

MEMORANDUM

To: Chief Justice Cherry, Indigent Defense Commission
From: Franny Forsman
Date: September 6, 2017
Subject: Rural Indigent Defense Contracts

At yesterday's meeting of the Indigent Defense Commission, there was some confusion and a number of questions about the memo which I submitted to the Commission analyzing the rural defense contracts.

The July 23, 2015 order in ADKT 411, set forth two requirements for all contracts for indigent defense if a contract system is used. The contracts must: "allow for a modification of fees for extraordinary cases," and 2) allow for investigative fees and expert witness fees."

I examined the contracts available to me from the Supreme Court to determine whether either of those elements were missing from the current contracts. Most of the contracts have some provision for the payment of investigative and expert witness expenses so that contract counsel need not bear the responsibility for these costs.¹

The primary deficiency in many of the contracts is the failure to "allow for modification of fees for extraordinary cases." This provision is clearly a reference to the modification of **attorney fees** above and beyond the flat annual fee when circumstances justify such a modification.

Carson City, Lyon County, and Douglas County all provide for additional fees in appropriate circumstances and, for the most part, reference the hourly rates in NRS §7.125, Nye, Eureka, and Churchill have no provision for additional attorney fees. White Pine and Lincoln counties provide additional fees only for capital cases that go to trial. Mineral County provides for additional fees for any "non-capital trial longer than 3 days."

¹ Carson City requires that "routine investigative costs" are borne by the contractor but I have no information about the practice.

The prohibition on totally flat fee contracts is based in a concern that such contracts create a conflict of interest due to the disincentive to go to trial or otherwise litigate the case as a result of the uncompensated time that will result. This is the reason the Supreme Court issued the July 23, 2015 order.

In Clark County, for instance, statutory hourly rates are paid to contract lawyers for the time spent in trial.

We still don't have data from the counties on requests for either additional attorney fees or investigative/expert expenses although we now have some anecdotal evidence. The ability to secure that data is essential to a full understanding of the state of rural indigent defense, in my opinion.