

UTAH INDIGENT DEFENSE: WHAT CITIES NEED TO KNOW

If a city opts to prosecute criminal cases, it must also provide indigent defense services.¹

WHAT CIRCUMSTANCES TRIGGER A CITY'S RESPONSIBILITY TO PROVIDE INDIGENT CRIMINAL DEFENSE SERVICES?

The U.S. Constitution, Utah Constitution, and Utah Code guarantee the right to court-appointed counsel, at government expense, to criminal defendants who are:

1. **Facing any risk of incarceration.** When a defendant is prosecuted for an offense that carries a statutory possibility of incarceration (a Class C Misdemeanor or higher charge); and
2. **Indigent.** A defendant who cannot afford to hire an attorney.²

If these circumstances are present, a Court must inform the defendant of the right to court-appointed counsel, and must appoint an attorney unless the defendant makes a voluntary and informed choice to waive that right. *Any policy or practice discouraging a defendant from exercising the right to counsel is prohibited.

WHAT LEVEL OF DEFENSE REPRESENTATION IS REQUIRED?

Court-appointed defense counsel must provide an effective defense³, which requires at a minimum, that means defense counsel⁴:

- Must be timely appointed;
- Must have access to the resources necessary to meaningfully test the validity of the prosecution's allegations by hiring investigators and experts, where appropriate;
- Should be paid on a compensation structures that does not financially discourage zealous representation (i.e., no flat fee compensation), by using hourly fees or other means to account for the actual work provided; and
- Must not be forced to represent multiple co-defendants or undertake other representation in violation of the Utah Rules of Professional Conduct.

HOW DOES A CITY ENSURE PROPER OVERSIGHT OVER THIS EXPENDITURE OF PUBLIC FUNDS?

Like any service contracted for through public funds, cities must provide proper oversight over indigent defense services to ensure the constitutional representation of indigent persons is actually being provided. This oversight requires, at a minimum:

- Written contracts that set forth the scope of work;

¹ Utah Code § 77-32-301 ("each county, city, and town shall provide for the legal defense of an indigent [person] in criminal cases in the courts . . . in accordance with legal defense standards.")

² Utah Code § 77-32-202(3) defines "Indigency" is defined for a court-determination in

³ Utah Code § 77-32-302 {"An indigent criminal defense services provider shall be assigned to represent each indigent and shall provide the legal defense services necessary for effective representation."}

⁴ Utah Code §§ 77-32-201(12)(c), 77-32-301(b)(ii), and 77-32-804, define the requirements for a legal defense.

- Oversight to ensure defense providers are fulfilling the scope of work;
- Oversight to monitor a provider's total workload to ensure the provider has the capacity to provide constitutional representation;
- Oversight that does not interfere with a defense providers' independence—i.e., oversight by someone other than a prosecutor or the judiciary.

HOW CAN MY CITY AVOID UNNECESSARY RISK/LIABILITY IN DISCHARGING THIS OBLIGATION?

The right to counsel is guaranteed by both constitution and statute, but there is no one way to ensure that right. As a result, governments are often the target of lawsuits challenging the sufficiency of appointed counsel systems.⁵

Cities in Utah need to be especially aware of this risk, given that a yearlong study and 2015 report identified right to counsel deficiencies in Utah's Justice Courts.⁶

Sensible management of this risk, requires periodic examination and review of cities appointed counsel providers and practices to ensure compliance with the requirements outlined above.

HOW CAN MY CITY GET HELP TO FUND AND PROPERLY EXECUTE THIS OBLIGATION?

The Utah Indigent Defense Commission was created to help ensure local governments provide public defense systems that ensure the effective assistance of counsel in all appointed cases. The IDC provides guidance, technical assistance, and financial support to local governments.

The IDC can support your city in a variety of ways, by:

- Providing best practices;
- Reviewing written contracts to flag potential issues;
- Identifying gaps or issues in defense services; and
- Provide funding to support improvements to indigent defense services.

Questions about the IDC or indigent defense in Utah? Contact the IDC Staff.

- Director, Joanna Landau: jlandau@utah.gov ; direct: 801.209.5440
- Asst. Director, Jojo Liu: jliu@utah.gov; direct: 801.903.3176
- <https://justice.utah.gov/indigent-defense.html>

⁵ The ACLU of Utah is suing the State of Utah over indigent defense. The ACLU has also successfully sued cities over right to counsel issues. See, for example: <https://www.aclu.org/news/federal-court-finds-public-defense-system-violates-constitutional-rights-indigent-defendants>

⁶ <http://sixthamendment.org/utah-report/>

CHECKLIST: NECESSARY INFORMATION TO KNOW ABOUT THE DEFENSE SERVICES YOUR CITY IS PAYING FOR

- Who are the defense services providers for your city?
- Do you have a written contract with your provider(s)?
- On how many cases does your Justice Court annually appoint defense counsel?
- Do you have a separate contract with an attorney for conflict cases?
- Is there a budgetary set-aside for experts and investigative costs?
- Do your contracts ensure:
 - A mechanism for screening for conflicts?
 - An attorney is present at all stages of the court proceedings, including during the critical early stages?
 - Your provider is adequately investigating cases?
 - Your provider is reporting on the level of services they are providing—at a minimum on their scope of work and how many cases they currently handle?