juvenile delinquency	Other	ALL case types
	146	70	5	35	256
	7	14	0	2	23
	32	42	2	20	96
	20	21	1	12	54
	33	28	7	16	84
	92	47	0	45	184
	0	21	0	0	21
	78	52	2	21	153
	89	59	25	60	233
	66	61	4	30	161
	34	34	10	15	93
	59	58	10	55	182
	107	75	22	43	247
	31	5	0	3	39
	47	46	0	29	122
	92	57	2	38	189
	74	59	14	81	228
	109	52	9	32	202
	13	17	0	7	37
	46	80	0	19	145
	60	15	0	8	83
	48	46	3	12	109
	113	64	0	14	191
	84	52	0	40	176
	12	12	2	36	62
	70	22	4	12	108
	84	52	0	47	183
	19	15	0	6	40
	133	53	6	41	233
	59	86	8	39	192
	23	28	10	9	70
	7	4	3	2	16
	1	0	0	1	2
	0	0	0	1	1
	4	0	0	2	6
	8	1	0	0	9
	0	0	0	1	1
	2	0	0	0	2
	2	0	0	0	2
	1	10	0	1	12
	8	1	0	1	10
	3	16	1	5	25
	8	0	0	3	11
	14	9	0	2	25
	1	0	0	0	1
	1	0	0	0	1
	0	0	2	0	2
	0	3	0	1	4
	10	1	0	0	11
	1	0	0	0	1
	1	5	0	0	6
	2	0	0	1	3
	7	0	0	0	7
	4	0	2	0	6
	7	19	0	0	26
	0	0	0	1	1
	9	5	0	0	14
	0	4	1	0	5
	2	0	0	0	2
	17	17	0	1	35
	0	1	0	0	1
	1	0	0	1	2
	0	8	0	0	8
	1	0	0	0	1

**COMBINED NUMBER OF CONTRACT COUNSEL CASES AND ASSIGNED COUNSEL CASES, ASSIGNED BY JUDICIAL COUNCIL DURING FY 2021**

69 Law firms	Felony	Misdemeanor	Juvenile delinquency	Other	ALL case types
	6	0	0	1	7
	9	2	2	2	15
	0	0	0	1	1
	1	0	0	0	1
	15	0	0	0	15
<b>ALL law firms</b>	<b>2,033</b>	<b>1,449</b>	<b>157</b>	<b>855</b>	<b>4,494</b>
Standard applied	NAC 150	NAC 400	NAC 200	400	
<b>FTE attorneys required</b>	<b>13.55</b>	<b>3.62</b>	<b>0.79</b>	<b>2.14</b>	<b>20.10</b>



## The coronavirus pandemic & indigent defense system caseloads

There is unanimous agreement that the coronavirus pandemic wrought havoc on every aspect of the justice system. For many months, very few if any pending cases were resolved in the trial courts, while new arrests continued to be made and new prosecutions continued to be filed. As a result, in every court location the number of pending cases grew larger and larger for the courts, the prosecution, and the defense.

As the justice system returns to its pre-pandemic normal, the amount of time it takes for a new case to proceed through the system from accusation to disposition will likely also return to normal. But the backlog of cases built up since March of 2020 cannot be absorbed by the pre-existing number of judges, prosecutors, and indigent defense attorneys.

New Hampshire policymakers and criminal justice stakeholders should consider determining the number of adult criminal and juvenile delinquency cases that exceed normal pre-pandemic averages and creating a temporary emergency structure of judges, prosecutors, and indigent defense system attorneys to work until the backlog is resolved. Among the options available to the judicial council is to exercise its statutory authority, with approval of the governor and council, to contract with an “alternate public defender program”<sup>a</sup> to represent those indigent defendants for whom the NHPD does not have an adequate number of attorneys due to caseloads.

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<sup>a</sup> See N.H. REV. STAT. ANN. § 604-B:8 (2019).

## Chapter VII

# Impeding independence and creating systemic conflicts of interest

In *United States v. Cronin*, the U.S. Supreme Court said: “an indispensable element of the effective performance of [defense counsel’s] responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation.”<sup>496</sup> On the same day in *Strickland v. Washington*, the Court declared that “independence of counsel” is “constitutionally protected,” and “[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.”<sup>497</sup> To ensure the independence of appointed attorneys from governmental interference, national standards as summarized in the first of the *ABA Ten Principles of a Public Defense Delivery System* require that the public defense function, including the attorneys it provides, must be “independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel.”<sup>498</sup>

Each state is responsible for ensuring that, where an attorney is appointed to represent an indigent defendant, that appointed attorney is able to provide effective representation.<sup>499</sup> Attorneys provide representation to indigent people within the structures of the system a state creates. In *United States v. Cronin*, the U.S. Supreme Court explains that deficiencies in indigent defense systems can make any lawyer – even the best attorney – perform in a non-adversarial way that results in a constructive denial of the right to counsel.<sup>500</sup> Governmental interference that infringes on an appointed lawyer’s independence to act in the stated interests of clients causes a constructive denial of the right to counsel under *Cronin*.<sup>501</sup> The Court in *Cronin* determined that,

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<sup>496</sup> *United States v. Cronin*, 466 U.S. 648, 656 n.17 (1984) (quoting *Ferri v. Ackerman*, 444 U. S. 193, 204 (1979)).

<sup>497</sup> *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

<sup>498</sup> AMERICAN BAR ASS’N, *ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM*, principle 1 cmt. (2002).

<sup>499</sup> *See, e.g., McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (“It has long been recognized that the right to counsel is the right to the effective assistance of counsel.”).

<sup>500</sup> *United States v. Cronin*, 466 U.S. 648, 659-60 (1984) (“[I]f counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. . . . Circumstances of that magnitude may be present on some occasions when, although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. *Powell v. Alabama*, 287 U.S. 45 (1932), was such a case.”); *Strickland v. Washington*, 466 U.S. 668, 683 (1984) (citing *United States v. Cronin*, 466 U.S. 648 (1984): “The Court has considered Sixth Amendment claims based on actual or constructive denial of the assistance of counsel altogether, as well as claims based on state interference with the ability of counsel to render effective assistance to the accused.”).

<sup>501</sup> *United States v. Cronin*, 466 U.S. 648, 656-57 (1984) (“Thus, the adversarial process protected by the Sixth Amendment requires that the accused have ‘counsel acting in the role of an advocate.’ The right to the effective

when an appointed attorney works within a system where factors are present that constructively deny the right to counsel, then the appointed attorney is presumptively ineffective. The government bears the burden of overcoming that presumption. The government may argue that, despite the systemic impediments, the appointed lawyer in a specific case was not ineffective, but it is the government’s burden to establish this. As the Seventh Circuit Court of Appeals noted in *Wahlberg v. Israel*, “if the state is not a passive spectator of an inept defense, but a cause of the inept defense, the burden of showing prejudice is lifted. It is not right that the state should be able to say, ‘sure we impeded your defense – now prove it made a difference.’”<sup>502</sup>

New Hampshire’s indigent defense system lacks independence from the political and judicial branches of government. This lack of independence causes systemic conflicts of interest that impede the ability of indigent defense system attorneys to make independent decisions about how to represent their appointed clients and to provide effective assistance of counsel. The State of New Hampshire has a constitutional obligation to ensure that its indigent defense system is free from conflicts that interfere with appointed counsel’s ability to render effective representation to each indigent defendant.

## **A. The indigent defense system lacks independence from the political and judicial branches of government**

### **1. The judicial council’s divided loyalties**

State law makes the New Hampshire Judicial Council, an executive branch state agency, responsible for administering the entirety of the indigent defense delivery system in New Hampshire and for ensuring its quality and cost effectiveness.<sup>503</sup>

The provision of indigent defense is not, however, the judicial council’s only duty, so from the outset the judicial council as a whole has divided loyalties imposed on it by state law. For example,<sup>504</sup> the state has given the judicial council some responsibilities for the courts. The judicial council is statutorily responsible for “devis[ing] ways of simplifying judicial procedure [and] expediting the transaction of judicial business.”<sup>505</sup> These are the same courts in which

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assistance of counsel is thus the right of the accused to require the prosecution’s case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted – even if defense counsel may have made demonstrable errors – the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.” (internal citations omitted).

<sup>502</sup> 766 F.2d 1071, No. 84-2435, ¶ 27 (7th Cir. 1985).

<sup>503</sup> N.H. REV. STAT. ANN. §§ 21-G:6-b(III)(g), 494:3(VI) (2019).

<sup>504</sup> As another example, the judicial council is required by statute to provide legal and guardian-ad-litem services in child protection cases, including providing attorneys to represent children alleged to have been abused or neglected. N.H. REV. STAT. ANN. § 494:3(VII) (2019). The allegations of abuse or neglect in a child protection case are also often the basis of criminal charges against an indigent defendant, so the judicial council’s duties to provide the right to counsel for a child in a child protection case may directly conflict with the judicial council’s duties to provide the right to counsel for an indigent defendant in a related criminal proceeding.

<sup>505</sup> N.H. REV. STAT. ANN. § 494:3(III) (2019).

indigent defendants are tried, so the simplification and expedition of court business may be at odds with the effective provision of the right to counsel for indigent defendants.

The judicial council has 23 members as defined by statute.<sup>506</sup> Each member of the judicial council is responsible for ensuring the indigent defense system provides the effective right to counsel for every indigent defendant.<sup>507</sup> But many of the judicial council members also have divided loyalties created by state law. The attorney general is by statute a member of the judicial council<sup>508</sup> and is simultaneously responsible for the prosecution of all criminal cases throughout the state<sup>509</sup> – the attorney general is the direct adversary of the indigent defense system attorneys appointed to represent indigent defendants in adult criminal and juvenile delinquency cases. The chief justice of the supreme court, the chief justice of the superior court, and the administrative judge of the circuit court are all by statute members of the judicial council,<sup>510</sup> yet they simultaneously have authority over every judge who serves as the arbiter of the cases in which indigent defense system attorneys must represent indigent defendants.<sup>511</sup> The chairs of both the senate and house judiciary committees are by statute members of the judicial council,<sup>512</sup> and as members of the legislature they create the very laws pursuant to which indigent defendants are prosecuted and they control the funding of the courts, prosecution, and indigent defense system.

State law allows others, who may themselves derive financial benefit from decisions made by the judicial council, to serve on the judicial council. For example, two of the seven attorney members of the judicial council during FY 2021 also held judicial council contracts to serve as contract counsel during FY 2020 and FY 2021, and they or members of their law firm were assigned by the judicial council (at least during FY 2021) to assigned counsel cases. Of those two attorneys, one of them also serves on the board of directors of the New Hampshire Public Defender and on its finance committee and received a subcontract from NHPD during August 2021 to be assigned to NHPD cases. This creates a potential conflict of interest between the judicial council member's own financial interests and that of other indigent defense system attorneys and the indigent defendants they represent. The judicial council explains that the multiple roles held by some judicial council members were necessary because there was an insufficient number of qualified attorneys available to accept appointed cases and that all parties involved guarded against any actual conflicts of interest.

Precisely because of the potential conflicts of interest inherent in the statutorily-required membership of the judicial council, in the mid-1990s the judicial council (on the advice of its state-provided legal advisor) made its indigent defense subcommittee responsible for

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<sup>506</sup> N.H. REV. STAT. ANN. §§ 494:1, 494:2 (2019).

<sup>507</sup> N.H. REV. STAT. ANN. § 494:3(VI) (2019).

<sup>508</sup> N.H. REV. STAT. ANN. §§ 494:1(II) (2019).

<sup>509</sup> N.H. REV. STAT. ANN. §§ 7:6, 7:11, 7:34 (2019); *Wyman v. Danais*, 101 N.H. 487, 490, 147 A.2d 116, 118 (N.H. 1958).

<sup>510</sup> N.H. REV. STAT. ANN. § 494:1(I) (2019); N.H. SUP. CT. R. 54.

<sup>511</sup> N.H. CONST. pt. II, art. 73-a; N.H. REV. STAT. ANN. §§ 490-A:2, 490-A:3, 490-A:4 (2019) (chief justice of the supreme court). N.H. REV. STAT. ANN. § 491:1 (2019); N.H. SUP. CT. R. 54 (chief justice of the superior court). N.H. REV. STAT. ANN. §§ 491-F:5(II), 490-F:6 (2019); N.H. SUP. CT. R. 54 (administrative judge of the circuit court).

<sup>512</sup> N.H. REV. STAT. ANN. § 494:1(VI),(VII) (2019).

overseeing all proposals, contracting, and other decision-making about indigent defense services. The judicial council members from the attorney general's office, the judicial branch, and the legislature do not serve on the indigent defense subcommittee. The indigent defense subcommittee makes recommendations about indigent defense services, and the full judicial council votes up or down on the subcommittee's recommendations.

The judicial council has never been sufficiently staffed nor funded to allow the indigent defense subcommittee to ensure that indigent defense system attorneys are able to exercise judgment, in the cases of the indigent defendants whom they represent, that is independent of the political and judicial branches of government. The indigent defense subcommittee is not established by statute or court rule or regulation, and just as it was created by the full judicial council it can be dismantled by the full judicial council at any time. There is no statute, court rule, or regulation that determines the members of the indigent defense subcommittee, and they are chosen by the chair of the judicial council from among the members of the judicial council. Nothing prevents members of the indigent defense subcommittee from themselves deriving financial benefit from decisions they make about the provision of indigent defense services.

## 2. Judicial council decisions impeding the provision of the effective assistance of counsel

The judicial council lacks sufficient staff to carry out its indigent defense system duties, along with all of its other statutory responsibilities. The judicial council has broad information-gathering powers – all judges, court clerks, sheriffs, county attorneys, and all officers of municipalities and counties and the state are statutorily required to provide to the judicial council any information it requests to fulfill its statutory duties.<sup>513</sup> Yet the judicial council has never been sufficiently staffed nor funded to collect and analyze information sufficient for it to ensure that the indigent defense system provides the effective right to counsel for every indigent defendant. If appropriately funded and staffed, the judicial council could:

- Require law enforcement agencies to notify the judicial council when they make arrests or issue summons, nor does it require bail commissioners to do so – information that would allow the judicial council to know when a person has entered into the criminal or delinquency justice system and is accused of an offense for which they are entitled to public counsel if indigent.
- Require any component of the indigent defense system to notify defendants of their right to counsel and of the process for having counsel appointed – doing so would enable indigent defendants to apply for an attorney immediately and receive an appointed attorney within 24 hours of making their request, rather than having to wait days, weeks, or months to apply for an appointed attorney at arraignment.
- Require the trial courts to notify the judicial council of the number of people and the types of cases in which defendants appear at arraignment and have privately retained counsel or request appointed counsel or waive their right to counsel. Relatedly, the judicial council could, but does not, require that an indigent defense system attorney be physically present at all arraignments of all defendants.

<sup>513</sup> N.H. REV. STAT. ANN. § 494:6 (2019).

- Require the trial courts to notify the judicial council when a defendant requests appointed counsel but the trial court determines the defendant is not indigent.
- Require the trial courts to send a copy of the notification of eligibility and appointment of counsel (“NEA”) form to the judicial council – information that would allow the judicial council to know the exact number of people and the types of cases in which the trial courts have appointed counsel and in which an indigent defense system attorney must be assigned.
- Require every indigent defense system attorney to send a copy to the judicial council of the motion to enroll that the attorney files in the case of an indigent defendant – information that would allow the judicial council to know the identity of the attorney handling each case of an indigent defendant and the date on which they enrolled.

The judicial council is responsible for both ensuring an effective indigent defense system and recommending ways to expedite matters in the courts. Yet the judicial council has not taken any steps to resolve the problem of delays in the courts that result when a single indigent defense system attorney is expected to appear in multiple court locations at the same time, referred to by numerous justice system stakeholders as the “chronic problem of defense attorneys being double-booked.” From the vantage of the appointed attorneys, they are forced to triage their court appearances on any given day: “Everyone has to make judgments about what cases are most important to appear on in person – what clients need you there the most, which judges will be angry at you, [and] how courts schedule things [whether as a number of cases set at the same time, or individual time slots for each case].” When the appointed attorney arrives at each court, they typically still need to meet with each appointed client to discuss what is intended to occur in the court that day, which results in being “constantly late because you’re scheduled in two or three courts. It can be kind of suffocating, the anxiety of always being late, and waiting for someone to yell at you about being late.” Judges say they can sometimes see that the appointed attorney did not have quite enough time to wrap up all the paperwork before court, and as a result “things [happen] on the fly” to, for example, effectuate a guilty plea. Worst of all, defendants sometimes wait a very long time for their appointed attorneys to show up, or worse yet have their cases continued, because the attorneys were “double set” for cases in multiple court locations. One judge describes having often seen “parents with families take off work when they didn’t have the finances to do it and they waited two or three hours in my court when [their attorney] was in [another] court, . . . and I don’t think that the defense or clients are well served by [such a delay].”

### 3. The NHPD's divided loyalties

State law requires the judicial council to contract with an “organization or groups of lawyers approved by the board of governors of the New Hampshire Bar Association to operate the public defender program.”<sup>514</sup> By law, then, the operator of the public defender program must be a non-governmental entity of private attorneys. But this does not ensure that indigent defense system attorneys are able to exercise judgment, in the cases of the indigent defendants whom they represent, that is independent of the political and judicial branches of government.

The NHPD was incorporated in 1985 for the sole purpose of representing New Hampshire indigent defendants – that is its only authorized corporate purpose.<sup>515</sup> And the only way that any NHPD attorney can be assigned to represent any New Hampshire indigent defendant is through the NHPD being awarded the public defender program two-year contract by the judicial council.<sup>516</sup> The NHPD board of directors is responsible for managing the business and affairs of the NHPD,<sup>517</sup> so to ensure the continued ability of the NHPD to exist, the NHPD board of directors must ensure that the NHPD continues to be awarded the judicial council contract to operate the public defender program. As a result, the NHPD has divided loyalties, counterbalancing its need to please the judicial council in order to receive the public defender program contract against its duty to act solely on behalf of the stated interests of the indigent defendants whom it is appointed to represent.

The problem of the NHPD board's divided loyalties is further compounded because there are no statutory safeguards preventing members of the NHPD board of directors from themselves deriving financial benefit from decisions made by the judicial council and/or by the NHPD board about the provision of indigent defense services. For example, one of the nine NHPD board members also served on the judicial council during fiscal year 2021, received a subcontract from the NHPD during August 2021 to be assigned to NHPD cases, was awarded a judicial council contract to serve as contract counsel during each of fiscal years 2020 and 2021 in cases where the NHPD is unavailable, and they or members of their law firm were assigned by the judicial council (at least during fiscal year 2021) to assigned counsel cases where the NHPD is unavailable. This creates a potential conflict of interest between the NHPD board member's own financial interests and that of other indigent defense system attorneys and the indigent defendants they represent.

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<sup>514</sup> N.H. REV. STAT. ANN. § 604-B:4 (2019).

<sup>515</sup> “Articles of Agreement of New Hampshire Public Defender,” art. 2 and By-Laws, art. III (as amended through Jan. 5, 1987).

<sup>516</sup> N.H. REV. STAT. ANN. § 604-A:2(II) (2019).

<sup>517</sup> “Articles of Agreement of New Hampshire Public Defender,” art. 2 and By-Laws, art. IV (as amended through Jan. 5, 1987).

#### 4. NHPD decisions impeding the provision of the effective assistance of counsel

The NHPD board's policy is for the NHPD to avoid getting involved in systemic indigent defense advocacy or efforts at legislative improvements for indigent defendants. As explained by NHPD board members, if the NHPD took on an advocacy role, the board fears it might affect the NHPD's funding from the legislature. The NHPD board of directors readily acknowledges that the NHPD is always dependent on the judicial council for funding, describing the judicial council as the integral interface between the NHPD and the New Hampshire legislature. And the NHPD needs more funding to hire more NHPD attorneys in order to reduce caseloads. But many believe the NHPD is afraid to say that caseloads are too high, for fear that the judicial council will not renew the NHPD's public defender program contract. The NHPD discourages its staff from speaking out individually about the indigent defense system: "As for public dissemination of non-client-related subject matter concerning the [NHPD], NHPD traditionally has maintained a low profile in the public square, letting our work in the courtroom speak for itself. The [NHPD] discourages expression in electronic social media inconsistent with that tradition."<sup>518</sup>

Rather than seek additional necessary funding to operate the public defender program (and risk losing the public defender program contract), the NHPD instead reduces the time its attorneys devote to representing indigent defendants.

- The NHPD could, but does not, provide staff attorneys to be present in the courtroom during the arraignment of in-custody adult defendants in the circuit court or of any out-of-custody defendants in any court.<sup>519</sup> As a result, many indigent defendants appear at arraignment without any attorney to guide them in making decisions about, for example, whether to negotiate directly with the prosecutor, how to plead, how to secure their release from pre-trial detention, and the effects of accepting an offered plea bargain. As one court clerk explains: "I've never seen a defendant represent themselves well in front of a judge."
- During 2020, the NHPD reminded all of its branch offices to refrain from declaring a conflict of interest in all except codefendant cases unless and until it becomes clear that a case is almost definitely going to trial. Many stakeholders believe the NHPD adopted this policy so that it can accept a larger portion of the appointed cases of indigent defendants, and thereby please the judicial council and the trial courts. This policy results in each NHPD attorney representing more appointed clients and having less time to devote to each individual defendant's case. It also means that some indigent defendants are

<sup>518</sup> NEW HAMPSHIRE PUBLIC DEFENDER, EMPLOYEE MANUAL § 5.3 (Mar. 28, 2019).

<sup>519</sup> The NHPD Orford office typically has an attorney physically present in the Grafton Superior Court when it conducts arraignments of out-of-custody defendants, and if the court appoints counsel to represent any indigent defendant during the arraignment, then the NHPD attorney will represent the defendant during the arraignment. The NHPD Laconia office assigns attorneys to provide representation to out-of-custody felony defendants in Carroll Superior Court and Belknap Superior Court whether the defendant has filled out the request for a lawyer form already or not.

The NHPD provides staff attorneys to be present *during* the arraignment for in-custody adult defendants in the superior court and for in-custody juvenile defendants in the circuit court, but only for the limited purpose of representing the defendant *during* the arraignment.



represented by an attorney with divided loyalty, and in those cases that the NHPD does decide are going to trial, then the indigent defendants in those cases are re-assigned to a new attorney who must get up to speed on the eve of trial.

- The NHPD knowingly continues to assign cases to its attorneys even when the NHPD attorneys' individual caseloads exceed the maximum caseload limits allowed by the judicial council contract. This results in each NHPD attorney representing more appointed clients and having less time to devote to each individual defendant's case. As one staff attorneys puts it, when the NHPD allows its attorneys to carry excessive caseloads, "the New Hampshire Public Defender program puts the contract first, not the client."

## B. Systemic conflicts of interest in the indigent defense system

All indigent defense system attorneys in New Hampshire are wholly dependent on decisions made by the judicial council for their continued engagement as indigent defense system attorneys and for the resources necessary to provide effective representation to their appointed clients. When an indigent defense system is not independent of the judicial and political branches of government – when there is no independent body, charged solely with ensuring effective assistance of counsel, that is responsible for overseeing the indigent representation system – then attorneys working within that system are subject to a series of potential conflicts of interest. The U.S. Supreme Court has repeatedly held that the Sixth Amendment guarantees each and every defendant the right to effective representation that is free from conflicts of interest.<sup>520</sup>

One of the ways that a lawyer can have a conflict of interest in a defendant's case is when the lawyer has a relationship with a third party (such as the lawyer's employer or the entity by which the lawyer is paid) that conflicts with the legal interests of the client whom the lawyer is appointed to represent.<sup>521</sup> The only way that any attorney can be appointed to represent an indigent defendant in New Hampshire is through assignment by or contract with the judicial council.<sup>522</sup> As a result, every indigent defense system attorney in New Hampshire is placed in a position of divided loyalties, where they must, often subconsciously, counterbalance the need to please the judicial council in order be assigned (and paid) in indigent defense cases against their duty to act solely on behalf of the stated interests of the indigent defendants whom they are assigned to represent.

<sup>520</sup> See, e.g., *Wood v. Georgia*, 450 U.S. 261, 271 (1981) ("Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest."); *Cuyler v. Sullivan*, 446 US 335, 346 (1980) ("Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial."); *Glasser v. United States*, 315 U.S. 60, 70 (1942).

<sup>521</sup> N.H. R. PROF'L CONDUCT 1.7(a)(2) ("... a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if... there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to... a third person..."). See N.H. R. PROF'L CONDUCT 5.4(c) ("A lawyer shall not permit a person who... pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.").

<sup>522</sup> N.H. REV. STAT. ANN. § 604-A:2(II) (2019).

Another way that a lawyer can have a conflict of interest in a defendant's case is when the lawyer's own personal interests conflict with the legal interests of the client whom the lawyer is appointed to represent.<sup>523</sup> Because every indigent defense system attorney in New Hampshire is dependent on the judicial council to award them a contract or assign them a case, the attorneys are sometimes working within a compensation scheme that pits the lawyer's own financial interests against the legal interests of the indigent defendants whom they are assigned to represent.

A third way that a lawyer can have a conflict of interest in a defendant's case is when the lawyer represents two or more clients at the same time and those clients have conflicting interests.<sup>524</sup> Because every indigent defense system attorney in New Hampshire works with the fiscal and temporal resources allotted to them by the judicial council, the attorneys are often taking on more cases than they can effectively handle,<sup>525</sup> pitting the legal interests of each of the attorney's clients against the legal interests of all of the attorney's other clients.

The system of indigent defense that the State of New Hampshire has established through the judicial council creates systemic conflicts of interest for all indigent defense system attorneys. While the systemic conflicts of interest manifest differently for the individual attorneys within each of the three components of New Hampshire's indigent defense system, they all impede the ability of the attorneys to provide effective assistance of counsel to the indigent defendants whom they are assigned to represent.

## 1. Inequities among indigent defense system attorneys

Indigent defendants do not get to choose the indigent defense system attorney who represents them. The effectiveness of the representation that an indigent defendant receives should not depend on whether they are represented by an NHPD attorney (staff attorney or subcontractor private attorney) or a contract counsel attorney or an assigned counsel attorney. Yet the judicial council has established different mechanisms for the operation of each of the three components of New Hampshire's indigent defense system, and these differences create different systemic conflicts of interest that affect the representation provided by the attorneys in different ways.

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<sup>523</sup> N.H. R. PROF'L CONDUCT 1.7(a)(2) ("... a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if... there is a significant risk that the representation of one or more clients will be materially limited by... a personal interest of the lawyer.").

<sup>524</sup> N.H. R. PROF'L CONDUCT 1.7(a) ("... a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client...").

<sup>525</sup> The ABA's *Criminal Justice Standards, Defense Function* direct that "[d]efense counsel should not carry a workload that, by reason of its excessive size or complexity, interferes with providing quality representation, endangers a client's interest in independent, thorough, or speedy representation, or has a significant potential to lead to the breach of professional obligations." AMERICAN BAR ASS'N, CRIMINAL JUSTICE STANDARDS FOR THE DEFENSE FUNCTION, std. 4-1.8(a) (4th ed. 2017). National standards, as summarized in the *ABA Ten Principles*, explain that defense counsel should refuse new case appointments when those appointments would create a conflict of interest because the attorney would have insufficient time to dedicate to all cases given the workload. AMERICAN BAR ASS'N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 5 & cmt. (2002).

**Inequities in qualifications, skills, and expertise.** The judicial council's contract with the NHPD does not impose any mandatory qualifications for the attorneys that the NHPD hires or subcontracts to represent indigent people, except that attorneys employed by the NHPD are prohibited from having any private law practice,<sup>526</sup> and the NHPD likewise does not have any formal requirements or qualifications that attorneys must meet to be hired or for the private attorneys with whom it subcontracts. As a result, the NHPD attorney assigned to represent an indigent defendant may be fresh out of law school with no experience. For assigned counsel, the only requirement actually imposed by the judicial council is that the attorney be in good standing with the bar association and be willing to represent the indigent defendant. In contrast, contract counsel attorneys must have "actively practiced criminal law for a minimum of three years and possess a substantial record of jury trial experience."<sup>527</sup>

Other than for contract counsel attorneys, the judicial council has not established any training requirements for indigent defense system attorneys to ensure that they have the ongoing knowledge and skills necessary to represent indigent adults and children in the types of cases to which they are assigned. Contract counsel attorneys are required by the judicial council to attend 10 hours of training annually focused on the types of cases in which they are assigned to represent indigent defendants, including one hour on juvenile representation,<sup>528</sup> and beginning in 2019 some hours of training are provided by the NHPD at no cost to the contract counsel attorney. The NHPD requires all of its staff attorneys to attend 2 ½ days of annual training focused on the types of cases in which they are assigned to represent indigent defendants, and the NHPD pays all costs. But for assigned counsel attorneys and NHPD subcontractor attorneys, there is no requirement that they attend any training focused on the types of cases in which they are assigned to represent indigent defendants, and they must pay themselves for the cost of obtaining the CLE hours necessary to maintain their bar cards.

**Inequities in compensation and resources.** NHPD staff attorneys are paid an annual salary and receive employment benefits, without regard to how many or how few cases are assigned to the attorney during the year, but NHPD staff attorneys cannot practice law outside of the NHPD, so their earning potential is limited to their NHPD salary. Each NHPD staff attorney typically receives a raise each year for 10 years, but once they have reached their 11th year of practice at the NHPD, there is no way for them to receive any further increase in their salary. NHPD staff attorneys do not have to personally pay for any of their overhead or the case-related expenses of the indigent defendants they are assigned to represent, and they have access to staff investigators, two social workers, and immigration law experts without having to spend time preparing and filing a motion to obtain them.

All other indigent defense system attorneys are private attorneys who are free to devote as much time as they desire to privately compensated work, in addition to the compensation they receive from their assigned cases on behalf of New Hampshire indigent defendants.

<sup>526</sup> "Agreement" between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A, ¶ 4 (for the term of July 1, 2019 through June 30, 2021).

<sup>527</sup> NEW HAMPSHIRE JUDICIAL COUNCIL, JUDICIAL COUNCIL ELIGIBILITY STANDARDS FOR CONTRACT COUNSEL AND ASSIGNED COUNSEL (no date).

<sup>528</sup> "New Hampshire Judicial Council Contract for Attorney Services, State Fiscal Year 2021," ¶ 26 (sample).

Contract counsel attorneys and NHPD subcontractor attorneys are paid a flat fee per case, without regard to how many or how few hours the attorney spends in representing the indigent defendant in that case. NHPD subcontractor attorneys have access to the NHPD staff investigators, without having to spend time preparing and filing a motion to obtain them. For all other case-related expenses, contract counsel attorneys and NHPD subcontractor attorneys must prepare and file a motion in the trial court to obtain funding for the necessary expenses. Both contract counsel attorneys and NHPD subcontractor attorneys must pay for all of their required overhead and some case-related expenses (costs of legal research, travel, and communications). What remains after they pay these costs is the attorney's pay.

Assigned counsel attorneys are paid an hourly rate with a maximum possible fee per case based on the type of case, and absent authorization from a court the attorney cannot be paid more than the maximum fee no matter how many hours the attorney spends in representing the indigent defendant in that case. For all case-related expenses, assigned counsel attorneys must prepare and file a motion in the trial court to obtain funding for the necessary expenses. Assigned counsel attorneys must pay for all of their own overhead, and what remains after assigned counsel pay these costs is the attorney's pay.

The table on page 186 illustrates the differences in compensation for each of the types of attorneys in the indigent defense system.

The disparities in compensation among indigent defense system attorneys are further illustrated by considering the attorneys' potential earnings during a year. For purposes of this comparison, we presume that there are 52 work weeks in a year, and 40 hours in each work week, for a total of 2,080 work hours available to each indigent defense system attorney.

- An NHPD staff attorney, no matter how experienced, cannot earn more than \$86,510 in a year (the equivalent of \$41.59 per hour), but the NHPD staff attorney also receives employment benefits and has no out-of-pocket expenses associated with representing indigent defendants.
- For both FY 2020 and FY 2021, the smallest contract awarded by the judicial council authorized a contract counsel to be assigned up to 50 units for a maximum possible compensation of \$15,000, and the largest contracts authorized a contract counsel to be assigned up to 300 units for a maximum possible compensation of \$90,000. A contract counsel attorney, then, can earn up to \$90,000 through the judicial council in a year (the equivalent of \$43.27 per hour if all hours are devoted to representing indigent defendants), with no requirement that the attorney devote any specific amount of time to the indigent defendants' cases they are assigned. And, a contract counsel attorney can also earn unlimited additional compensation for other professional endeavors. But the contract counsel attorney must pay for all of their own overhead and some of the case-related expenses associated with representing indigent New Hampshire defendants.
- An assigned counsel attorney earns either \$100 per hour or \$60 per hour, depending on the type of case assigned. There is no limit on the number of cases that an assigned counsel attorney can be assigned in a year, so if all hours are devoted to representing indigent defendants and if the assigned counsel attorney never devotes more than the

Comparison of compensation methods used in New Hampshire’s indigent defense system

NHPD staff attorneys		Contract counsel and NHPD subcontractors				Assigned counsel			
Annual salary for unlimited cases		Type of case	Unit rate	Unit value	Flat fee paid per case	Type of case	Hourly rate	Maximum fee paid per case	Compensable hours under maximum fee
Step 11 \$86,510 Step 10 \$84,948 Step 9 \$83,383 Step 8 \$81,893 Step 7 \$80,402 Step 6 \$73,639 Step 5 \$65,565 Step 4 \$60,764 Step 3 \$57,411 Step 2 \$55,176 Step 1 \$52,950						Capital murder, first degree murder, second degree murder, manslaughter	\$100	\$20,000	200
		Felony I		8.3	\$2,490	Aggravated felonious sexual assault, felonious sexual assault, first degree assault			\$8,000
		Felony II		2.75	\$825	Other felonies		\$4,100	68.33
		Misdemeanor (Circuit Court)		1	\$300	Misdemeanors	\$60	\$1,400	23.33
		Misdemeanor/ Complaint (Superior Court)		1.5	\$450				
		Misdemeanor Appeal (from Circuit Court)		1.5	\$450	Juvenile delinquency		\$1,700	28.33
		Juvenile Delinquency Proceeding	\$300	1	\$300	Juvenile court review hearings		\$300	5
		Juvenile Review (and related work)		0.33	\$99				
		Juvenile Sununu Youth Services Center review		1	\$300				
		Preparation of a Notice to Appeal		1	\$300				
		Habeas Corpus Petition (Superior Court)		1	\$300				
		Specialty Court Appearance		0.25	\$75				
		"Other" (VOP, sentence related Witness Rep, etc.)		0.75	\$225				

maximum compensable hours to each assigned case, an assigned counsel attorney can earn between \$124,800 and \$208,000 through the judicial council in a year. Alternatively, an assigned counsel attorney can choose to accept fewer indigent defense cases and take on more cases of private clients that allow for greater compensation. But the assigned counsel attorney must pay for all of their own overhead.

## 2. NHPD staff attorneys

NHPD staff attorneys do not have any control over the number of cases of indigent defendants that they must handle at any moment or over the course of any given year, and each NHPD staff attorney must effectively represent each and every person to whom they are assigned. An attorney explains: “I wish there was some mechanism for cutting off caseloads. I feel like the answer [from the courts] is to just plead things faster. But that’s not my job.”

During FY 2021, the NHPD as a whole handled a total of 27,788 individual adult criminal and juvenile delinquency cases in the trial courts (including cases open at the start of the year plus cases assigned during the year). With 124 NHPD staff attorneys at the start of the year and 123 at the end of the year, this means that each NHPD staff attorney was responsible on average for between 224 to 226 cases of indigent defendants during FY 2021, in addition to all of the attorneys’ other workload responsibilities and without sufficient support staff. Throughout the NHPD, staff attorneys express serious concerns about their caseloads and workloads.

- One staff attorney describes the caseloads as “absurdly high” and says that when a lawyer has one homicide and 100 other cases at the same time “it is not workable.”
- A managing attorney says “it is definitely too many cases; everybody has too many cases, and when people have caseloads in the 100s at the same time they start making mistakes.”
- While many of the less experienced staff attorneys say their caseloads are too high and they cannot handle more cases, even the experienced attorneys say that handling over 100 cases at the same time is too many to allow for effective assistance of counsel.

NHPD staff attorneys point to the many ways in which they make trade-offs among the clients they represent.

- “Effectively preparing one client’s case is always at the detriment of another client’s case.”
- Many attorneys believe that felonies take priority over other cases, because they carry a more serious potential sentence, placing misdemeanors and juvenile delinquency cases “on a back-burner.” One attorney thinks that juvenile cases in particular get “lost in the shuffle” when attorneys have high adult caseloads.
- Cases of clients who are detained take priority, in part because it costs the county to detain those defendants pre-trial, so out-of-custody defendants take a back seat even when they face more serious charges.
- One attorney describes always “unfortunately working toward deadlines, so whatever has the soonest deadline” gets prioritized and other clients must wait. Another attorney explains: “Everything we do is affected by volume, so in our decisions day-to-day we

have to prioritize and have to be very, very efficient.” A third attorney says: “What is immediately in your face is what you’re going to be thinking of. You’re kind of just doing the best you can in the moment with the case in front of you, until you become aware of another case that has a fire you need to put out.”

All NHPD staff attorneys acknowledge they could do more for their clients if they had more time. Some attorneys believe that, overall, they provide effective representation, explaining: “We do the best we can with what we’ve got,” and “I do everything I need to do.” But a large number of NHPD staff attorneys describe specific ways in which they limit the representation they provide to individual indigent defendants because of the large number of cases they are handling.

- *Limited communication with clients.* Rather than initiating communication with newly assigned clients, the attorneys avoid communicating with clients until after they receive discovery. Especially for out-of-custody clients, it is not uncommon for the attorneys to communicate with their clients for the first time at the first case status conference in circuit court or first dispositional conference in superior court. If a client tries to schedule a meeting with their attorney, it is not uncommon for the attorney’s first available meeting time to be several weeks away. The higher the caseloads, the more time the attorneys are in court and the less time they are in the office, so defendants have “less access” to their attorneys. The most vulnerable clients, such as those with mental illness or a substance abuse disorder or with inadequate access to a phone, “fall off the radar.” Other attorneys describe it as attorneys and clients “losing track of each other.” High caseloads mean the attorneys do not have the time to spend with clients to build trusting relationships: one attorney describes being “shorter with clients, end-game focused, and [having] no time to get to know clients beyond words on paper;” another attorney says their “emotional connection is now gone” with clients.
- *Failing to review discovery, independently investigate the facts, and conduct legal research.* Attorneys say it is not possible to review all of the discovery produced by the prosecution in every client’s case – if the prosecution makes a reasonable offer in a case, “you are not pouring through the discovery the state provides; you will just resolve it.” Attorneys say they commonly do not interview potential witnesses in a case until the case is scheduled for trial, then they often need a continuance in order to finish interviewing witnesses. One attorney acknowledges never even beginning to review discovery and consider evidentiary or suppression issues until a case is scheduled for trial.

Although anecdotes are merely descriptive, one attorney’s summary reflects the comments of a significant number of NHPD staff attorneys: “We just do not have enough time to do all the work that we need to do and give every client what they need because we are stretched too thin, and the pressure of the caseload is astronomical.”

NHPD staff attorneys suffer from exhaustion, stress, and burn-out. Multiple attorneys say they always work more than 40 hours every week and many regularly work weekends, holidays, and 60-hour weeks. “It makes the job very difficult, and not sustainable in the long term.” An attorney with over 20 years of experience says: “There are times where I feel completely overwhelmed.” Attorneys say the high caseloads contribute to a “brain drain” in the NHPD, where attorneys leave their employment as public defender program attorneys. One attorney

says: “The program loses good people who at heart are public defenders but cannot keep up with the work mentally or physically.” Another attorney explains: “We are not the same agency that I signed up to be in.” And a third attorney says with regret: “People who like being a public defender do not like it anymore because you cannot represent clients effectively. Had I known what New Hampshire’s program was like, I would not have come here.”

### 3. Contract counsel attorneys and NHPD subcontractor attorneys

When an attorney is paid a flat fee to represent an indigent defendant, this creates a conflict of interest between the appointed attorney’s own financial interests and the legal interests of the indigent defendants whom they are appointed to represent. This is because the attorney is paid exactly the same amount no matter how few or how many hours they devote to each case. As a result, it is in the attorney’s own financial interest to spend as little time as possible on each individual defendant’s case.

The situation is made worse yet if the attorney is required to personally pay for overhead and case-related expenses in appointed cases. In these circumstances, the attorney must first pay for all overhead expenses (including, for example, law office rent and compensation of support staff) and then pay for all case-related expenses incurred in representing appointed clients (including, for example, costs of copies or travel to interview witnesses), before the attorney earns any pay at all. The more that the appointed attorney spends on necessary overhead and case-related expenses for appointed clients, the less money the attorney has left over for their personal compensation. A federal court in 2013 considered a fixed fee contract in which the appointed attorneys were required to pay for all of the overhead and case-related expenses in an unlimited number of cases and found it to be an “[i]ntentional choice[.]” of government that left “the defenders compensated at such a paltry level that even a brief meeting [with clients] at the outset of the representation would likely make the venture unprofitable.”<sup>529</sup>

Contract counsel attorneys uniformly believe that the flat fees the judicial council pays do not adequately compensate them for the amount of time necessary to effectively represent their assigned clients. The contract counsel are required, by the terms of their contracts with the judicial council, to accept assignment in the agreed court locations for any case in which they do not have a conflict of interest. Contract counsel attorneys know they will lose money on some of the cases they are assigned, but they believe the judicial council will not renew their contract if they refuse to take these cases.

The judicial council contracts create an incentive for contract counsel attorneys to do the bare minimum number of hours of work necessary to dispose of each assigned case. To minimize their own financial loss, many contract counsel attorneys limit the hours they devote to assigned cases in numerous ways.

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<sup>529</sup> Memorandum of Decision at 15, *Wilbur v. City of Mount Vernon*, No. C11-1100RSL (W.D. Wash., Dec. 4, 2013), <http://sixthamendment.org/wp-content/uploads/2013/12/Wilbur-Decision.pdf>.



- *Failing to review discovery, independently investigate the facts, and conduct legal research.* Several attorneys say that, rather than reviewing all of the discovery produced by the prosecution, instead they ask the prosecutor or the police what portions of the discovery are “important to look at;” for example, “There’s no reason to look at eight hours of video. I spend very little time on video as defense counsel although as a prosecutor I spent much more time on video.”
- *Encouraging clients to plead guilty rather than go to trial.* As one attorney explains: “If you go to trial, in most cases you will lose as a business decision,” so attorneys encourage their assigned clients to accept the prosecution’s plea offer, sometimes without regard to the evidence in the case. There are some justice system stakeholders who say that many contract counsel attorneys simply will not try a case – as long as the attorney does not withdraw, the attorney is paid the full flat fee for the case even if a breakdown in the attorney-client relationship means that the court removes the attorney from the case.

Some contract counsel attorneys admit that they “resent a client who demands a lot of time.”

To enhance the likelihood of actually earning a profit from their assigned cases, some contract counsel attorneys try to handle a high volume of cases in a single circuit court location whenever possible. Attorneys explain: you make money by “piling multiple cases up on one day;” there is an economy of scale if you can “stack cases in one court.” One contract counsel attorney explains how it is possible to make \$120 per hour on assigned circuit court cases: “It is not hard for me to load everything up on one day especially in District Court. I do more drunk driving cases than anyone. Preparation time is minimal if you earn your money in District Court. A district court trial is one or two hours. I can do a trial and two pleas on one day. You can do a motion to suppress on the same day as the trial.”

Justice system stakeholders say that contract counsel attorneys initially accept judicial council contracts in order to build their practices. It is a “loss leader; you get some money and it benefits your practice by keeping you in the local court.” The attorneys become better known in the community, which helps them get more lucrative assigned counsel cases in state court and in federal court. Once attorneys are able to earn the equivalent of their contract counsel compensation from some other source, they generally stop serving as contract counsel attorneys. An attorney sums it up, saying: “When times are good, no one wants a contract; when times are bad, everyone wants a contract because the money is steady” even though inadequate.

#### 4. Assigned counsel attorneys

When an attorney is paid an hourly rate with a cap on the maximum that the attorney can earn in a case, this creates a conflict of interest between the appointed attorney’s own financial interests and the legal interests of the indigent defendants they are assigned to represent. This is because the attorney’s financial incentive is to devote exactly the maximum number of compensable hours and not a single moment more to each individual defendant’s case.

## Chapter VIII

# Findings & recommendations

Providing the Sixth Amendment right to effective counsel is an obligation of the states under the due process clause of the Fourteenth Amendment.<sup>530</sup> The State of New Hampshire has vested in its judicial council the entirety of the state's Fourteenth Amendment obligation to ensure effective Sixth Amendment services. However, systemic deficiencies and inadequate funding prevent the judicial council from meeting the state's constitutional obligations under the Sixth and Fourteenth Amendments.

New Hampshire has many well-qualified, skilled, and passionate defense attorneys providing representation all across the state, both within and outside of the NHPD, however the indigent defense system as funded by the legislature and administered by the judicial council places those attorneys in an untenable situation in which they are asked to carry excessive caseloads while being undercompensated. As more experienced attorneys leave the system, the remaining attorneys are forced to take on even more cases, causing a cycle of greater frustration and burnout, and indigent defendants wait longer and longer to have an attorney assigned to represent them after their constitutional right to appointed counsel has attached.

### A. Findings

**FINDING 1: The judicial council is not adequately funded and thus does not have sufficient staff to properly oversee the indigent defense system.**

The State of New Hampshire inadequately funds the judicial council and has provided the judicial council with only three staff members to try to annually ensure effective representation of approximately 39,000 cases of indigent defendants heard in 42 trial court locations before 58 judges. That is an impossible task for even the most dedicated of employees.

As a result of inadequate funding and insufficient staff, the judicial council cannot obtain the data or reports necessary to know whether and when indigent defendants who are constitutionally entitled to public counsel are in fact receiving an attorney. For example, the judicial council should know, but does not:

- the number of arrests made or summons issued in cases that carry loss of liberty as a possible punishment, for which the defendant is entitled to appointed counsel if indigent;
- the number of people who request appointed counsel in advance of arraignment and the outcome of those requests;

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<sup>530</sup> Gideon v. Wainwright, 372 U.S. 335, 343-45 (1963).

- among the people who appear at arraignment, how many have privately retained counsel or request appointed counsel or waive their right to counsel;
- the number of people who request appointed counsel but are found not indigent; and
- of those people for whom a court appoints public counsel, how much time transpires between their arrest or summons and their request for appointed counsel and how much time transpires between the court appointing public counsel and an individual attorney actually enrolling to represent that individual indigent defendant.

As a result of inadequate funding and insufficient staff, the judicial council does not obtain the information necessary to know whether there is a sufficient number of attorneys with sufficient time and resources to provide effective assistance of counsel to every indigent defendant. For example, the judicial council should know, but does not:

- how much time is actually spent representing each indigent defendant in each type of case;
- how many appointed cases and of what types each indigent defense system attorney is handling in a given year;
- what other workload responsibilities each indigent defense system attorney has in a given year in addition to representing individual New Hampshire indigent defendants;
- whether each indigent defense system attorney is working with sufficient support to allow them to dedicate adequate time to each indigent defendant's case; and
- how much money is spent by indigent defense systems attorneys (or by the NHPD as an entity) on overhead and what is acquired, how much money is spent out-of-pocket by indigent defense system attorneys for the necessary case-related expenses of their appointed clients or whether the attorneys forgo seeking necessary case-related expenses on behalf of their appointed clients, and how much money is paid to each individual indigent defense system attorney as the attorney's personal compensation and what services those attorneys provide in exchange.

When the judicial council does exercise oversight of the indigent defense system, it often does so in ways that result in the effectiveness of the representation that an indigent defendant receives differing depending on whether the appointed attorney is an NHPD staff attorney or an NHPD subcontractor attorney or a contract counsel attorney or an assigned counsel attorney. For example:

- the judicial council does not have or enforce consistent qualifications that every attorney must meet before being eligible to represent an indigent person;
- the judicial council does not have or enforce consistent training requirements that every attorney must meet to ensure their continuing qualifications to represent indigent defendants;
- the judicial council does not have or enforce consistent supervisory requirements to ensure that attorneys are not appointed to represent indigent defendants in types of cases for which they lack the necessary skill and expertise and to provide a mechanism to remove an attorney from the indigent defense system when necessary; and
- the judicial council has not established any standards against which to measure the representation provided by every indigent defense system attorney.

As a result of inadequate funding and insufficient staff for the judicial council, the taxpayers and policymakers in New Hampshire do not know whether every indigent defendant who is entitled to and does not waive the right to appointed counsel is in fact being represented by qualified appointed counsel at every critical stage of their case. The taxpayers and policymakers do not know on an ongoing basis how many attorneys are actually required and provided to represent indigent defendants in all the trial court locations in the state. They do not know on an ongoing basis how much funding is actually required and spent on the necessary fiscal components of representing indigent defendants. They do not know on an ongoing basis how much time is actually required and spent in representing indigent defendants. All of this information is necessary for policymakers and justice system stakeholders to understand in order to plan for the future needs of New Hampshire's indigent defense system and ensure effective representation to each indigent defendant.

**FINDING 2: New Hampshire's indigent defense system lacks the structural safeguards necessary to ensure the provision of effective assistance of counsel to every indigent defendant, as required by the federal and state constitutions.**

In *United States v. Cronin*, the U.S. Supreme Court said: “an indispensable element of the effective performance of [defense counsel’s] responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation.”<sup>531</sup> On the same day in *Strickland v. Washington*, the Court declared that “independence of counsel” is “constitutionally protected,” and “[g]overnment violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense.”<sup>532</sup> Heeding these admonitions from the Court, national standards call for independence of the defense function. The first of the *ABA Ten Principles of a Public Defense Delivery System* explains that, in a properly constituted system, “[t]he public defense function, including the selection, funding, and payment of defense counsel, is independent,” and the indigent defense system and the attorneys it provides must be “independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel.”<sup>533</sup>

The National Study Commission on Defense Services’ *Guidelines for Legal Defense Systems in the United States*, created in consultation with the United States Department of Justice under a Law Enforcement Assistance Administration grant, state that, to avoid conflicts of interests, an indigent defense commission should not include “judges, prosecutors, or law enforcement officials.”<sup>534</sup> The American justice system is an adversarial system in which opposing parties – the prosecution and the defense – present their positions before an unbiased arbiter – the judge. National standards prohibit judges from serving on an indigent defense commission because the referee in a proceeding should not make rules for only one side of the adversarial system.

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<sup>531</sup> *United States v. Cronin*, 466 U.S. 648, 656 n.17 (1984) (quoting *Ferri v. Ackerman*, 444 U. S. 193, 204 (1979)).

<sup>532</sup> *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

<sup>533</sup> AMERICAN BAR ASS’N, *ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM*, principle 1 and cmt. (2002).

<sup>534</sup> NATIONAL STUDY COMM’N ON DEF. SERVS., *GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES*, guideline 2.10 (1976).

National standards prohibit prosecutors from serving on an indigent defense commission because one adversary cannot be allowed to participate in the planning and oversight of the other.

Despite these prohibitions under national standards, the judicial council lacks sufficient independence from the judicial and political branches of government. Both judges and prosecutors serve on the judicial council that is responsible for administering the entirety of New Hampshire's indigent defense delivery system and for ensuring its quality and cost effectiveness. Additionally, many members of the judicial council have conflicts of interest between their role in overseeing the provision of the right to counsel and their role as a judge or prosecutor, while other members of the judicial council may themselves benefit financially from decisions they participate in making.<sup>535</sup> Furthermore, the provision of indigent defense is not the judicial council's only duty, so from the outset the judicial council as a whole has divided loyalties imposed on it by state law.

The judicial council's lack of independence and conflicts of interest are not solved by the existence of either the judicial council's indigent defense subcommittee or the NHPD's board of directors.

The judicial council's indigent defense subcommittee was voluntarily created by the judicial council and can just as easily be disbanded at any time, because its existence is not mandated by law. While the members of the subcommittee have traditionally been people with knowledge of criminal defense, nothing beyond the goodwill of the judicial council ensures that this tradition will continue or that the subcommittee will continue to exist. The members of the subcommittee are themselves members of the judicial council that lacks independence, and nothing prohibits the subcommittee members from personally benefitting financially from decisions about the provision of indigent defense services that they participate in making.

The NHPD is entirely beholden to the judicial council for its continued existence; if the judicial council does not award the public defender program contract to the NHPD, then the NHPD cannot carry out its only authorized corporate purpose of representing New Hampshire indigent defendants. As a result, the sole fiduciary duty of the NHPD board of directors is to ensure the continued existence of the NHPD by ensuring that the NHPD receives the public defender program contract from the judicial council. The NHPD and its board of directors counterbalance the NHPD's need to please the judicial council in order to receive the public defender program contract against the duty of its attorneys to act solely on behalf of the stated interests of the indigent defendants whom they are appointed to represent. Compounding the conflicts of interest, nothing prohibits the members of the NHPD board of directors from personally benefitting financially from decisions about the provision of indigent defense services that they participate in making.

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<sup>535</sup> As explained in chapters II and V, it is not always a financial benefit – it may in fact be a financial loss – for a member of the judicial council to serve as a contract counsel and/or assigned counsel. Members of the judicial council often feel an obligation to accept appointments to represent indigent defendants because of their commitment to indigent defense, because of the lack of sufficient attorneys available for appointment, and to bring to bear their expertise on behalf of indigent defendants and as mentors to other appointed attorneys.

Lacking sufficient independence, both the judicial council and the NHPD avoid making policy decisions that are necessary to ensure the constitutional right to counsel and make policy decisions that impede the ability of appointed attorneys to effectively represent indigent defendants, as detailed throughout this report. For example:

- To the best of anyone's memory, the NHPD is the only entity that has applied to serve as the state's public defender program since it first received the contract from the judicial council in 1986. The judicial council has not taken any steps to consider whether changes to its request for proposals, such as awarding separate contracts for a public defender program in each county or in defined regions of the state, would encourage other law firms or attorney consortiums in the state to apply in order to stimulate innovation and spark improvement in indigent defense services.
- The terms of the judicial council contract with the NHPD to serve as the state's public defender program rarely change, even when they no longer make sense and are not enforced. For example, the NHPD contract requires a specific number of attorneys to represent clients in each county, despite the fact that the jurisdiction of the court locations does not align with counties and that the NHPD stations its attorneys in its branch offices that do not align with either the court locations or the counties. Worse still, the judicial council's contract with the NHPD perpetuates a contractual caseload limit based on each NHPD attorney having no more than 70 open cases at any time, yet prior to this evaluation the judicial council did not require the NHPD to report the open caseloads of its individual attorneys (it began doing so during this evaluation), and the NHPD has not historically complied with the limits, and even if reported and enforced the contractual caseload limits do not prevent the NHPD attorneys from carrying an excessive caseload and workload. Changes to the contract provisions in either of these examples would likely require statutory amendments, yet neither the judicial council nor the NHPD have sought the necessary modifications from the legislature.
- The NHPD board's policy is for the NHPD to avoid getting involved in systemic indigent defense advocacy or efforts at legislative improvements for indigent defendants, for fear of affecting funding from the legislature or losing the judicial council contract altogether. The NHPD conflicts policy as implemented today discourages its attorneys from withdrawing from cases with known potential conflicts of interest, without advising the represented clients of the potential conflict and even when retaining those cases means that the NHPD attorneys have caseloads exceeding the contractual limits such that the NHPD attorneys ration their time in favor of some clients and to the detriment of others.
- All indigent defense system attorneys in New Hampshire are wholly dependent on decisions made by the judicial council for their continued engagement as indigent defense system attorneys and for the resources necessary to provide effective representation to their appointed clients. Yet the judicial council perpetuates methods of compensating private attorneys in conflict cases that pit the personal financial interests of the appointed attorneys against the constitutional legal interests of the indigent defendants whom they are assigned to represent. And the judicial council has not sought from the legislature the statutory changes necessary to eliminate these conflicts between appointed attorneys and their clients.

**FINDING 3: The indigent defense system’s lack of structural safeguards and inadequate funding allow for the possibility of both actual and constructive denial of the right to effective assistance of counsel to at least some indigent defendants.**

The right to counsel attaches at the defendant’s initial appearance before a judicial officer, which for most defendants in New Hampshire occurs when an arrested defendant is brought before a bail commissioner, yet the judicial council does not gather information sufficient to know whether bail commissioners consistently and adequately advise defendants of their right to appointed counsel if indigent and facing possible loss of liberty as a punishment, nor whether defendants are provided with the information necessary to request appointed counsel.

The arraignment after arrest or summons (occurring between 24 hours to longer than 35 days after the arrest or summons) is a critical stage, and it is the proceeding in New Hampshire at which most defendants first request appointed counsel. However, indigent adult defendants in the circuit court who are held in custody at the time of their arraignment must choose between delaying having a court consider reducing their bail until an attorney is assigned to represent them or attempting to represent themselves in advocating for a bail reduction. Moreover, the judicial council does not gather information sufficient to know whether or how many or under what circumstances indigent defendants (whether in-custody or out-of-custody) may negotiate directly with prosecutors and plead guilty at arraignment, in order for example to secure their own release from custody or avoid having to return to court, but without making a knowing and voluntary waiver of their right to counsel.

For those defendants for whom a court appoints counsel at or quickly following arraignment, the defendant does not know the identity of the attorney who will represent them and in fact no specific individual attorney has yet been assigned to their case. The process of assigning a specific attorney to represent a specific defendant can take between one day and many weeks, during which the indigent defendant is not actively represented by any attorney. Nonetheless, the deadlines for discovery and filing of motions have already begun, and the period between arraignment and trial is also a critical stage.

Once an individual attorney is assigned to represent an individual defendant, that attorney often works under systemic conflicts of interest that impede the ability of the attorney to provide effective assistance of counsel. For example:

- The NHPD requires its staff attorneys to accept case assignments or fail to timely withdraw even when known potential conflicts of interest are identified and even when NHPD staff attorneys have excessive caseloads and workloads, often resulting in representation provided by an attorney with divided loyalty and/or the attorney rationing time and resources in favor of one client to the detriment of another and/or a defendant’s case being reassigned to a new attorney on the eve of trial.
- NHPD subcontractor attorneys and the judicial council’s contract counsel attorneys are paid a flat fee per case, with the amount depending on the type of case, without regard to how little or how much time the attorney must actually spend to effectively represent the

indigent defendant in the case. Although these attorneys can in theory request additional compensation in certain circumstances, the attorneys have almost no hope of receiving any compensation beyond the flat fee, and to even make the attempt the attorneys must devote significant uncompensated time toward making the application. Out of the flat fee paid per case to these attorneys, the attorneys must provide all necessary overhead and some case-related expenses, leaving them with a per case fee so low that they often accept more cases than they can effectively handle in order to earn greater compensation and they sometimes encourage indigent defendants to plead guilty before conducting necessary investigation into the facts of the case and necessary legal research or advocacy.

- The judicial council's assigned counsel attorneys are paid an hourly rate, but the maximum amount that the attorney can bill in each case is capped, with the hourly rate and the cap depending on the type of case, without regard to how much time the attorney must actually spend to effectively represent the indigent defendant in the case. These attorneys can in theory request additional compensation in certain circumstances, but in practice most attorneys are unwilling to devote more hours than the number for which they can be paid under the court's payment schedule, sometimes encouraging indigent defendants to plead guilty before conducting necessary investigation into the facts of the case and necessary legal research or advocacy. Out of the fee paid to these attorneys, the attorneys must provide all necessary overhead and some case-related expenses.

## B. Recommendations

The following recommendations acknowledge that the New Hampshire Judicial Council must immediately be provided adequate funding to increase the number of attorneys willing to be appointed to represent indigent defendants and to provide sufficient judicial council staff to collect the data necessary to properly forecast future needs, while the New Hampshire Legislature works to implement the structural safeguards necessary to ensure effective assistance of counsel to each indigent defendant.

**RECOMMENDATION 1: The State of New Hampshire should statutorily ban the use of fixed fee compensation methods that create financial disincentives to or otherwise interfere with appointed attorneys providing effective advocacy on behalf of indigent defendants' legal interests, and the state should ensure that every component of the indigent defense system is adequately and equitably funded to fulfill its constitutional and statutory duties.**

The flat fee per case contracts currently used in New Hampshire to compensate the NHPD's subcontractor attorneys and the judicial council's contract counsel attorneys, and the capped hourly rates currently used to compensate assigned counsel attorneys, both cause conflicts of interest between the indigent defense attorney's financial self-interest and the legal interests of the indigent defendant they are assigned to represent. New Hampshire should follow the lead of other states that have banned these practices. For example, in Idaho, the terms of any contract



with a private attorney to represent an indigent person “shall not include any pricing structure that charges or pays a single fixed fee for the services and expenses of the attorney.”<sup>536</sup>

According to rules adopted by the New Hampshire Supreme Court, assigned counsel attorneys are paid \$60 per hour for most felonies and all misdemeanors. All national standards and a significant number of state courts require that “counsel should be paid a reasonable fee in addition to actual overhead and expenses.”<sup>537</sup> To ensure that private attorneys appointed to represent indigent defendants are adequately compensated, New Hampshire will need to determine the typical cost of necessary overhead for an indigent defense system attorney and the amount of the fee that attorney should earn in addition to the cost of overhead. Many states provide a basis for comparison. We highlight three as a beginning point:

- *Alabama.* In 1993, the Alabama Court of Criminal Appeals determined that indigent defense attorneys were entitled to overhead expenses (set at \$30 per hour) in addition to a reasonable fee.<sup>538</sup> A decade later, when the state’s attorney general issued an opinion against paying the overhead rate and the state comptroller subsequently stopped paying it, the issue went to the Alabama Supreme Court, which determined that assigned counsel are entitled to a reasonable fee in addition to overhead expenses.<sup>539</sup> After this litigation, the Alabama legislature increased the hourly rate to \$70. New Hampshire has a higher cost of living than Alabama, so New Hampshire would have to pay \$78.00 per hour to be equivalent to Alabama’s rate.<sup>540</sup>
- *Kansas.* In 1987, the Kansas Supreme Court determined that the state has an “obligation to pay appointed counsel such sums as will fairly compensate the attorney, not at the top rate an attorney might charge, but at a rate which is not confiscatory, considering overhead and expenses.”<sup>541</sup> Testimony taken in the case set the average overhead rate of attorneys in Kansas in 1987 at \$30 per hour. Today, Kansas compensates public defense attorneys at \$80 per hour. New Hampshire has a higher cost of living than Kansas, so New Hampshire would have to pay \$92.57 per hour to be equivalent to Kansas’ rate.<sup>542</sup>
- *South Dakota.* The South Dakota Supreme Court set public counsel compensation hourly rates at \$67 per hour in 2000. To ensure that attorneys are perpetually paid both

<sup>536</sup> IDAHO CODE § 19-859 (2021).

<sup>537</sup> AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, principle 8 cmt. (2002).

<sup>538</sup> *May v. State*, 672 So. 2d 1307, 1308 (Ala. Crim. App. 1993).

<sup>539</sup> *Wright v. Childree*, 972 So. 2d 771, 780-81 (Ala. 2006).

<sup>540</sup> The cost of living in Concord, New Hampshire is 11.43% higher than in Birmingham, Alabama. *Cost of Living Comparison Between Concord, NH and Birmingham, AL*, NUMBEO, [https://www.numbeo.com/cost-of-living/compare\\_cities.jsp?country1=United+States&city1=Concord%2C+NH&country2=United+States&city2=Birmingham%2C+AL](https://www.numbeo.com/cost-of-living/compare_cities.jsp?country1=United+States&city1=Concord%2C+NH&country2=United+States&city2=Birmingham%2C+AL) (last visited Nov. 27, 2021).

<sup>541</sup> *State ex rel Stephan v. Smith*, 747 P.2d 816, 242 Kan. 336, 383 (Kan. 1987).

<sup>542</sup> The cost of living in Concord, New Hampshire is 15.71% higher than in Wichita, Kansas. *Cost of Living Comparison Between Concord, NH and Wichita, KS*, NUMBEO, [https://www.numbeo.com/cost-of-living/compare\\_cities.jsp?country1=United+States&country2=United+States&city1=Concord%2C+NH&city2=Wichita%2C+KS](https://www.numbeo.com/cost-of-living/compare_cities.jsp?country1=United+States&country2=United+States&city1=Concord%2C+NH&city2=Wichita%2C+KS) (last visited Nov. 27, 2021).

a reasonable fee and overhead, the court also mandated that “court-appointed attorney fees will increase annually in an amount equal to the cost-of-living increase that state employees receive each year from the legislature.” Assigned counsel compensation in South Dakota stands at \$99 per hour in 2021.<sup>543</sup> New Hampshire has a higher cost of living than South Dakota, so New Hampshire would have to pay \$103.25 per hour to be equivalent to South Dakota’s rate.<sup>544</sup>

To be clear, banning flat-fee contracts and moving to a private attorney system paying a reasonable hourly rate plus overhead will make it more difficult to predict and contain costs. A properly staffed, managed assigned counsel system can estimate future caseloads based on prior years trends and apply average estimated costs per case, by case type, to calculate what funding will be required to deliver its mandated services, but there is no guarantee that past averages will continue to apply to future years. For this reason, some governments have funded alternate public defender offices for conflict representation. There will always be a need for private attorneys in tertiary and other conflict situations but funding an alternate public defender office will offer New Hampshire policymakers more predictability with funding while increasing oversight and supervision.

**RECOMMENDATION 2: The New Hampshire Judicial Council should immediately be given adequate funding to significantly increase staff dedicated to overseeing indigent defense services.**

Although New Hampshire has historically given its judicial council broad authority over the statewide indigent defense system, the judicial council has never had more than three full-time staff at any time during the past 40 years – a number of staff that is wholly insufficient to effectively monitor and administer the provision of the right to counsel for all indigent defendants.

The State of New Hampshire must provide adequate funding and staff to the judicial council, so that the judicial council can: carry out the state’s fiduciary duty to taxpayers to oversee the indigent defense system; and collect, analyze, and report necessary data to allow New Hampshire policymakers to know the number of cases of indigent defendants likely to require an appointed attorney each year, the amount of time necessary to provide effective assistance of counsel in each indigent defendant’s case, the number of attorneys and support staff necessary to provide effective assistance of counsel to each indigent defendant, and the amount of funding required and spent for each necessary fiscal component of representing indigent defendants.

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<sup>543</sup> Letter from South Dakota State Court Administrator to State Bar of South Dakota (Nov. 13, 2020), <https://ujs.sd.gov/uploads/docs/2021CourtAppointedAttorneyFees.pdf>.

<sup>544</sup> The cost of living in Concord, New Hampshire is 4.3% higher than in Sioux Falls, South Dakota. See *Attorney/Lawyer Cost of Living Concord, New Hampshire vs. Sioux Falls, South Dakota*, NUMBEO, [https://www.numbeo.com/cost-of-living/compare\\_cities.jsp?country1=United+States&country2=United+States&city1=Sioux+Falls%2C+SD&city2=Concord%2C+NH](https://www.numbeo.com/cost-of-living/compare_cities.jsp?country1=United+States&country2=United+States&city1=Sioux+Falls%2C+SD&city2=Concord%2C+NH) (last visited Nov. 27, 2021).

The State of New Hampshire should appropriate state funding for the judicial council to hire a sufficient number of professional staff devoted full-time to training, compliance, finance, information technology, and research and data analysis. Most statewide indigent defense systems have a substantially larger staff than the three employees historically allotted to the judicial council to manage New Hampshire's indigent defense system. At minimum, the judicial council should have at least the following 14 positions (although New Hampshire policymakers may choose to title roles or align their responsibilities differently than suggested here) and additional administrative support based on work required and available time:

- one executive director;
- three deputy directors: one for the trial-level public defender program; one for the trial-level conflict counsel; and one for the appellate-level;
- each deputy director should have at least two assistants (for a total of six): one for adult representation and one for juvenile representation (or alternatively, one for criminal representation and one for civil representation);
- one director of training;
- one director of administration and human resources;
- one director of information technology; and
- one director of finance and accounting.

The judicial council should collect and evaluate on an on-going basis all information necessary to ensure that a sufficient number of qualified attorneys are available to be appointed and that adequate resources are available (overhead including support staff, training, supervision, and technology; case-related needs including social workers, investigators, and experts; and fair attorney compensation) to ensure effective assistance of counsel can be provided to each person who is entitled to public counsel under federal and state law.

Some of this data necessarily comes from other components of the justice system, including law enforcement, prosecutors, and the courts. The State of New Hampshire should coordinate with all justice components to gather information without imposing duplicative, undue, or onerous administrative or fiscal burdens and to do so in a way that protects the privacy and attorney-client privilege of individuals and the privileged work product of prosecutors and defense attorneys. For any collected data to be useful, all data reporters must apply the same definitions to terms and should use the same reporting forms. The details of the data that the state should collect and analyze on an on-going basis are shown in appendix E.

**RECOMMENDATION 3: The State of New Hampshire should statutorily vest the authority to provide and oversee all indigent defense services in a state-level independent public defense commission.**

As discussed throughout this report, New Hampshire's judicial council has responsibilities that, while important, often conflict with the State of New Hampshire's constitutional obligation to ensure effective Sixth Amendment right to counsel services for indigent defendants. Compounding the lack of independence, individual members of the judicial council may derive personal financial benefit from decisions made by the judicial council on which they serve. To overcome the lack of independence and the divided loyalties that underlie and cause most of

the problems identified in this evaluation, New Hampshire must either: reconfigure the existing judicial council to ensure its independence and remove from it the responsibility for matters other than the indigent defense system; or remove from the judicial council the responsibility for the state's indigent defense system and establish a new state-level independent public defense commission.

National standards, as compiled in the *ABA Ten Principles*, agree that the best way to protect defense counsel independence is by establishing an independent public defense commission: in order to “safeguard independence and to promote the efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems.”<sup>545</sup> The *Guidelines for Legal Defense Systems in the United States* explain:

A special Defender Commission should be established for every defender system, whether public or private.

The Commission should consist of from nine to thirteen members, depending upon the size of the community, the number of identifiable factions or components of the client population, and judgments as to which non-client groups should be represented.

Commission members should be selected under the following criteria:

- (a) The primary consideration in establishing the composition of the Commission should be ensuring the independence of the Defender Director.
- (b) The members of the Commission should represent a diversity of factions in order to ensure insulation from partisan politics.
- (c) No single branch of government should have a majority of votes on the Commission.
- (d) Organizations concerned with the problems of the client community should be represented on the Commission.
- (e) A majority of the Commission should consist of practicing attorneys.
- (f) The Commission should not include judges, prosecutors, or law enforcement officials.

Members of the Commission should serve staggered terms in order to ensure continuity and avoid upheaval.<sup>546</sup>

The commission should be made up of members selected by diverse appointing authorities, so that no single branch of government has the ability to usurp power over or exert outsized influence over the delivery of public defense services. The most straightforward way for New Hampshire to ensure this balance on its public defender commission is to give an equal number of member appointments to the executive, legislative, and judicial branches of government.

Many jurisdictions include one or more voices on their commission from communities affected by the indigent defense function, such as a layperson former client, or, to ensure that the commission reflects the demographic makeup of the community, often by including members

<sup>545</sup> AMERICAN BAR ASS'N, *ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM*, principle 1 cmt. (2002).

<sup>546</sup> NATIONAL STUDY COMM'N ON DEF. SERVS., *GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES*, guideline 2.10 (1976).

appointed by each of the state's minority bar associations. States have also found that giving appointments to the deans of accredited law schools can create nexuses that help the indigent defense commission (for example, law schools can help with drafting standards, providing training facilities, etc.). Some jurisdictions select members from the urban, suburban, and rural geographical areas of the state, while some jurisdictions focus on appointing members with backgrounds and expertise in relevant fields, such as finance or forensics or adolescent development. To fill out any remaining appointments, governments often give responsibility for one or two positions to the state bar association. Appointments by non-governmental organizations generally must be confirmed by an official of some branch of state government.

In constructing its independent public defense commission, New Hampshire should follow the lead of the increasing number of states that prohibit voting members of the commission from being a sitting judge, a current prosecuting attorney, a current law enforcement employee, or a person currently paid to provide public defense services (or any employee of any person in those roles).<sup>547</sup>

**RECOMMENDATION 4: The State of New Hampshire should empower the state-level independent public defense commission to decide the most effective method or combination of methods to provide indigent defense services and to promulgate and enforce statewide standards applicable to all indigent defense attorneys, with all decisions to be made in compliance with U.S. Supreme Court case law and national standards.**

The methods used in New Hampshire to provide the right to counsel for indigent people were established by the legislature between 1977 and 1988, requiring a contract of not longer than two years with one or more private entities to serve as the public defender program and allowing the contracted entities to subcontract for services, and allowing for conflict cases the options of contracting private attorneys or appointing private attorneys on a case-by-case basis or contracting with one or more private entities to serve as an alternate public defender program. These statutory mandates have tied the hands of the judicial council, in many ways preventing it from modernizing and adapting the state's indigent defense system to keep pace

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<sup>547</sup> The NSC's *Guidelines* direct that an indigent defense system "[c]ommission should not include judges, prosecutors, or law enforcement officials." NATIONAL STUDY COMM'N ON DEF. SERVS., GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, guideline 2.10 (1976). These prohibitions are only for sitting judges and prosecutors; states often find former judges and law enforcement officials to make very good commission members. Louisiana, for example, incorporates this provision of national standards and also protects against potential financial conflicts of interest of individual commission members by requiring that:

[p]ersons appointed to the board shall have significant experience in the defense of criminal proceedings or shall have demonstrated a strong commitment to quality representation in indigent defense matters. No person shall be appointed to the board who has received compensation to be an elected judge, elected official, judicial officer, prosecutor, law enforcement official, indigent defense provider, or employees of all such persons, within a two-year period prior to appointment. No active part-time, full-time, contract or court-appointed indigent defense provider, or active employees of such persons, may be appointed to serve on the board as a voting member. No person having an official responsibility to the board, administratively or financially, or their employee shall be appointed to the board during their term of office.

LA. REV. STAT. § 15:146(B)(2) (2020).

with developments in the state’s broader criminal and juvenile justice systems, in case law, in technology, in changing populations, and in societal understanding of the most effective and efficient means of providing the right to counsel. The state-level independent public defense commission should have the power to implement whatever method or combination of methods it determines is most likely to ensure the provision of effective representation of each indigent defendant throughout the state and that complies with U.S. Supreme Court case law and national standards.

The state-level independent commission must consider whether one or more governmental public defender offices could more effectively and efficiently ensure the provision of the right to counsel to indigent defendants than the existing system of the state compensating only private attorneys to represent indigent defendants. Over the decades since *Gideon v. Wainwright* was decided, New Hampshire policymakers have expressed reluctance to add indigent defense attorneys to the state government payroll, which would be necessary if the independent public defense commission determines the right to counsel is most effectively ensured by hiring governmentally-employed public attorneys. But the State of New Hampshire must move forward to exercise greater oversight of the entirety of its indigent defense system in order to address the myriad deficiencies identified in this evaluation, and in doing so the state may find itself held responsible to pay and provide benefits for the private attorneys in the indigent defense system in the same manner that it would be responsible if they were public employees.<sup>548</sup>

No matter what methods are chosen to secure the attorneys who are appointed to represent indigent defendants, the state-level independent public defense commission must be statutorily required to promulgate and enforce binding standards applicable to all indigent defense system attorneys. For example, both Louisiana and Michigan statutorily require their commissions to promulgate and enforce mandatory statewide standards for, among other things: attorney qualifications; attorney performance; attorney supervision; time sufficiency; continuity of services, whereby the same attorney provides representation from appointment through disposition; client communications; and data collection.<sup>549</sup> (*See* appendices F and G for the complete text of the Louisiana statute and the Michigan statute.)

In particular, the New Hampshire public defense commission must have authority to ensure attorneys have sufficient time to effectively advocate for their appointed clients. The commission should be authorized to create workload standards that require attorneys to track their time against specific performance criteria to garner a more accurate projection of what it actually

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<sup>548</sup> Under the laws of many states and the federal government, the question of whether a person labeled an independent contractor by a state should in fact properly be classified as an employee is decided by courts applying multi-factor tests that examine the actual working relationship of the contracting parties. In the context of a non-profit public defense contractor employee seeking to receive government employee benefits, the Washington Supreme Court noted that “government can and should exact high standards of performance from its independent contractors. Prudent financial controls and careful oversight of contract compliance does not render a contractor an agency of the government.” *Dolan v. King County*, 258 P.3d 20, 30 (Wash. 2012). Ultimately, the Washington Supreme Court held that, under the facts of the case before it, “the county has exerted such a right of control over the defender organizations as to make them agencies of the county” and the “employees of the defender organizations are employees of the county” entitled to be enrolled in the government’s retirement system. *Dolan v. King County*, 258 P.3d 20, 31 (Wash. 2012).

<sup>549</sup> LA. REV. STAT. § 15:148 (2020); MICH. COMP. LAWS § 780.991 (2021).

## A Word on Time-Tracking

To be clear, there are no national standards that require indigent defense providers to keep contemporaneous time records. However, it is a best practice that the 6AC strongly encourages. The benefit of time-tracking is that it allows indigent defense systems to objectively demonstrate when they are at capacity, to set binding caseload standards, and to establish protocols for withdrawing from cases. By continually tracking time, indigent defense systems can change caseload standards as new events require it. For example, if a jail changes practices that affect how long it takes for lawyers to meet with clients, tracking time allows the indigent defense system to show

the impact of that decision on the amount of time that must be dedicated to the average case, and potentially to lower a caseload standard. Time-tracking can also account for other factors that may increase or decrease the amount of work and effort attorneys must spend on their appointed cases, including but not limited to: the complexity of cases; the geographical size of the jurisdiction; appropriate access to non-legal support staff, such as investigators, social workers, mitigation specialists, paralegals, etc.; and the prevalence of mental health, developmental disabilities, and/or substance addiction issues in the clients.

takes to handle each component of a client’s advocacy needs, based on each type of case<sup>550</sup> – a far more accurate method of measuring (and thereby controlling) workload than any other available. More than that, tracking time enables policymakers to tie specific variables (such as “time meeting with the client in person”) not only to specific case outcomes and dispositions, but also to systemic outcomes (like recidivism rates, or the rate of former clients now employed and contributing to the tax base).

**RECOMMENDATION 5: The state-level independent public defense commission should have an office of indigent defense services to carry out the day-to-day duties of the commission, headed by an executive director attorney selected by the commission and with adequate permanent staff to fulfill the commission’s constitutional and statutory duties to ensure effective assistance of counsel to each indigent defendant.**

As directed by national standards, the state-level independent public defense commission should have statutory authority to select a senior attorney to serve as executive director of the office of indigent defense services, chosen “on the basis of a non-partisan, merit procedure which ensures the selection of a person with the best available administrative and legal talent, regardless of

<sup>550</sup> In September 2013, the Montana Office of the State Public Defender filed a motion seeking to decline new cases in two courts of limited jurisdiction. Though the lower court found in October of that year that it did not have the authority to grant relief, a subsequent appeal was put on hold to allow for a political resolution. Because the Montana office had significant time-based data, the office received significant funding to resolve the excessive caseload issues. See David Carroll, *Montana caseload challenge results in a significant increase in resources*, SIXTH AMENDMENT CENTER (Apr. 17, 2014), <http://sixthamendment.org/montana-caseload-challenge-results-in-a-significant-increase-in-resources/>.

political party affiliation, contributions, or other irrelevant criteria.”<sup>551</sup> The executive director should be hired by the commission for a fixed term that is subject to renewal and should not be removed from office absent good cause shown through due process.<sup>552</sup> To ensure that the indigent defense system has a voice equal to that of other justice system participants,<sup>553</sup> the executive director of the commission’s office of indigent defense services should be made a permanent member of those statewide bodies in New Hampshire that are convened to consider and improve justice system policies, such as the judicial council.

At minimum, a New Hampshire public defense commission’s office of indigent defense services should reflect the staffing roles contained in Recommendation 2.

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<sup>551</sup> NATIONAL STUDY COMM’N ON DEF. SERVS., GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, guideline 2.12 (1976).

<sup>552</sup> NATIONAL STUDY COMM’N ON DEF. SERVS., GUIDELINES FOR LEGAL DEFENSE SYSTEMS IN THE UNITED STATES, guideline 2.12 (1976).

<sup>553</sup> *See, e.g.*, AMERICAN BAR ASS’N, ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, principle 8 (2002) (“No part of the justice system should be expanded or the workload increased without consideration of the impact that expansion will have on the balance and on the other components of the justice system. Public defense should participate as an equal partner in improving the justice system.”).



# Appendices

## A. NHPD branch office attorney changes, FY 2019 through FY 2021

### NHPD BRANCH OFFICE ATTORNEY CHANGES DURING FY 2019

Branch office affected	Hire date	Terminate / transfer out date	Total NHPD branch office attorneys
			<b>118 start of FY 2019</b>
Orford		7/6/18	117
Nashua		8/0/18	116 transfer to Appellate
Dover	8/27/18		
Stratham	8/27/18		
Dover	8/27/18		
Orford	8/27/18		
Nashua	8/27/18		
Laconia	8/27/18		126 new hire class of FY 2019
Concord	8/27/18		
Manchester	8/27/18		
Orford	8/27/18		
Manchester	8/27/18		
Dover		8/31/18	125
Stratham		9/14/18	124
Concord		10/5/18	123
Concord	10/9/18		124
Nashua		10/18/18	123
Concord	10/22/18		124
Manchester		11/7/18	122
Littleton		11/7/18	
Concord		12/7/18	121
Manchester		1/23/19	120
Concord	2/4/19		121
Manchester		2/22/19	120
Concord		3/7/19	119
Orford		3/29/19	118
Orford		4/5/19	117
Nashua		4/15/19	116
Newport	4/29/19		117
Concord	5/20/19		118
Nashua		5/3/19	117
Stratham		6/29/19	115
Concord		6/29/19	
<b>15 hired: 10 new 5 lateral</b>			<b>17 terminated 1 transfer out</b>
			<b>115 end of FY 2019</b>

## NHPD BRANCH OFFICE ATTORNEY CHANGES DURING FY 2020

Branch office affected	Hire date	Terminate / transfer out date	Total NHPD branch office attorneys
			<b>115 start of FY 2020</b>
Nashua	8/26/19		
Manchester	8/26/19		
Nashua	8/26/19		
Manchester	8/26/19		
Concord	8/26/19		
Laconia	8/26/19		
Stratham	8/26/19		
Dover	8/26/19		129 new hire class of FY 2020
Nashua	8/26/19		
Laconia	8/26/19		
Concord	8/26/19		
Nashua	8/26/19		
Manchester	8/26/19		
Laconia	8/26/19		
Stratham	9/3/19		130
Concord	9/12/19		131
Stratham		10/4/19	
Stratham		10/4/19	128
Stratham		10/4/19	
Stratham		10/23/19	127
Manchester		10/31/19	126
Laconia		12/2/19	124
Laconia		12/2/19	
Keene		1/31/20	123
Nashua		2/7/20	122
Stratham	2/24/20		123
Concord	3/9/20		124
Laconia	4/1/20		125
Laconia		4/10/20	123
Concord		4/10/20	
Concord		5/0/20	122 transfer to Central Administration
Orford	6/1/20		123
<b>20 hired: 14 new 6 lateral</b>			<b>11 terminated 1 transfer out</b>
			<b>123 end of FY 2020</b>

**NHPD BRANCH OFFICE ATTORNEY CHANGES DURING FY 2021**

<b>Branch office affected</b>	<b>Hire date</b>	<b>Terminate / transfer out date</b>	<b>Total NHPD branch office attorneys</b>	
			<b>123</b>	<b>start of FY 2021</b>
Littleton	7/1/20		124	
Concord	7/6/20		126	
Dover	7/6/20			
Littleton		7/10/20	124	
Stratham		7/10/20		
Littleton		8/14/20	123	
Manchester		8/20/20	122	
Stratham	9/15/20		123	
Orford		9/15/20	122	
Dover		9/30/20	121	
Laconia	10/19/20		123	"hiring freeze"
Concord	10/19/20			
Manchester		11/6/20	122	
Manchester		11/30/20	121	
Laconia	12/7/20		122	
Dover	1/4/21			
Stratham	1/4/21			
Manchester	1/4/21			
Orford	1/4/21			
Nashua	1/4/21			
Manchester	1/4/21		133	new hire class of FY 2021
Laconia	1/4/21			
Concord	1/4/21			
Manchester	1/4/21			
Laconia	1/4/21			
Orford	1/4/21			
Dover		1/8/21	132	
Nashua		1/29/21	131	
Nashua		3/1/21	130	
Stratham		3/3/21	129	
Keene		3/17/21	128	
Dover		3/26/21	127	
Laconia		4/2/21	126	
Nashua		4/9/21	125	
Laconia		4/23/21	124	

## NHPD BRANCH OFFICE ATTORNEY CHANGES DURING FY 2021

Branch office affected	Hire date	Terminate / transfer out date	Total NHPD branch office attorneys
Nashua		5/28/21	122
Orford		5/28/21	123
Orford	6/1/21		122
Laconia		6/18/21	122
<b>19 hired: 11 new 8 lateral</b>			<b>20 terminated 0 transfer out</b>
			<b>122 end of FY 2021</b>

## B. NHPD caseload snapshot – branch office attorneys hired during fiscal year, FY 2019 through FY 2021

Numbers in red in each table indicate a caseload that exceeds the number allowed by the judicial council’s contract with the NHPD. All full-time NHPD trial attorneys are contractually limited to “a caseload of not more than 70 open and active cases.”<sup>554</sup> For full-time NHPD trial attorneys assigned a mixed caseload, among the maximum 70 open and active cases there is a further limit of not more than:<sup>555</sup>

- 35 felonies
  - no more than 2 first-degree murder, second-degree murder, manslaughter;<sup>556</sup>
- 35 misdemeanors;
- 20 juvenile delinquencies; and
- 16 other
  - no more than 2 civil commitment of sexually violent predator.<sup>557</sup>

The new hire class of FY 2019 began work at the NHPD on August 27, 2018. The first table shows their open NHPD cases on July 1, 2019, approximately 10 months after they were hired.

The new hire class of FY 2020 began work at the NHPD on August 26, 2019. The second table shows their open NHPD cases on July 1, 2020, approximately 10 months after they were hired.

The new hire class of FY 2021 began work at the NHPD on January 4, 2021. The third table shows their open NHPD cases on July 16, 2021, approximately six months after they were hired.

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<sup>554</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A-1, ¶ 5 (for the term of July 1, 2019 through June 30, 2021).

<sup>555</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A-1, ¶ 5 (for the term of July 1, 2019 through June 30, 2021).

<sup>556</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A-1, ¶ 6 (for the term of July 1, 2019 through June 30, 2021).

<sup>557</sup> “Agreement” between the State of New Hampshire Judicial Council and the New Hampshire Public Defender, Exh. A-1, ¶ 10 (for the term of July 1, 2019 through June 30, 2021).

## Number of NHPD cases open on July 1, 2019, for branch office attorneys hired during FY 2019

Attorney hire date	Attorney office location	Felony	Misdemeanor	Juvenile delinquency	Other	Civil Commitment	ALL case types
		NHJC 35	NHJC 35	NHJC 20	NHJC 15	NHJC 2	NHJC 70
<b>New hire attorneys</b>							
8/27/18	Dover	13	36	16	6	0	71
8/27/18	Stratham	15	41	9	9	0	74
8/27/18	Dover	16	46	7	7	0	76
8/27/18	Orford	26	48	3	11	0	88
8/27/18	Nashua	12	36	12	10	0	70
8/27/18	Laconia	32	19	3	5	0	59
8/27/18	Concord	8	33	13	11	0	65
8/27/18	Manchester	10	24	7	6	0	47
8/27/18	Orford	24	31	22	10	0	87
8/27/18	Manchester	14	22	6	6	0	48
<b>New hire average</b>		<b>17</b>	<b>34</b>	<b>10</b>	<b>8</b>	<b>0</b>	<b>69</b>
<b>Lateral hire attorneys</b>							
10/9/18	Concord	25	42	1	18	0	86
10/22/18	Concord	30	27	0	17	0	74
2/4/19	Concord	23	32	4	12	0	71
4/29/19	Newport	5	10	6	4	0	25
5/20/19	Concord	26	19	3	10	0	58
<b>Lateral hire average</b>		<b>22</b>	<b>26</b>	<b>3</b>	<b>12</b>	<b>0</b>	<b>63</b>
<b>ALL hires average</b>		<b>19</b>	<b>31</b>	<b>7</b>	<b>9</b>	<b>0</b>	<b>67</b>

Number of NHPD cases open on July 1, 2020, for branch office attorneys hired during FY 2020

Attorney hire date	Attorney office location	Felony	Misdemeanor	Juvenile delinquency	Other	Civil Commitment	ALL case types
		NHJC 35	NHJC 35	NHJC 20	NHJC 15	NHJC 2	NHJC 70
<b>New hire attorneys</b>							
8/26/19	Nashua	18	31	3	4	0	<b>56</b>
8/26/19	Manchester	12	40	2	5	0	<b>59</b>
8/26/19	Nashua	12	38	2	7	0	<b>59</b>
8/26/19	Manchester	17	34	5	3	0	<b>59</b>
8/26/19	Concord	16	30	9	11	0	<b>66</b>
8/26/19	Laconia	33	43	1	13	0	<b>90</b>
8/26/19	Stratham	14	55	20	6	0	<b>95</b>
8/26/19	Dover	26	46	5	6	0	<b>83</b>
8/26/19	Nashua	18	30	5	6	0	<b>59</b>
8/26/19	Laconia	39	39	1	9	0	<b>88</b>
8/26/19	Concord	17	40	7	9	0	<b>73</b>
8/26/19	Nashua	14	36	8	3	0	<b>61</b>
8/26/19	Manchester	18	43	6	5	0	<b>72</b>
8/26/19	Laconia	36	41	2	4	0	<b>83</b>
<b>New hire average</b>		<b>21</b>	<b>39</b>	<b>5</b>	<b>7</b>	<b>0</b>	<b>72</b>
<b>Lateral hire attorneys</b>							
9/3/19	Stratham	34	41	0	16	0	<b>91</b>
9/12/19	Concord	21	40	1	11	0	<b>73</b>
2/24/20	Stratham	19	18	0	17	0	<b>54</b>
3/9/20	Concord	8	28	3	6	0	<b>45</b>
4/1/20	Laconia	7	36	2	1	0	<b>46</b>
6/1/20	Orford	15	13	0	2	0	<b>30</b>
<b>Lateral hire average</b>		<b>17</b>	<b>29</b>	<b>1</b>	<b>9</b>	<b>0</b>	<b>57</b>
<b>ALL hires average</b>		<b>20</b>	<b>36</b>	<b>4</b>	<b>7</b>	<b>0</b>	<b>67</b>



## Number of NHPD cases open on July 16, 2021, for branch office attorneys hired during FY 2021

Attorney hire date	Attorney office location	Felony	Misdemeanor	Juvenile delinquency	Other	Civil Commitment	ALL case types
		NHJC 35	NHJC 35	NHJC 20	NHJC 15	NHJC 2	NHJC 70
<b>New hire attorneys</b>							
1/4/21	Dover	3	53	4	5	0	65
1/4/21	Stratham	9	32	9	2	0	52
1/4/21	Manchester	7	28	4	2	0	41
1/4/21	Orford	4	32	2	2	0	40
1/4/21	Nashua	3	62	5	5	0	75
1/4/21	Manchester	7	34	2	1	0	44
1/4/21	Laconia	15	32	3	3	0	53
1/4/21	Concord	6	43	8	3	0	60
1/4/21	Manchester	6	27	1	0	0	34
1/4/21	Laconia	14	41	2	2	0	59
1/4/21	Orford	4	32	2	2	0	40
<b>New hire average</b>		<b>7</b>	<b>38</b>	<b>4</b>	<b>2</b>	<b>0</b>	<b>51</b>
<b>Lateral hire attorneys</b>							
7/1/20	Littleton	30	46	1	2	0	79
7/6/20	Concord	8	54	12	7	0	81
7/6/20	Dover	3	70	3	3	0	79
9/15/20	Stratham	12	50	0	11	0	73
10/19/20	Laconia	23	29	2	5	0	59
10/19/20	Concord	3	49	9	7	0	68
12/7/20	Laconia	36	29	2	6	0	73
6/1/21	Orford	0	20	2	3	0	25
<b>Lateral hire average</b>		<b>14</b>	<b>43</b>	<b>4</b>	<b>6</b>	<b>0</b>	<b>67</b>
<b>ALL hires average</b>		<b>10</b>	<b>40</b>	<b>4</b>	<b>4</b>	<b>0</b>	<b>58</b>

## C. The trial-level adult criminal and juvenile delinquency systems and implementation of the indigent defense system in each county

This appendix describes, for each of the 10 New Hampshire counties, the structure of the adult criminal and juvenile delinquency justice system and how New Hampshire’s indigent defense system is implemented on behalf of the indigent defendants whose cases arise out of the county, taking the counties in alphabetical order. The maps provided are scaled in size in relation to each other, to illustrate the differences in the geographic area encompassed by each county.

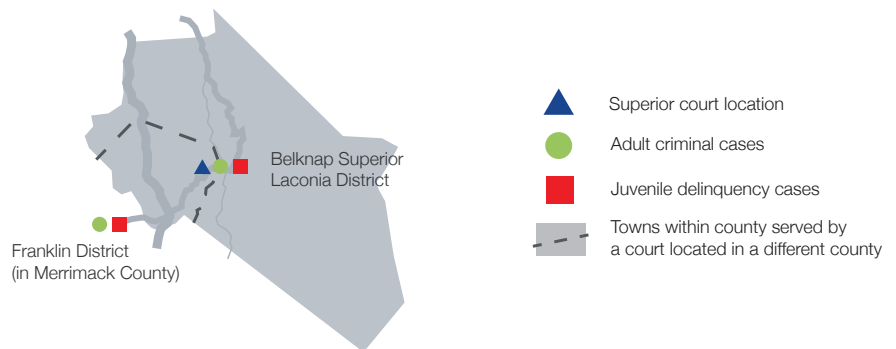
### 1. Belknap County

Belknap County is one of the two New Hampshire counties that does not border any other state or country. It is the second smallest county geographically, covering only 401 square miles. The county’s 2019 estimated population was 61,022. The county seat is Laconia.

The county operates its own jail in Laconia, where it houses both men and women. Defendants held in the county jail can call an NHPD attorney at no cost. Any attorney can call the jail to speak to their client, and a guard will allow the client to return the attorney’s call relatively quickly. Attorneys do not need an appointment to visit their clients in jail, and on the rare occasion when more than one attorney-client visit is occurring at the same time, the jail makes additional rooms available.

There are three court locations that hear cases arising out of Belknap County: the Belknap Superior Court; the Franklin District Circuit Court, located in Merrimack County; and the Laconia District Circuit Court. If a case arises out of the towns of Sanbornton or Tilton and is prosecuted in circuit court, then the defendant will have to travel to Merrimack County to attend court.

**Courthouse locations serving Belknap County**



There are at least 10 municipal police departments in the county, all making arrests that result in prosecutions: Alton, Barnstead, Belmont, Center Harbor, Gilford, Gilmanton, Laconia, Meredith, Sanbornton, and Tilton.

The attorney general can take over any case arising anywhere in the county and exercise discretion over whether to file that case in superior court or circuit court. The county attorney can take over any case arising anywhere in the county and exercise discretion over whether to file that case in superior court or circuit court. The county attorney rarely takes over prosecution of misdemeanor cases unless they are “sufficiently serious.” Otherwise, a municipal prosecutor handles class A misdemeanors and juvenile delinquency cases in the circuit court location that has geographic jurisdiction. There are six municipal prosecutors who each have authority over cases arising out of certain towns (plus a state police prosecutor and a sheriff’s department prosecutor).

The attorney who is assigned to represent an indigent defendant in any case arising out of the county depends on the type of case, the court in which it is prosecuted, and the available attorneys.

For cases heard in the Belknap Superior Court or the Laconia District Circuit Court, the NHPD Laconia office is assigned first. At the start of FY 2021, there were 10 attorneys in the NHPD Laconia office. These same 10 attorneys are also assigned first in all cases arising anywhere in Carroll County. The NHPD also subcontracted a private law firm to be assigned some cases during FY 2021 that would otherwise be handled by the NHPD staff attorneys in the Laconia office.

For cases heard in the Franklin District Circuit Court, the NHPD Concord office (located in Merrimack County) is assigned first. At the start of FY 2021, there were 18 attorneys in the NHPD Concord office. These same 18 attorneys are also assigned first in cases in five of the six court locations that hear cases arising out of Merrimack County, and one of those court locations is in Hillsborough County.

If an NHPD attorney is unavailable, then a contract counsel attorney is assigned if one is available. During FY 2021, there were:

- 5 attorneys potentially available in Belknap Superior Court;
- 5 attorneys potentially available in adult misdemeanor cases in the Franklin District;
- 4 attorneys potentially available in juvenile delinquency cases in the Franklin District;
- 5 attorneys potentially available in adult misdemeanor cases in the Laconia District;
- 4 attorneys potentially available in juvenile delinquency cases in the Laconia District.

Only two contract counsel attorneys have a law office in Belknap County.

## 2. Carroll County

Carroll County is located on the eastern side of the state bordering Maine, about mid-way between Canada and Massachusetts. With 934 square miles of geography, it is mid-sized among New Hampshire counties. The county’s 2019 estimated population was 48,779. The county seat is Ossipee.

The county operates its own jail, where it houses both men and women. Defendants held in the county jail can call an NHPD attorney at no cost. Any attorney can call the jail to speak to their client, and a guard will bring the client to a private room right away to speak to the attorney by phone. Attorneys do not need an appointment to visit their clients in jail, where attorney-client visits take place in the jail library. On the rare occasion when more than one attorney-client visit is occurring at the same time, the two groups either sit apart in the library or the jail makes an additional room available.

There are three court locations that hear cases arising out of Carroll County: the Carroll Superior Court; the Conway District Circuit Court; and the Ossipee District Circuit Court. All cases arising anywhere in the county are heard in one of these court locations, all located within the county.

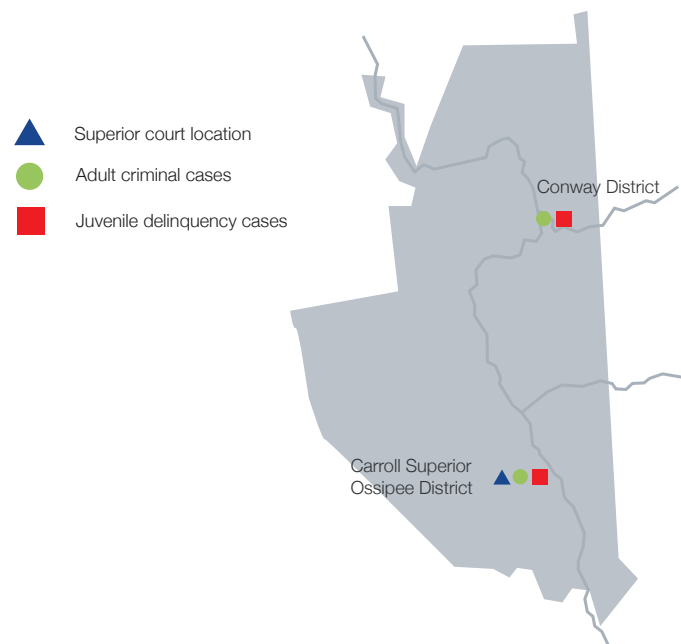
There are at least five municipal police departments in the county, all making arrests that result in prosecutions: Conway, Moultonborough, Ossipee, Wakefield, and Wolfeboro.

The attorney general can take over any case arising anywhere in the county and exercise discretion over whether to file that case in superior court or circuit court. The county attorney can take over any case arising anywhere in the county and exercise discretion over whether to file that case in superior court or circuit court. Otherwise, a municipal prosecutor handles class A misdemeanors and juvenile delinquency cases in the circuit court location that has geographic jurisdiction. There are 14 municipal prosecutors who each have authority over cases arising out of certain towns, plus a state police prosecutor.

The attorney who is assigned to represent an indigent defendant in any case arising out of the county depends on the type of case, the court in which it is prosecuted, and the available attorneys.

For cases heard in any court location in the county, the NHPD Laconia office is assigned first. At the start of FY 2021, there were 10 attorneys in the NHPD Laconia Office. These same 10 attorneys are also assigned first in all cases heard in the Belknap Superior Court or the Laconia District Circuit Court (both located in Belknap County). The NHPD also subcontracted a private law firm to be assigned some cases during FY 2021 that would otherwise be handled by the NHPD staff attorneys in the Laconia office.

**Courthouse locations serving Carroll County**



If an NHPD attorney is unavailable, then a contract counsel attorney is assigned if one is available. During FY 2021, there were:

- 6 attorneys potentially available in Carroll Superior Court;
- 2 attorneys potentially available in the Conway District;
- 3 attorneys potentially available in the Ossipee District.

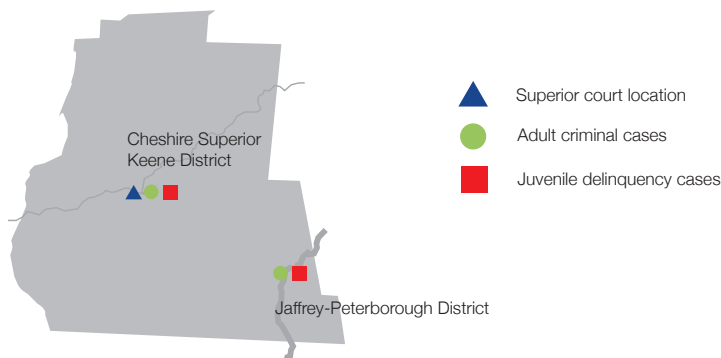
Only one contract counsel attorney has a law office in Carroll County.

### 3. Cheshire County

Cheshire County sits at the south-west corner of the state, bordering Massachusetts to its south and Vermont to its west. The county covers 708 square miles and had a 2019 estimated population of 76,493. The county seat is Keene.

There are three court locations that hear cases arising out of Cheshire County: the Cheshire Superior Court; the Jaffrey-Peterborough District Circuit Court; and the Keene District Circuit Court. All cases arising anywhere in the county are heard in one of these court locations, all located within the county.

#### Courthouse locations serving Cheshire County



There are at least 12 municipal police departments in the county, all making arrests that result in prosecutions.

The attorney general can take over any case arising anywhere in the county and exercise discretion over whether to file that case in superior court or circuit court. The county attorney can

take over any case arising anywhere in the county and exercise discretion over whether to file that case in superior court or circuit court. The county attorney's office has two assistant county attorneys and one retired part-time police officer who prosecute in the circuit court locations those misdemeanors that arise out of nine towns and the city of Keene. The retired police officer handles most of the arraignments, leaving the assistant county attorneys to handle pre-trial litigation and trials. Otherwise, a municipal prosecutor handles class A misdemeanors and juvenile delinquency cases in the circuit court location that has geographic jurisdiction.

The attorney who is assigned to represent an indigent defendant in any case arising out of the county depends on the type of case, the court in which it is prosecuted, and the available attorneys.

For cases arising from anywhere in the county, the NHPD Keene office is assigned first. At the start of FY 2021, there were six attorneys in the NHPD Keene office. These same six attorneys are also assigned first in juvenile delinquency cases arising out of Hillsborough County that are

heard in the Jaffrey-Peterborough District.

If an NHPD attorney is unavailable, then a contract counsel attorney is assigned if one is available. During FY 2021, there were:

- 4 attorneys potentially available in Cheshire Superior Court;
- 3 attorneys potentially available in adult misdemeanor cases in the Jaffrey-Peterborough District;
- 2 attorneys potentially available in juvenile delinquency cases in the Jaffrey-Peterborough District;
- 2 attorneys potentially available in the Keene District.

Three contract counsel attorneys have a law office in Cheshire County.

#### 4. Coos County

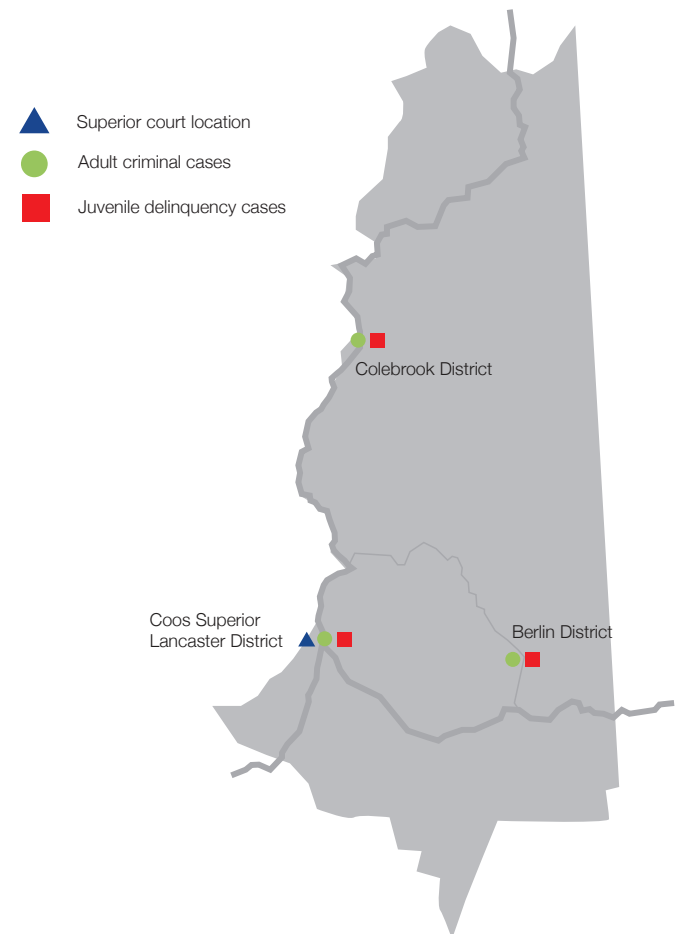
Coos County<sup>558</sup> is the northernmost county of the state, bordering Canada to its north, Maine to its east, and Vermont to its west. The county is the geographically largest in the state, covering 1,801 square miles. Yet it is the least populous, with an estimated 2019 population of 31,589. The county seat is Lancaster. There are no interstate highways in Coos County. Much of the cross-county travel takes place on two-lane highways through the mountains, and particularly in the winter travel can be treacherous.

The county operates a jail for men, but any women who are detained are held most often at Grafton County’s jail or less frequently at Carroll County’s jail.

There are four court locations that hear cases arising out of Coos County: the Coos Superior Court; the Berlin District Circuit Court; the Colebrook District Circuit Court; and the Lancaster District Circuit Court. All cases arising anywhere in the county are heard in one of these court locations, all located within the county.

There are at least 11 municipal police departments in the county, all making

**Courthouse locations serving Coos County**



<sup>558</sup> The county officially spells and pronounces its name as Coös. We omit the umlaut in the spelling throughout this report, in keeping with standard typographical style.

arrests that result in prosecutions: Berlin, Carroll, Colebrook, Gorham, Jefferson, Lancaster, Northumberland, Pittsburg, Randolph, Stark, and Whitefield.

The attorney general can take over any case arising anywhere in the county and exercise discretion over whether to file that case in superior court or circuit court. The county attorney can take over any case arising anywhere in the county and exercise discretion over whether to file that case in superior court or circuit court. Otherwise, a municipal prosecutor handles class A misdemeanors and juvenile delinquency cases in the circuit court location that has geographic jurisdiction.

The attorney who is assigned to represent an indigent defendant in any case arising out of the county depends on the type of case, the court in which it is prosecuted, and the available attorneys.

For cases heard in any court location in the county, the NHPD Littleton office (located in Grafton County) is assigned first. At the start of FY 2021, there were three attorneys in the NHPD Littleton office. These same three attorneys are also assigned first in all cases arising out of Grafton County that are heard in the Littleton District.

If an NHPD attorney is unavailable, then a contract counsel attorney is assigned if one is available. During FY 2021, there was only one contract counsel attorney potentially available for assignment in any court location hearing cases arising out of Coos County, and that contract counsel attorney does not have a law office in Coos County.

## 5. Grafton County

Grafton County is located on the western side of the state bordering Vermont, about mid-way between Canada and Massachusetts. It is the second largest county geographically, with 1,714 square miles of geography. The county's 2019 estimated population was 89,786. The county seat is North Haverhill.

The county operates its own jail in North Haverhill, where it houses both men and women (and it also houses women for Coos County). Defendants held in the county jail can call their attorneys on an unrecorded line. Any attorney can call the jail to speak to their client, and a guard will allow the client to return the attorney's call typically within 15 minutes. Non-contact visits between attorneys and clients are allowed every day between 8 a.m. and 5 p.m.

There are five court locations that hear cases arising out of Grafton County: the Grafton Superior Court; the Haverhill District Circuit Court; the Lebanon District Circuit Court; the Littleton District Circuit Court; and the Plymouth District Circuit Court. All cases arising anywhere in the county are heard in one of these court locations, all located within the county.

The attorney general can take over any case arising anywhere in the county and exercise discretion over whether to file that case in superior court or circuit court. The county attorney

can take over any case arising anywhere in the county and exercise discretion over whether to file that case in superior court or circuit court. The county attorney’s office rarely takes over prosecution of a misdemeanor in any of the circuit court locations, but seven towns have contracted with the county attorney’s office for the county attorney to serve as the municipal prosecutor for cases arising out of their geographic areas. Otherwise, a municipal prosecutor handles class A misdemeanors and juvenile delinquency cases in the circuit court location that has geographic jurisdiction.

The attorney who is assigned to represent an indigent defendant in any case arising out of the county depends on the type of case, the court in which it is prosecuted, and the available attorneys.

For cases heard in the Littleton District Circuit Court, the NHPD Littleton office is assigned first. At the start of FY 2021, there were three attorneys in the NHPD Littleton office. These same three attorneys are also assigned first in the four court locations that hear cases arising out of Coos County.

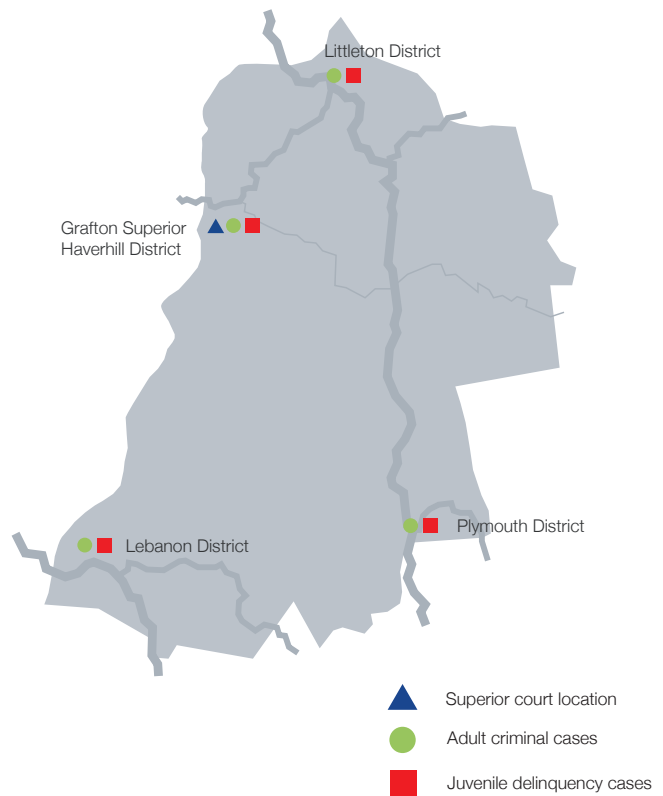
For cases prosecuted in the other four court locations that hear cases arising out of Grafton County, the NHPD Orford office is assigned first. At the start of FY 2021, there were seven attorneys in the NHPD Orford office.

If an NHPD attorney is unavailable, then a contract counsel attorney is assigned. During FY 2021, there were:

- 1 attorney potentially available in Grafton Superior Court;
- 1 attorney potentially available in the Haverhill District and in the Littleton District;
- 2 attorneys potentially available in adult misdemeanor cases in the Lebanon District;
- 1 attorney potentially available in juvenile delinquency cases in the Lebanon District;
- 4 attorneys potentially available in adult misdemeanor cases in the Plymouth District;
- 3 attorneys potentially available in juvenile delinquency cases in the Plymouth District.

Only two contract counsel attorneys have a law office in Grafton County.

**Courthouse locations serving Grafton County**



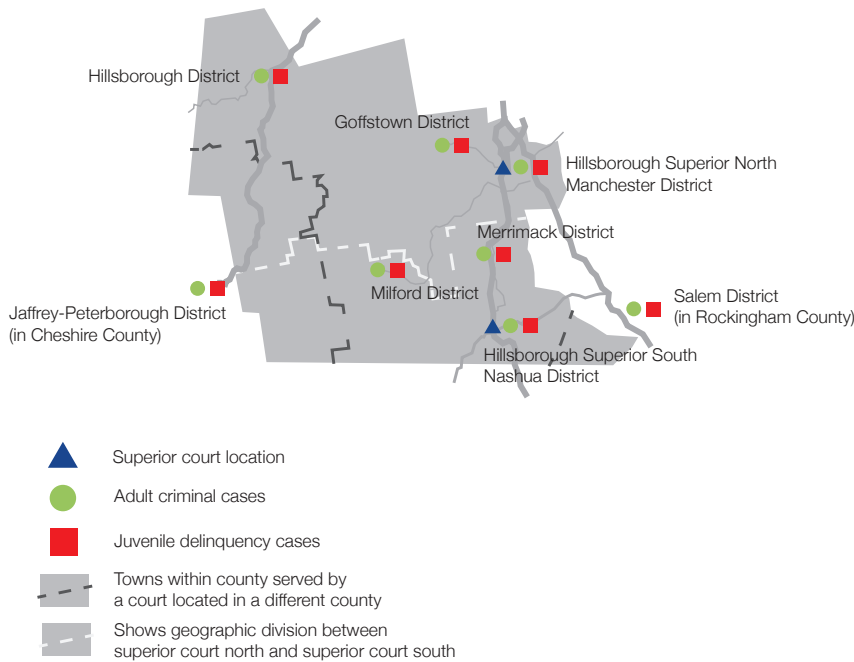


## 6. Hillsborough County

By far the most populous of New Hampshire’s counties, with an estimated 2019 population of 415,247, Hillsborough County is mid-sized at 876 square miles. The county is located on the southern border of the state, bordering Massachusetts and mid-way between Vermont and the Atlantic Ocean. It is the only New Hampshire county with two county seats: Manchester in the north; and Nashua in the south.

Hillsborough County operates the largest jail in the state, and about 70% of the people detained there are not convicted and are awaiting trial. It is notoriously difficult for attorneys to access their clients in the jail. Defendants held in the county jail can only attempt to call their attorneys

### Courthouse locations serving Hillsborough County



during “out-of-cell time,” and for many defendants this occurs only after business hours when their attorneys are not available to receive their call. Attorneys who call the jail to speak to their clients can only leave a message with the jail staff, but stakeholders report that those messages rarely seem to make it to the client. When attorneys attempt to visit their clients in the jail, it is not unusual for them to wait an entire hour before being allowed to see the client. The problems affect every aspect of an adult criminal case; so much so that judges, prosecutors, defense attorneys, Manchester police, and jail representatives

began in April 2020 to meet monthly in an as-yet unsuccessful effort to address access between defendants and their attorneys.

The court location structure in Hillsborough County is the most complex in the state. There are in total ten court locations that hear cases arising out of Hillsborough County, however some of those court locations have geographic jurisdiction only in Hillsborough-North, some have geographic jurisdiction only in Hillsborough-South, and some of the circuit court districts have geographic jurisdiction over portions of both parts of the county. The table on page 223 shows the court locations, and the locations highlighted in blue have geographic jurisdiction in portions of both the north and south of the county.

**Courts hearing cases arising out of Hillsborough County**

Superior Court hearing cases arising within the county	location	Circuit Court divisions hearing cases arising within certain geographic areas of the county	
		District Division (adult criminal)	Family Division (juv delinquency)
Hillsborough Superior Court North	Manchester		Goffstown District
			Hillsborough District
			Jaffrey-Peterborough District (in Cheshire County)
			Manchester District
			Merrimack District
Hillsborough Superior Court South	Nashua		Jaffrey-Peterborough District (in Cheshire County)
			Merrimack District
			Milford District
			Nashua District
			Salem District (in Rockingham County)

If a case arises out of the towns of Greenfield, Greenville, Hancock, Peterborough, Sharon, or Temple and is prosecuted in circuit court, then the defendant will have to travel to Cheshire County to attend court. If a case arises out of the town of Pelham and is prosecuted in circuit court, then the defendant will have to travel to Rockingham County to attend court.

The attorney general can take over any case arising anywhere in the county and exercise discretion over whether to file that case in superior court or circuit court. The county attorney can take over any case arising anywhere in the county and exercise discretion over whether to file that case in superior court or circuit court. The county attorney occasionally takes over any complex misdemeanor case and files it directly into superior court. Otherwise, a municipal prosecutor handles class A misdemeanors and juvenile delinquency cases in the circuit court location that has geographic jurisdiction.

The attorney who is assigned to represent an indigent defendant in any case arising out of the county depends on the type of case, the court in which it is prosecuted, and the available attorneys.

The NHPD Manchester office is assigned first in cases heard in: Hillsborough Superior Court North; Goffstown District; Manchester District; cases arising out of the town of Bedford that are heard in the Merrimack District; and adult misdemeanor cases arising out of the towns of Greenfield, Hancock, or Peterborough that are heard in the Jaffrey-Peterborough District (located in Cheshire County). At the start of FY 2021, there were 25 attorneys in the NHPD Manchester office.

The NHPD Nashua office is assigned first in cases heard in: Hillsborough Superior Court South; Milford District; Nashua District; cases arising out of the towns of Litchfield or Merrimack that

are heard in the Merrimack District; and adult misdemeanor cases arising out of the towns of Greenville, New Ipswich, Sharon, or Temple that are heard in the Jaffrey-Peterborough District (located in Cheshire County). At the start of FY 2021, there were 19 attorneys in the NHPD Nashua office. The NHPD also subcontracted two private law firms to be assigned some cases during FY 2021 that would otherwise be handled by the NHPD staff attorneys in the Nashua office.

For cases heard in the Hillsborough District Circuit Court, the NHPD Concord office (located in Merrimack County) is assigned first. At the start of FY 2021, there were 18 attorneys in the NHPD Concord office. These same 18 attorneys are also assigned first in cases in five of the six court locations that hear cases arising out of Merrimack County, and in cases arising out of Belknap County that are heard in the Franklin District.

For juvenile delinquency cases heard in the Jaffrey-Peterborough District Circuit Court (located in Cheshire County), the NHPD Keene office (located in Cheshire County) is assigned first. At the start of FY 2021, there were six attorneys in the NHPD Keene office. These same six attorneys are also assigned first in the three court locations hearing cases arising out of Cheshire County.

For cases heard in the Salem District Circuit Court (located in Rockingham County), the NHPD Stratham office (located in Rockingham County) is assigned first. At the start of FY 2021, there were 20 attorneys in the NHPD Stratham office. These same 20 attorneys are also assigned first in the seven court locations that hear cases arising out of Rockingham County.

If an NHPD attorney is unavailable, then a contract counsel attorney is assigned if one is available. During FY 2021, there were 10 or more contract counsel attorneys potentially available in each of the court locations hearing cases arising out of Hillsborough County except:

- 9 attorneys potentially available in juvenile delinquency cases in the Goffstown District;
- 6 attorneys potentially available in the Hillsborough District;
- 3 attorneys potentially available in adult misdemeanor cases in the Jaffrey-Peterborough District;
- 2 attorneys potentially available in juvenile delinquency cases in the Jaffrey-Peterborough District.

## 7. Merrimack County

The county seat of Merrimack County is Concord, which is also the state capital. Surrounded by other New Hampshire counties, Merrimack County is located in the southern third of the state, covering 934 square miles. It is the third most populous county, with an estimated 2019 population of 151,132.

The county operates its own jail in Boscawen, where it houses both men and women. Attorneys can readily communicate with their clients held in the jail by either calling the facility to speak to the client, receiving a call from a client, or visiting a client in person. Each unit in the jail has a phone dedicated to attorney-client phone calls. During the pandemic, however, in-person visits

have been prohibited, replaced by one 25-minute video visit each week, at a cost to the detained defendant of 40 cents per minute.

There are six court locations that hear cases arising out of Merrimack County: the Merrimack Superior Court; the Concord District Circuit Court; the Franklin District Circuit Court; the Hillsborough District Circuit Court, located in Hillsborough County; the Hooksett District Circuit Court; and the Newport District Circuit Court, located in Sullivan County. If a case arises out of the towns of Bradford, Henniker, Sutton, or Warner and is prosecuted in circuit court, then the defendant will have to travel to Hillsborough County to attend court. If a case arises out of the towns of New London, Newbury, or Wilmot and is prosecuted in circuit court, then the defendant will have to travel to Sullivan County to attend court.

The attorney general can take over any case arising anywhere in the county and exercise discretion over whether to file that case in superior court or circuit court. The county attorney can take over any case arising anywhere in the county and exercise discretion over whether to file that case in superior court or circuit court. The county attorney prosecutes certain misdemeanor cases in the circuit court locations.<sup>559</sup>

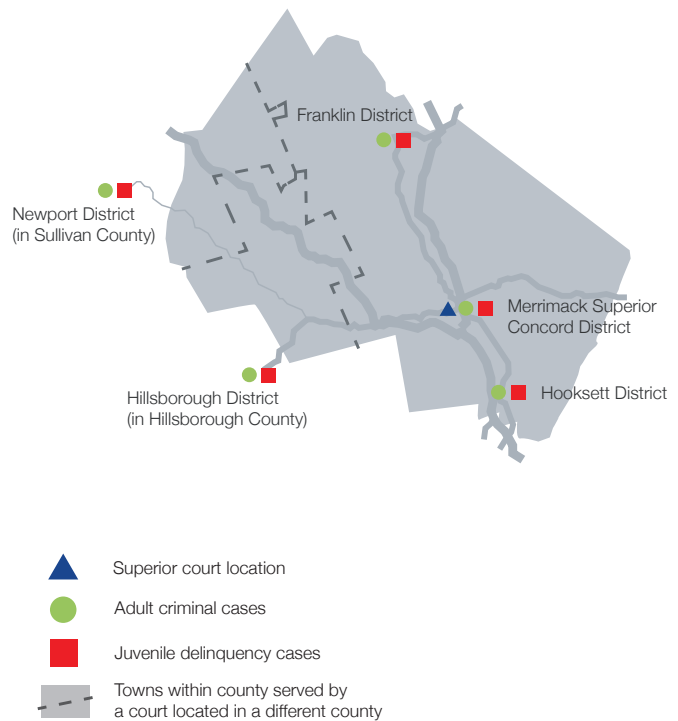
Otherwise, a municipal prosecutor handles class A misdemeanors and juvenile delinquency cases in the circuit court location that has geographic jurisdiction.

The attorney who is assigned to represent an indigent defendant in any case arising out of the county depends on the type of case, the court in which it is prosecuted, and the available attorneys.

For cases heard in the Newport District Circuit Court (located in Sullivan County), the NHPD Newport office (located in Sullivan County) is assigned first. At the start of FY 2021, there were four attorneys in the NHPD Newport office. These same four attorneys are also assigned first in the three court locations that hear all cases arising out of Sullivan County.

For cases in the other five court locations (one of which is located in Hillsborough County) that hear cases arising out of Merrimack County, the NHPD Concord office is assigned first. At the start of FY 2021, there were 18 attorneys in the NHPD Concord office. These same 18 attorneys

**Courthouse locations serving Merrimack County**



<sup>559</sup> This was the policy during the term of the county attorney in office at the time of this evaluation. A different county attorney took office in January 2021 and may have different policies.

are also assigned first in cases arising out of either Belknap County or Hillsborough County that are heard in the Franklin District.

If an NHPD attorney is unavailable, then a contract counsel attorney is assigned if one is available. During FY 2021, there were:

- 7 attorneys potentially available in Merrimack Superior Court;
- 7 attorneys potentially available in adult misdemeanor cases in the Concord District;
- 6 attorneys potentially available in juvenile delinquency cases in the Concord District;
- 5 attorneys potentially available in adult misdemeanor cases in the Franklin District;
- 4 attorneys potentially available in juvenile delinquency cases in the Franklin District;
- 6 attorneys potentially available in the Hillsborough District;
- 8 attorneys potentially available in adult misdemeanor cases in the Hooksett District;
- 7 attorneys potentially available in juvenile delinquency cases in the Hooksett District;
- 4 attorneys potentially available in adult misdemeanor cases in the Newport District;
- 3 attorneys potentially available in juvenile delinquency cases in the Newport District.

Three contract counsel attorneys have a law office in Merrimack County.

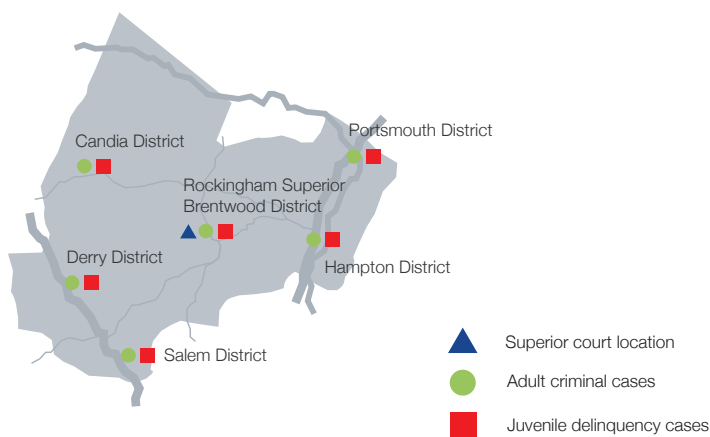
## 8. Rockingham County

Rockingham County sits at the south-east corner of the state, bordering Massachusetts and the Atlantic Ocean. The county covers 695 square miles and is the second-most populous county, with a 2019 estimated population of 309,176. The county seat is Brentwood.

The county operates a jail for men, but women who are detained for longer than about five days are held most often at Hillsborough County's jail in Manchester. The Rockingham County jail provides one large attorney conference room for attorney-client visits, three smaller meeting

rooms, and an additional room that can be used when the other four are occupied.

### Courthouse locations serving Rockingham County



There are seven court locations that hear cases arising out of Rockingham County: the Rockingham Superior Court; the Brentwood District Circuit Court; the Candia District Circuit Court; the Derry District Circuit Court; the Hampton District Circuit Court; the Portsmouth District Circuit Court; and the Salem District Circuit Court. All cases arising anywhere in the county are heard in one of these court locations, all located within the county.

The attorney general can take over any case arising anywhere in the county and exercise discretion over whether to file that case in superior court or circuit court. The county attorney

can take over any case arising anywhere in the county and exercise discretion over whether to file that case in superior court or circuit court. The county attorney does not take over any misdemeanor cases in the circuit court locations. Accordingly, a municipal prosecutor handles class A misdemeanors and juvenile delinquency cases in the circuit court location that has geographic jurisdiction.

The attorney who is assigned to represent an indigent defendant in any case arising out of the county depends on the type of case, the court in which it is prosecuted, and the available attorneys.

The NHPD Stratham office is assigned first in the seven court locations that hear cases arising out of the county. At the start of FY 2021, there were 20 attorneys in the NHPD Stratham office. These same 20 attorneys are also assigned first in the cases arising out of Hillsborough County that are heard in the Salem District.

If an NHPD attorney is unavailable, then a contract counsel attorney is assigned if one is available. During FY 2021, there were 10 or more contract counsel attorneys potentially available in each of the court locations hearing cases arising out of Rockingham County except:

- 7 attorneys potentially available in juvenile delinquency cases in the Candia District;
- 8 attorneys potentially available in juvenile delinquency cases in the Derry District;
- 8 attorneys potentially available in adult misdemeanor cases in the Hampton District;
- 7 attorneys potentially available in juvenile delinquency cases in the Hampton District;
- 9 attorneys potentially available in juvenile delinquency cases in the Portsmouth District.

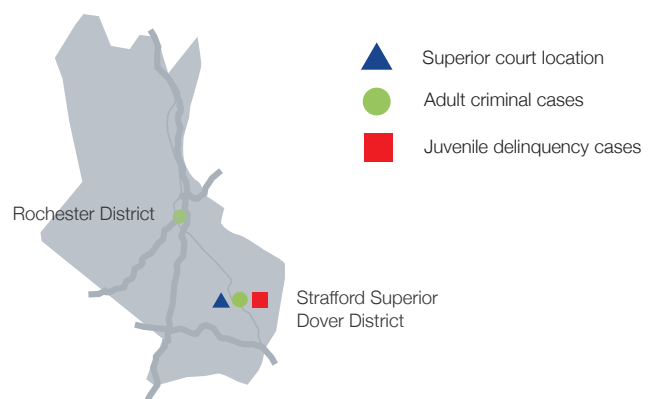
## 9. Strafford County

Strafford County is the geographically smallest county in the state, with only 369 square miles. Located near the south-east corner of the state, it has a small length of Atlantic Ocean coast but primarily borders Massachusetts. The county had a 2019 estimated population of 130,090. The county seat is Dover.

There are three court locations that hear cases arising out of Strafford County: the Strafford Superior Court; the Dover District Circuit Court; and the Rochester District Circuit Court. All cases arising anywhere in the county are heard in one of these court locations, all located within the county.

However, the Rochester District location does not hear family division cases, so any juvenile delinquency case arising anywhere in the county is heard only in the Dover District Circuit Court.

**Courthouse locations serving Strafford County**



The attorney general can take over any case arising anywhere in the county and exercise discretion over whether to file that case in superior court or circuit court. The county attorney can take over any case arising anywhere in the county and exercise discretion over whether to file that case in superior court or circuit court. The county attorney frequently takes over misdemeanor cases. The county attorney often files domestic violence misdemeanors directly into superior court. The county attorney also actively prosecutes many misdemeanors in the circuit court locations. Otherwise, a municipal prosecutor handles class A misdemeanors and juvenile delinquency cases in the circuit court location that has geographic jurisdiction.

The attorney who is assigned to represent an indigent defendant in any case arising out of the county depends on the type of case, the court in which it is prosecuted, and the available attorneys.

For cases heard in any court location in the county, the NHPD Dover office is assigned first. At the start of FY 2021, there were 11 attorneys in the NHPD Dover office.

If an NHPD attorney is unavailable, then a contract counsel attorney is assigned if one is available. During FY 2021, there were:

- 8 attorneys potentially available in Strafford Superior Court;
- 8 attorneys potentially available in adult misdemeanor cases in the Dover District and in the Rochester District;
- 7 attorneys potentially available in juvenile delinquency cases in the Dover District and in the Rochester District.

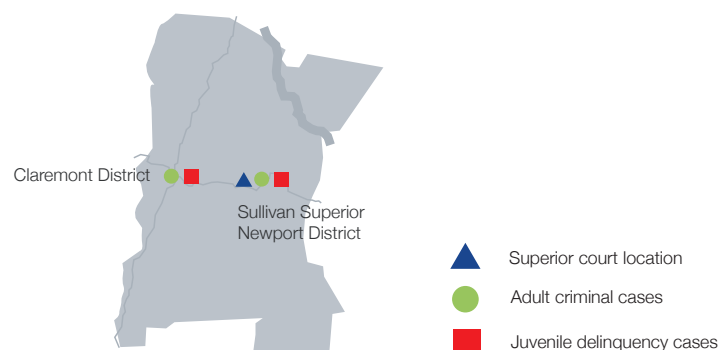
None of these contract counsel attorneys have a law office in Strafford County.

## 10. Sullivan County

Sullivan County is located on the western side of the state bordering Vermont, nearer to Massachusetts than to Canada. It is the second smallest county by population, at 43,144 estimated for 2019, and it is geographically the third smallest county, with 537 square miles. The county seat is Newport.

The county operates its own jail in Claremont.

**Courthouse locations serving Sullivan County**



There are three court locations that hear cases arising out of Sullivan County: the Sullivan Superior Court; the Claremont District Circuit Court; and the Newport District Circuit Court. All cases arising anywhere in the county are heard in one of these court locations, all located within the county.

There are at least 11 municipal police departments in the county, all making arrests that result in prosecutions: Charlestown, Claremont, Cornish, Goshen, Grantham, Langdon, Newport, Plainfield, Springfield, Sunapee, and Washington.

The attorney general can take over any case arising anywhere in the county and exercise discretion over whether to file that case in superior court or circuit court. The county attorney can take over any case arising anywhere in the county and exercise discretion over whether to file that case in superior court or circuit court. Three towns have contracted with the county attorney's office for the county attorney to serve as the municipal prosecutor for cases arising out of their geographic area. Otherwise, a municipal prosecutor handles class A misdemeanors and juvenile delinquency cases in the circuit court location that has geographic jurisdiction.

The attorney who is assigned to represent an indigent defendant in any case arising out of the county depends on the type of case, the court in which it is prosecuted, and the available attorneys.

The NHPD Newport office is assigned first in all court locations hearing cases arising out of the county. At the start of FY 2021, there were four attorneys in the NHPD Newport office. These same four attorneys are also assigned first in cases arising out of Merrimack County that are heard in the Newport District Circuit Court.

If an NHPD attorney is unavailable, then a contract counsel attorney is assigned if one is available. During FY 2021, there were:

- 3 attorneys potentially available in Sullivan Superior Court and in the Claremont District;
- 4 attorneys potentially available in adult misdemeanor cases in the Newport District;
- 3 attorneys potentially available in juvenile delinquency cases in the Newport District.

Only one contract counsel attorney has a law office in Sullivan County.





**FY2020, showing NHJC contract standard applied to NHPD cases open at start of year and showing NAC standard applied to total NHPD cases handled during year**

Number of attorneys		Homicide	Felony	Misdemeanor	Misdemeanor information	Juvenile delinquency	Misdemeanor appeal	Violation	Sentence related	Miscellaneous court representation	Probation violation	Parole violation	Other post-conviction	Civil commitment	ALL case types	
133 attorneys listed as having open cases at start of year	NHJC standard (applied to cases open at start of year)	NHJC 2	NHJC 35	NHJC 35		NHJC 20				NHJC 15				NHJC 2	NHJC 70	
	Number of attorneys exceeding NHJC standard	0	20	25		2				47				0	66	
	Cases open at start of year	20	3,202	3,090	59	360	23	3	1,112	81	390	29	3	1	8,373	
	<hr/>															
	Cases opened during year	12	6,635	8,426	117	1,965	67	0	3,323	324	1,282	361	12	2	22,526	
	Total cases handled during year	32	9,837	11,516	176	2,325	90	3	4,435	405	1,672	390	15	3	30,899	
	NAC standard (applied to total cases)	NAC 150	NAC 150	NAC 400	NAC 400	NAC 200	NAC 25	400	400	400	400	400	400	NAC 200		
115 NHPD branch office attorneys at start of year	123 NHPD branch office attorneys at end of year	FTE attorneys required by NAC standard	0.21	65.58	28.79	0.44	11.63	3.60	0.01	11.09	1.01	4.18	0.98	0.04	0.02	127.56

**FY2021, showing NHJC contract standard applied to NHPD cases open at start of year and showing NAC standard applied to total NHPD cases handled during year**

Number of attorneys		Homicide	Felony	Misdemeanor	Misdemeanor information	Juvenile delinquency	Misdemeanor appeal	Violation	Sentence related	Miscellaneous court representation	Probation violation	Parole violation	Other post-conviction	Civil commitment	ALL case types	
144 attorneys listed as having open cases at start of year	NHJC standard (applied to cases open at start of year)	NHJC 2	NHJC 35	NHJC 35		NHJC 20				NHJC 15				NHJC 2	NHJC 70	
	Number of attorneys exceeding NHJC standard	2	38	51		1				54				0	87	
	Cases open at start of year	21	3,829	3,931	67	342	32	4	1,160	95	502	27	3	0	10,013	
	<hr/>															
	Cases opened during year	5	5,625	6,654	111	1,538	32	0	2,266	317	840	368	13	7	17,776	
	Total cases handled during year	26	9,454	10,585	178	1,880	64	4	3,426	411	1,342	395	16	7	27,788	
	NAC standard (applied to total cases)	NAC 150	NAC 150	NAC 400	NAC 400	NAC 200	NAC 25	400	400	400	400	400	400	NAC 200		
123 NHPD branch office attorneys at start of year	122 NHPD branch office attorneys at end of year	FTE attorneys required by NAC standard	0.17	63.03	26.46	0.45	9.40	2.56	0.01	8.57	1.03	3.36	0.99	0.04	0.04	116.09

## E. Data needed to be collected and analyzed by the state

To ensure the provision of the effective right to counsel to all indigent defendants in New Hampshire, the state should collect and analyze on an on-going basis the following data.

**Adult criminal and juvenile delinquency (trial court level - new offenses and probation violations).** All adult criminal and juvenile delinquency data should be tracked by the court's case number, once it is assigned.

### *Arrest & citation*

The number of people arrested for an offense that carries a possible sentence of incarceration (grouped by type of case), including the date of arrest. Of these:

The number of people seen by a bail commissioner, including the date of that meeting, and of these:

The number of people determined to be ineligible for bail prior to appearing in front of a judge;

The number of people for whom bail was set prior to appearing in front of a judge; and

The number of people notified of their right to counsel if indigent and provided the paperwork necessary to request appointed counsel.

The number of people released from custody before appearing in front of a judge, including the date of release.

The number of people appearing before a judge, including the date of appearance, and of these:

The number of people ordered detained without bail;

The number of people for whom bail / conditions of release are ordered, and of these:

The number of people subsequently released, including the date of release; and

The number of people continuing in custody.

The number of people cited for an offense that carries a possible sentence of incarceration (grouped by type of case), including the date of citation.

### *Arraignment for adults; arraignment/detention hearing for juveniles*

The number of people appearing in court for arraignment on any offense that carries a possible sentence of incarceration (grouped by type of case and court in which arraignment is conducted), including the date of appearance, and showing whether the person is in-custody or out-of-custody at the time of appearance. Of these:

The number of people who are represented by privately-secured counsel, and the date on which that attorney makes an appearance in the case.

The number of people who waive their right to counsel and self-represent.

The number of people who request appointed counsel (showing the number making the request before the arraignment and the number making the request during the arraignment). Of these:

The number of people determined by the court to be not indigent. Of these:  
 The number who waive their right to counsel and self-represent; and  
 The number who are represented by privately-secured counsel, and the date on which that attorney makes an appearance in the case.

The number of people determined by the court to be indigent, the name of the attorney appointed to represent each person in each case number, and the date on which that appointed attorney makes an appearance in the case.

*Effective assistance of counsel – systemwide caseloads*

At the beginning of each month, the number of separate case file numbers being represented by an appointed attorney (grouped by type of case, court in which pending, and by appointed attorney).

During each month, the number of separate case file numbers to which a court appointed an attorney (grouped by type of case, court in which pending, and by appointed attorney).

During each month, the number of separate case file numbers that were disposed or reappointed to a different attorney (grouped by type of case, court in which pending, and by appointed attorney). Of these:

*Reappointment to different attorney:*

The number of separate case file numbers reappointed from one attorney to another. Of these, showing the reason for the reappointment:

Appointed attorney left the indigent representation system;

Attorney personal conflict of interest that does not conflict out the attorney's law firm / public defender office;

Attorney conflict of interest that conflicts out the attorney's law firm / public defender office. Of these, whether a multi-defendant case (co-defendants) or excessive caseload or other conflict.

*Juvenile transfers to adult court:*

The number of juvenile delinquency cases that were transferred to adult criminal court.

*Disposed cases:*

The number of separate case file numbers that were dismissed, including the date of dismissal, and whether by prosecutorial action or as the result of a preliminary examination.

The number of separate case file numbers that resulted in acquittal, and whether by bench trial or jury trial, including the date of acquittal.

The number of separate case file numbers that resulted in conviction / adjudication, and whether by plea, bench trial, or jury trial, including the date of conviction / adjudication. Of these:

The number convicted as charged, and the number convicted of a lesser offense (responsive verdict).

The number receiving deferred entry of judgment, including the date the court announced deferred judgment. Of these:

The number required to pay a fine only; and

The number placed on probation and/or community supervision

and required to fulfill conditions of probation, including but not limited to participation in a collaborative court program; and  
 The number required to serve any period of incarceration, including but not limited to work release.

The sentence / disposition imposed, including the date of imposition of sentence / disposition. Of these:

The number required to pay a fine only; and  
 The number placed on probation and/or community supervision and required to fulfill conditions of probation, including but not limited to participation in a collaborative court program; and  
 The number required to serve any period of incarceration (usefully broken down into ranges of sentence imposed), including but not limited to work release, and remanded to:

County jail;  
 Juvenile hall;  
 State prison – adults;  
 State prison – juveniles.

*Suspended cases:*

The number of separate case file numbers in which a bench warrant has been issued and the person's appearance has not yet been secured, including the date the bench warrant was issued; and

The number of separate case file numbers that are not active because the prosecution is suspended in some fashion, such as defendants receiving mental health treatment to restore competency and/or sanity, including the date prosecution was suspended.

At the end of each month, the number of separate case file numbers that are in active prosecution status.

*Effective assistance of counsel – systemwide resources.*

*Available resources:*

At the beginning of each month, and showing change at end of month:

The number of managers (such as chief public defender, chief assigned counsel administrator, financial officer, human resources officer, IT officer) (grouped by public defender office, contract counsel, assigned counsel);

The number of supervisors (grouped by type of case responsibility, and grouped by public defender office, contract counsel, assigned counsel);

The number of qualified attorneys available (grouped by type of case responsibility and/or court location availability, and grouped by public defender office, contract counsel, assigned counsel);

The number of paralegals (grouped by public defender office, contract counsel, assigned counsel);

The number of secretaries / administrative assistants (grouped by public defender office, contract counsel, assigned counsel);

The number of social workers (grouped by public defender office, contract

counsel, assigned counsel);

The number of investigators (grouped by public defender office, contract counsel, assigned counsel);

The number of interpreters (grouped by public defender office, contract counsel, assigned counsel);

The number of any additional support staff not included in the above categories, with description (grouped by public defender office, contract counsel, assigned counsel).

The amount of funding available for overhead reimbursement and fair compensation of appointed counsel (grouped by public defender office, contract counsel, assigned counsel);

The amount of funding available for case-related expenses ((grouped by public defender office, contract counsel, assigned counsel).

*Use of resources:*

During each month, the number of separate case file numbers (grouped by type of case and by appointed attorney) and amount of expenditure for:

Compensation of appointed counsel (grouped by public defender office, contract counsel, assigned counsel);

Reimbursement of overhead (grouped by public defender office, contract counsel, assigned counsel);

Direct payment to provider or reimbursement of appointed counsel for case-related expenses (grouped by public defender office, contract counsel, assigned counsel), broken down by type of expenses (such as: expert; investigation; translation/interpreter; copies; subpoenas; travel; etc.).

**Adult criminal and juvenile delinquency (after disposition at the trial court level).** Data similar to that shown above for the trial court level should also be collected and analyzed for all types of proceedings in which a right to counsel is guaranteed in writs, appeals, and collateral proceedings related to adult criminal and juvenile delinquency cases. These include: habitual offender proceedings, parole violations, community supervision violations, writs from misdemeanor convictions, appeals from felony convictions, state post-conviction and/or federal habeas proceedings, record modifications and/or record clearances (generally considered to be “clean slate” matters), and representation in any collaborative courts.

**Civil & quasi-civil proceedings.** Data similar to that shown above for the trial court level should also be collected and analyzed for all types of proceedings in which a right to counsel is guaranteed in civil & quasi-civil cases. These include: children in need of services, abuse & neglect, termination of parental rights, parental notification of abortion proceedings, involuntary treatment and/or commitment, and involuntary guardianship.

## F. Louisiana statute requiring commission to promulgate and enforce mandatory statewide standards

LA. REV. STAT. § 15:148 (2020):

§ 148. Rulemaking; considerations in developing rules

A. The board shall adopt all rules necessary to implement the provisions of this Part.

B. The rules shall include but not be limited to:

(1) Creating mandatory statewide public defender standards and guidelines that require public defender services to be provided in a manner that is uniformly fair and consistent throughout the state. Those standards and guidelines shall take into consideration all of the following:

(a) Manageable public defender workloads that permit the rendering of competent representation through an empirically based case weighting system that does not count all cases of similar case type equally but rather denotes the actual amount of attorney effort needed to bring a specific case to an appropriate disposition. In determining an appropriate workload monitoring system, the board shall take into consideration all of the following:

(i) The variations in public defense practices and procedures in rural, urban, and suburban jurisdictions.

(ii) Factors such as prosecutorial and judicial processing practices, trial rates, sentencing practices, attorney experience, extent and quality of supervision, and availability of investigative, social worker, and support staff.

(iii) Client enhancers specific to each client such as the presence of mental illness.

(b) Continuity of representation. The board shall adopt standards and guidelines which ensure that each district devises a plan to provide that, to the extent feasible and practicable, the same attorney handles a case from appointment contact through completion at the district level in all cases.

(c) Documentation of communication. The board shall adopt standards and guidelines to ensure that defense attorneys providing public defender services provide documentation of communications with clients regarding the frequency of attorney client communications as required by rules adopted by the board.

(d) Performance supervision protocols. The board shall adopt standards and guidelines to ensure that all defense attorneys providing public defender services undergo periodic review of their work against the performance standards and guidelines in a fair and consistent manner throughout the state, including creating a uniform evaluation protocol.

(e) Performance of public defenders in all assigned public defense cases. The board shall adopt general standards and guidelines that alert defense counsel to courses of action that may be necessary, advisable, or appropriate to a competent defense including performance standards in the nature of job descriptions.

(f) Consistency of standards. The performance standards and guidelines shall be based upon the performance standards originally adopted by the Louisiana Indigent Defense Assistance Board (LIDAB) in 2006 and any subsequent amendments to those standards adopted by the board.

(2) Creating mandatory qualification standards for public defenders that ensure that the public defender services are provided by competent counsel. Those standards shall ensure that public defenders are qualified to handle specific case types which shall take into consideration the level of education and experience that is necessary to competently handle certain cases and case types such as juvenile delinquency, capital, appellate, and other case types in order to provide effective assistance of counsel. Qualification standards shall include all of the following:

(a) The specific training programs that must be completed to qualify for each type of case.

(b) The number of years the public defender has spent in the practice of law in good standing with the Louisiana State Bar Association.

(3) Establishing methods of monitoring and evaluating compliance with the mandatory public defender standards and guidelines and the performance of counsel in order to ensure competent representation of defendants in all courts of the state.

(4) Establishing procedures to handle complaints about public defender performance and to ensure that public defenders, office personnel, and clients are aware of avenues available for bringing a complaint and that office procedures do not conflict with the supervisory jurisdiction of the Louisiana Supreme Court and pursuant to the court's inherent authority provided for in Article V, Section 5 of the Constitution of Louisiana.

(5) Establishing appropriate sanctions for failure to adhere to the mandatory standards and guidelines for the delivery of public defender services.

(6) Establishing a policy of selecting a proportionate number of minority and women lawyers in accordance with the makeup of the general population of the state, to the extent that minority and women lawyers are available and otherwise eligible for selection within each service region in accordance with law. Any citizen of majority age shall have a cause of action to enjoin the activities of the board for failure to comply with this provision.

(7) Establishing policies and procedures for ensuring that cases are handled according to the Rules of Professional Conduct.

(8) Establishing policies and procedures for handling conflict of interest cases and overflow cases when workload standards which are established by rules of the board are breached.

(9) Establishing policies and procedures to ensure that detailed expenditure and workload data is collected, recorded, and reported to support strategic planning efforts for the system.

(10) Creating separate performance standards and guidelines for attorney performance in capital case representation, juvenile delinquency, appellate, and any other subspecialties of criminal defense practice as well as children in need of care cases determined to be feasible, practicable, and appropriate by the board.

(11) Ensuring data, including workload, is collected and maintained in a uniform and timely manner throughout the state to allow the board sound data to support resource needs.

(12) Providing for minimum salary and compensation standards for attorney, investigator, paraprofessional, and any and all other staff necessary for the adequate defense of indigent defendants in criminal courts and comparable to other positions of similar stature throughout the state.

(13) Establishing processes and procedures to ensure that when a case that is assigned presents a conflict of interest for a public defender, the conflict is identified and handled



appropriately and ethically.

(14) Establishing processes and procedures to ensure that board and contract personnel use information technology and workload management systems so that detailed expenditure and workload data is accurately collected, recorded, and reported.

(15) Establishing administrative salary ranges for compensation of attorneys delivering public defender services throughout the state so that compensation is based on objective policymaking, including years of service, nature of the work and workload, and in consideration of variations in public defense practices and procedures in rural, urban, and suburban districts as well as prosecutorial and judicial processing practices, trial rates, sentencing practices, and attorney experience.

C. All rules shall be adopted pursuant to the provisions of the Administrative Procedure Act and shall be subject to legislative oversight by the House Committee on the Administration of Criminal Justice and the Senate Committee on Judiciary C.

Added by Acts 1976, No. 653, §1; Acts 1987, No. 920, §1; Acts 2005, No. 343, §1; Acts 2007, No. 307, §1; Acts 2008, No. 220, §6, eff. June 14, 2008.

## G. Michigan statute requiring commission to promulgate and enforce mandatory statewide standards

MICH. COMP. LAWS § 780.991 (2021):

780.991 MIDC; establishment of minimum standards, rules, and procedures; principles; application for, and appointment of, indigent criminal defense services; requirements; partially indigent; objective standards.

Sec. 11.

(1) The MIDC shall establish minimum standards, rules, and procedures to effectuate the following:

(a) The delivery of indigent criminal defense services must be independent of the judiciary but ensure that the judges of this state are permitted and encouraged to contribute information and advice concerning that delivery of indigent criminal defense services.

(b) If the caseload is sufficiently high, indigent criminal defense services may consist of both an indigent criminal defender office and the active participation of other members of the state bar.

(c) Trial courts shall assure that each criminal defendant is advised of his or her right to counsel. All adults, except those appearing with retained counsel or those who have made an informed waiver of counsel, must be screened for eligibility under this act, and counsel must be assigned as soon as an indigent adult is determined to be eligible for indigent criminal defense services.

(2) The MIDC shall implement minimum standards, rules, and procedures to guarantee the right of indigent defendants to the assistance of counsel as provided under amendment VI of the Constitution of the United States and section 20 of article I of the state constitution of 1963. In establishing minimum standards, rules, and procedures, the MIDC shall adhere to the following principles:

(a) Defense counsel is provided sufficient time and a space where attorney-client confidentiality is safeguarded for meetings with defense counsel's client.

(b) Defense counsel's workload is controlled to permit effective representation. Economic disincentives or incentives that impair defense counsel's ability to provide effective representation must be avoided. The MIDC may develop workload controls to enhance defense counsel's ability to provide effective representation.

(c) Defense counsel's ability, training, and experience match the nature and complexity of the case to which he or she is appointed.

(d) The same defense counsel continuously represents and personally appears at every court appearance throughout the pendency of the case. However, indigent criminal defense systems may exempt ministerial, nonsubstantive tasks, and hearings from this prescription.

(e) Indigent criminal defense systems employ only defense counsel who have attended continuing legal education relevant to counsels' indigent defense clients.

(f) Indigent criminal defense systems systematically review defense counsel at the local

level for efficiency and for effective representation according to MIDC standards.

(3) The following requirements apply to the application for, and appointment of, indigent criminal defense services under this act:

(a) A preliminary inquiry regarding, and the determination of, the indigency of any defendant, including a determination regarding whether a defendant is partially indigent, for purposes of this act must be made as determined by the indigent criminal defense system not later than at the defendant's first appearance in court. The determination may be reviewed by the indigent criminal defense system at any other stage of the proceedings. In determining whether a defendant is entitled to the appointment of counsel, the indigent criminal defense system shall consider whether the defendant is indigent and the extent of his or her ability to pay. Factors to be considered include, but are not limited to, income or funds from employment or any other source, including personal public assistance, to which the defendant is entitled, property owned by the defendant or in which he or she has an economic interest, outstanding obligations, the number and ages of the defendant's dependents, employment and job training history, and his or her level of education. A trial court may play a role in this determination as part of any indigent criminal defense system's compliance plan under the direction and supervision of the supreme court, consistent with section 4 of article VI of the state constitution of 1963. If an indigent criminal defense system determines that a defendant is partially indigent, the indigent criminal defense system shall determine the amount of money the defendant must contribute to his or her defense. An indigent criminal defense system's determination regarding the amount of money a partially indigent defendant must contribute to his or her defense is subject to judicial review. Nothing in this act prevents a court from making a determination of indigency for any purpose consistent with article VI of the state constitution of 1963.

(b) A defendant is considered to be indigent if he or she is unable, without substantial financial hardship to himself or herself or to his or her dependents, to obtain competent, qualified legal representation on his or her own. Substantial financial hardship is rebuttably presumed if the defendant receives personal public assistance, including under the food assistance program, temporary assistance for needy families, Medicaid, or disability insurance, resides in public housing, or earns an income less than 140% of the federal poverty guideline. A defendant is also rebuttably presumed to have a substantial financial hardship if he or she is currently serving a sentence in a correctional institution or is receiving residential treatment in a mental health or substance abuse facility.

(c) A defendant not falling below the presumptive thresholds described in subdivision (b) must be subjected to a more rigorous screening process to determine if his or her particular circumstances, including the seriousness of the charges being faced, his or her monthly expenses, and local private counsel rates would result in a substantial hardship if he or she were required to retain private counsel.

(d) A determination that a defendant is partially indigent may only be made if the indigent criminal defense system determines that a defendant is not fully indigent. An indigent criminal defense system that determines a defendant is not fully indigent but may be partially indigent must utilize the screening process under subdivision (c). The provisions of subdivision (e) apply to a partially indigent defendant.

(e) The MIDC shall promulgate objective standards for indigent criminal defense systems to determine whether a defendant is indigent or partially indigent. These standards must include

availability of prompt judicial review, under the direction and supervision of the supreme court, if the indigent criminal defense system is making the determination regarding a defendant's indigency or partial indigency.

(f) The MIDC shall promulgate objective standards for indigent criminal defense systems to determine the amount a partially indigent defendant must contribute to his or her defense. The standards must include availability of prompt judicial review, under the direction and supervision of the supreme court, if the indigent criminal defense system is making the determination regarding how much a partially indigent defendant must contribute to his or her defense.

(g) A defendant is responsible for applying for indigent defense counsel and for establishing his or her indigency and eligibility for appointed counsel under this act. Any oral or written statements made by the defendant in or for use in the criminal proceeding and material to the issue of his or her indigency must be made under oath or an equivalent affirmation.

(4) The MIDC shall establish standards for trainers and organizations conducting training that receive MIDC funds for training and education. The standards established under this subsection must require that the MIDC analyze the quality of the training, and must require that the effectiveness of the training be capable of being measured and validated.

(5) An indigent criminal defense system may include in its compliance plan a request that the MIDC serve as a clearinghouse for experts and investigators. If an indigent criminal defense system makes a request under this subsection, the MIDC may develop and operate a system for determining the need and availability for an expert or investigator in individual cases.

