

The Future of Indigent Defense Task Force Recommendations



Introduction:

The right to counsel is a constitutional mandate guaranteed by the Sixth and Fourteenth Amendments of the US Constitution, and Ohio's indigent defense system is essential in upholding this right. Currently, there are five different delivery methods of indigent defense services in Ohio, determined at the county level: (1) county public defender, (2) court-appointed counsel, (3) contract with the state public defender, (4) contract with a nonprofit corporation, and (5) combination of a county public defender and contract with a nonprofit corporation. The system operates on a reimbursement basis, with county governments providing upfront payment for services and the state reimbursing those costs at varying levels, depending how much funding was allocated for that purpose and if reimbursement requirements are met.

Funding for the system has historically been a partnership between the state and county governments, originally contemplated in a statutory agreement as a 50/50 split. However, state funding has fluctuated significantly over the years. According to the State Public Defender, between 2009 and 2019, state reimbursement for indigent defense had been below 50 percent in all but 10 months of that period.

Recently, the state has increased resources to more fully fund indigent defense based on estimates for system costs over the biennium. However, costs are difficult to predict because they vary based on the number and types of cases, decision-making by 88 counties, and necessary investments made to ensure competent counsel is provided. Years of underfunding has put a significant strain on the system and also necessitated some recent "catch-up" spending.

The Future of Indigent Defense Task Force aimed to bring stakeholders to the table, review current practices and delivery models, and consider alternatives that balance efficiency, maintain local input, and most importantly, ensure that Ohio citizens are able to access their right to the assistance of counsel guaranteed by the Constitution.

In addition to the Ohio Bar Task Force, House Bill 150 of the 134th General Assembly (also supported by the Ohio Bar) called for a legislative task force on this same topic that includes elected officials. This task force is due to issue recommendations by April 3, 2024.

The Future of Indigent Defense Task Force has made great strides in gathering recommendations we hope the General Assembly will eventually consider and build upon, with the goal of enhancing our current system to provide effective, efficient delivery of indigent defense services while maintaining local input.

Overall System Recommendations:

First and foremost, ***the Task Force acknowledges that indigent defense services must be fully and consistently funded by the state, regardless of the delivery model in the state.***

The Task Force recommends a statewide system for indigent defense services, where counties have the option of opting in or opting out. Therefore, there will be two primary providers for delivery of indigent defense services: 1.) the state government and 2.) individual county governments. State services will be organized by the Office of the Ohio Public Defender (OPD) and county services will be organized by individual county governments. Within the state and county models, a variety of delivery methods will continue to exist, depending on what fits the needs of the community.

Distinct from the current system, the recommended system will feature an opt-in/opt-out option. The “opt-in” option refers to all counties that have elected to turn indigent defense services over to the state, specifically the OPD. The “opt-out” option refers to all counties that have elected to run indigent defense services at the county level. Both the opt-in and opt-out options are described below.

The Task Force recommends the board of county commissioners/county council in each individual county determine whether their county will opt in to state services or opt out and, in that case, provide their own method of delivery at the county level. Further, the Task Force recommends the board of county commissioners/county council make an affirmative decision, via resolution, to opt in to state services. By default, counties would be considered opt-out counties and thus, providing their own method of delivery.

As outlined by the OPD, the estimated timeline to onboard all opt-in counties is five years. This timeline is contingent on funding from the General Assembly.

Recommendations for the “Opt-In”/State Services:

For counties that have opted in to state services, the Task Force recommends the OPD determine the primary delivery method and that OPD is responsible for delivery of service, including budgeting, employees, setting rates for appointed counsel, etc. For these counties, OPD will determine the primary delivery method, provide all support services, and cover the cost of service directly (rather than by reimbursement). OPD will set the budget biennially, which must be approved by the Ohio General Assembly.

Employees, including those serving a particular county or counties, are considered state employees and are subject to state laws and/or contracts regarding pay and benefits. The Office of the Ohio Public Defender is responsible for employee management. OPD is also responsible for setting appointed counsel rates and caps for state services.

Additionally, ***the Task Force recommends the board of county commissioners/county council be required to consult with the local bar, judges, and local public defender commission (if applicable) ahead of passing a resolution to opt in to state services.*** Similarly, ***the Task Force recommends the OPD be required to consult with the local bar, judges, and public defender commission (if applicable) of the respective county ahead of a decision to alter the delivery method in an opt-in county.*** The Task Force highly encourages robust collaboration at the local level, where decisions are best made by the entities most impacted.

If a county elects to opt in to state services but later wishes to reverse this decision, the Task Force recommends the board of county commissioners/county council provide a minimum of three years’ notice to the OPD. If a county elects to reverse their decision to opt in to state services within five years, they are required to repay the

startup costs to the state at a rate of 20 percent of the startup costs for each year of the first five years remaining since opting in. These costs shall include all furniture, phones, IT equipment, copiers, and any other necessary equipment as part of the initial start of services. Costs shall also include any amount due and owing for layoffs pursuant to employment laws, any costs for lease termination, and moving costs to remove any and all equipment and materials from a facility.

Recommendations for the “Opt-Out”/County Services:

For counties that opt out of state services, the Task Force recommends the board of county commissioners/county council determine the delivery method for their respective county and the county will be responsible for all support services and related activities, including budgeting, employees, settings rates for appointed counsel, etc. The county will pay 100 percent of the cost of service, and the Office of the Ohio Public Defender will reimburse the county for eligible expenses. Eligible expenses are outlined pursuant to R.C. §120.18.

In terms of budget, the Task Force notes the difficulty in predicting, forecasting, and budgeting in a reimbursement model. Given that the state fiscal year runs July to June and operates on a two-year budget cycle while counties have an annual budget that runs January to December, the Task Force recognizes there are likely to be variances in opt-out county budgets. ***The Task Force recommends open lines of communication between the OPD and an opt-out county for budgeting purposes.***

To incorporate opt-out counties into the state budget process, ***the Task Force recommends the following process:***

- 1. The OPD provides budget guidance (provided to OPD by the Ohio Office of Budget and Management) to all opt-out counties in July of the year preceding the state budget approval process (all even-numbered years).***
- 2. Counties must submit their indigent defense budget to OPD in September of the same year. The indigent defense budget must be formatted from July to June and include two fiscal years (to coincide with the state’s biennial budget).***
- 3. OPD will submit the proposed opt-out county budgets to the state. OPD will offer guidance, rather than approval, to counties in developing their indigent defense budgets.***

Noting the high potential for budget variations in a reimbursement system, it may be necessary to seek additional appropriations for unexpected, unbudgeted expenses in the opt-out model or for applicable county governments to cover any budget overages.

Employees in out-opt counties will be considered county employees. This includes personnel hired by a county public defender office but does not include individuals with whom the county contracts to provide indigent defense services or court-appointed counsel. The board of county commissioners/county council is responsible for setting appointed counsel rates and caps for an opt-out county.

Additional Considerations:

While the focus of the Task Force was the framework of the opt-in/opt-out models, the group also reviewed other topics pertinent to the indigent defense system. ***The Task Force recommends that the General Assembly further explore these topics and expresses general consensus on the following:***

1. Availability of appointed counsel.

The Task Force recognizes that appointed counsel will be needed in both the opt-in and opt-out models. ***The Task Force maintains that judges must continue to play a significant role in selecting appointed counsel.*** Currently, trial judges are responsible for maintaining lists of counsel qualified to receive appointments and have the authority to appoint from these lists.

While the hourly rates for appointed counsel will be set by the OPD or the board of county commissioners/county council as applicable, ***the Task Force recommends the OPD set a floor and ceiling for appointed counsel rates.***

Additionally, support systems are important to ensure that appointed counsel have adequate resources available. ***The Task Force encourages the OPD to maintain and update appointed counsel resources on their website.***

2. Combatting attorney shortages.

Additionally, the Task Force recognizes the shortage of attorneys in rural parts of Ohio. ***The Task Force recommends the General Assembly consider programs or incentives to ensure there are adequate numbers of prosecutors, public defenders, and appointed counsel in all areas of the state.*** To that end, the Task Force encourages adjustments to the Ohio Revised Code that allow attorneys to work part time in private practice while serving in public defender positions, either at the county level or state level, should that be appropriate as determined by the OPD or relevant local authority (similar to the authority of prosecuting attorneys pursuant to R.C. §309.06).

3. Representation in ordinance cases.

Representation is constitutionally required in certain municipal ordinance cases, and currently there is a lack of clear guidelines around these procedures. Municipalities may contract with the OPD for services. However, if there is no contract in place, questions may arise regarding who is providing services and how those services are rendered.

The Task Force recommends that the reimbursement protocol for representation in municipal ordinance cases where an individual is legally entitled to counsel be clarified in the Ohio Revised Code, and further recommends that representation in ordinance cases be provided by either the state or county, as appropriate, given the overall delivery model. Municipalities will be required to reimburse either the state or county government for the actual cost of services provided.

4. Cost containment and funding.

While the focus of this task force was the delivery method of indigent defense services in Ohio, system costs are an unavoidable and necessary part of the discussion. ***The Task Force recommends the General Assembly review both cost-containment factors and funding needs of the system.*** As noted in the introduction, indigent defense had been underfunded for many years, and this has impacted the position of our system today. Funding for indigent defense should be equitable regardless of delivery method and structured to support both opt-in and opt-out counties.

List of Recommendations



- 1** The Task Force acknowledges that indigent defense services must be fully and consistently funded, regardless of the delivery model in the state.
- 2** The Task Force recommends a statewide system for indigent defense services, where counties have the option of opting in or opting out.
- 3** The Task Force recommends the board of county commissioners/county council in each individual county determine whether their county will opt in to state services or opt out and, in that case, provide their own method of delivery at the county level.
- 4** The Task Force recommends the board of county commissioners/county council make an affirmative decision, via resolution, to opt in to state services. By default, counties would be considered opt-out counties and thus, providing their own method of delivery.
- 5** For counties that have opted in to state services, the Task Force recommends the Office of the Ohio Public Defender (OPD) determine the primary delivery method and that OPD is responsible for delivery of service, including budgeting, employees, setting rates for appointed counsel, etc.
- 6** The Task Force recommends the board of county commissioners/county council be required to consult with the local bar, judges, and the local public defender commission (if applicable) ahead of passing a resolution to opt in to state services.
- 7** The Task Force recommends the OPD be required to consult with the local bar, judges, and the public defender commission (if applicable) of the respective county ahead of a decision to alter the delivery method in an opt-in county.
- 8** If a county elects to opt in to state services but later wishes to reverse this decision, the Task Force recommends the board of county commissioners/county council provide a minimum of three years' notice to the OPD.
- 9** For counties that opt out of state services, the Task Force recommends the board of county commissioners/county council determine the delivery method for their respective county and the county will be responsible for all support services and related activities, including budgeting, employees, settings rates for appointed counsel, etc.

10 The Task Force recommends open lines of communication between the OPD and an opt-out county for budgeting purposes.

- 11** The Task Force recommends the following budget process for opt-out counties:
- a. The OPD provides budget guidance (provided to OPD by the Ohio Office of Budget and Management) to all opt-out counties in July of the year preceding the state budget approval process (all even-numbered years).
 - b. Counties must submit their indigent defense budget to OPD in September of the same year. The indigent defense budget must be formatted from July to June and include two fiscal years (to coincide with the state's biennial budget).
 - c. OPD will submit the proposed opt-out county budgets to the state. OPD will offer guidance, rather than approval, to counties in developing their indigent defense budgets.

Items for Additional Consideration:

12 The Task Force recommends the OPD set a floor and ceiling for appointed counsel rates.

13 The Task Force recommends the General Assembly consider programs or incentives to ensure that there are adequate numbers of prosecutors, public defenders, and appointed counsel in all areas of the state.

14 The Task Force recommends that the reimbursement protocol for representation in municipal ordinance cases where an individual is legally entitled to counsel be clarified in the Ohio Revised Code, and further recommends that representation in ordinance cases be provided by either the state or county, as appropriate, given the overall delivery model.

15 The Task Force recommends the General Assembly review both cost-containment factors and funding needs of the system.

Thank you

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