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**Rates of Compensation for Court-Appointed Counsel in
Capital Cases at Trial: A State-By-State Overview**

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Rates of Compensation Paid to Court-Appointed Counsel in Capital Cases at Trial: A State-By-State Overview, 2007

Introduction

Since 1996, The Spangenberg Group has periodically produced tables and narratives on behalf of the American Bar Association's Bar Information Program detailing compensation rates paid to court-appointed counsel who handle death penalty trial cases in the 38 states that permit the death penalty. The first table was published in July 1996, and the second, along with an accompanying narrative, was produced in April 1998. The most recent full update to the report was completed in April 2003. We receive repeated requests for the tables from attorneys, policy-makers and others.

The table that follows this narrative reflects the information collected during the course of our survey conducted between February and April of 2007. As in previous reports, we have included citations to the authority for the compensation rates and/or maximum fees.

It is not the purpose of this report to produce any type of assessment or evaluative ranking of states in terms of compensation rates paid to court-appointed counsel in capital cases. In many states, the compensation rates vary according to locality. Most of these states, referred to in this report as "reasonable compensation" states,¹ do not maintain centralized records on the precise amounts court-appointed counsel are paid.² To collect these data, in each "reasonable compensation" state, we interviewed public defenders, court administrators, private counsel, or others familiar with the jurisdiction's indigent defense system. The numbers reflected in the accompanying table and/or narrative are representative of the limited information provided to us through these interviews.

Additionally, while the compensation rate information in the table pertains only to court-appointed counsel, there are two other methods by which legal counsel is provided to indigent defendants. The three methods that jurisdictions use to provide indigent defense are:

- The assigned counsel model: Private attorneys are assigned to indigent criminal cases on either a systematic or ad hoc basis. Typically they are paid on an hourly basis or paid a flat fee per case.
- The contract model: A jurisdiction contracts with private attorneys, groups of attorneys, a bar association or a private, non-profit organization to provide representation in some or all of the indigent cases in the jurisdiction. In some jurisdictions, the public defender agency contracts with private attorneys to handle conflict of interest cases.

¹ A "reasonable compensation" state is one in which the state legislature places the responsibility for establishing the rate of compensation for court-appointed counsel on each individual criminal court judge (or other locality in some cases) throughout the state.

² Texas and Nebraska are notable exceptions in that each local jurisdiction reports the compensation rates paid to court-appointed attorneys, where applicable.

- The public defender model: A public or private non-profit organization with full or part-time staff attorneys provides all or a percentage of the representation to indigent defendants in a jurisdiction. Many states have separate capital defender units which handle death penalty cases at trial.

From these three models for the appointment of counsel, states and counties have developed indigent defense delivery systems, most of which employ some combination of the three. For example, even in states with a statewide public defender system, private attorneys are usually appointed in conflict of interest cases and in some instances to alleviate burdensome caseloads. In other states where there is less uniformity, there may be contract counsel in one county, assigned counsel in a second county, and a public defender office in yet a third county.

Most jurisdictions use a combination of the above three models, thus it is inappropriate to conclude that one jurisdiction better funds its indigent defense system because it pays assigned counsel a higher rate of compensation than other jurisdictions. To determine the relative adequacy of funding of any state's indigent defense system, one must look at many factors; the comparable rates of compensation for court-appointed counsel is only one of these factors. Other factors include whether or not there is a statutory limit on the amount that may be paid per case and whether or not overhead and other expenses are paid on top of the hourly rate. Litigation in Mississippi, for example, resulted in court-appointed counsel being paid an hourly amount to cover overhead costs.³ The accompanying table includes statutory maximums, where applicable, and whether they may be waived or not.

Thirty-eight states, as well as the U.S. government, permit the use of the death penalty. The table on the following page is the number of death row inmates by state as reported by the NAACP Legal Defense and Educational Fund.⁴

³ *Wilson v. State*, 574 So.2d 1338 (Miss. 1990).

⁴ "Death Row USA, Winter 2007," *Criminal Justice Project of the NAACP Legal Defense and Educational Fund, Inc.*, http://www.naacpldf.org/content/pdf/pubs/drusa/DRUSA_Winter_2007.pdf.

Death Row Inmates by State

California	660	Mississippi	66	Utah	9
Florida	397	Missouri	51	Washington	9
Texas	393	<i>U.S. Government</i>	44	<i>U.S. Military</i>	9
Pennsylvania	226	Kentucky	41	Connecticut	8
Alabama	195	Arkansas	37	Maryland	8
Ohio	191	Oregon	33	South Dakota	4
North Carolina	185	Indiana	23	Colorado	2
Arizona	124	Idaho	20	Montana	2
Georgia	107	Virginia	20	New Mexico	2
Tennessee	107	Delaware	18	Wyoming	2
Louisiana	88	Illinois	11	New York	1
Oklahoma	88	New Jersey	11	New Hampshire	0
Nevada	80	Kansas	9		
South Carolina	67	Nebraska	9	Total	3357

Since the last full update of this report in 2003, many changes have taken place in regard to the death penalty. In our last report, the total number of death row inmates across the United States was 3,533. As of January 2007, the number of death row inmates (3,357) has decreased by nearly 5 percent. Several states (Indiana, Missouri, North Carolina, Oklahoma and Texas) have experienced a significant decrease in the number of death row inmates since 2003. On the other hand, the number of inmates on death row in California has increased considerably since our last full update. Formal moratoria have been placed on executions in Illinois (2000) and New Jersey (2006) because of general concerns about the death penalty. According to the Death Penalty Information Center, in 2006 and 2007 a number of states declared moratoria on the death penalty because of concerns over the method of execution.⁵ In 2004, the highest court in New York, the Court of Appeals, declared the New York's death penalty statute unconstitutional.⁶ As of June 2007, legislative attempts to correct the flaws in the statute have failed.

Previous updates of this report have revealed two clear trends: one toward the creation of specialized statewide capital trial units, the other toward increased compensation rates for court-appointed counsel in capital trial cases. At least fourteen states (Connecticut, Georgia, Kansas, Kentucky, Maryland, Mississippi, Missouri, Nebraska, New Jersey, New York, North Carolina, Ohio, Oklahoma, and Virginia) along with a number of circuit public defender offices in

⁵ "Death Penalty in Flux," *Death Penalty Information Center*, <http://www.deathpenaltyinfo.org/article.php?did=2289>.

⁶ *People v. LaValle*, 817 N.E. 2d 341 (2004).

Florida, have separate units that handle and/or provide support for private counsel handling death penalty cases at trial. Additionally, the Louisiana Indigent Defender Assistance Board (LIDAB) contracts with non-profit organizations that specialize in providing capital trial representation. Of the five states with the largest number of death row inmates, none has a specialized statewide capital trial unit. In some states, there are programs that serve as a resource center for court-appointed attorneys representing indigent defendants in capital cases. For example, Texas Defender Service provides consulting services to those private bar attorneys representing indigent capital defendants. Undoubtedly, the availability of a specialized support organization encourages private attorneys to accept appointments in capital cases.

The trend toward increased rates of compensation also serves to increase the number of qualified attorneys willing to handle capital trial cases. Since our last survey, thirteen states (Colorado, Connecticut, Georgia, Illinois, Indiana, Kansas, Kentucky, Maryland, Montana, Nevada, New Jersey, North Carolina, and South Dakota) and the United States government have increased their hourly compensation rates for court-appointed attorneys. In Wyoming, where a range of possible rates is set by the high court, the range has increased since 2003. Three states (Kentucky, Nevada, and Ohio) have increased the maximum amount counsel can earn in a given case; Maryland removed its cap altogether. These rate increases across the country demonstrate that policy makers are recognizing that, in order to attract qualified counsel who are able to provide effective representation in capital cases, it is necessary to increase hourly rates of compensation.

Different Approaches to Compensating Assigned Counsel

The following section discusses six approaches taken by the states in determining compensation for court-appointed counsel. The approaches are broken down by the authority that sets the rates. These approaches are characterized as:

- C Statutory hourly rate;
- C Administrative or court rule;
- C State public defender;
- C State commission on indigent defense;
- C Reasonable compensation; and
- C Combination approach.

Since the last full report was published in April 2003, the authority for setting compensation rates has changed in three states: Georgia, Montana and Oregon. In 2003, the Georgia legislature passed the Georgia Indigent Defense Act, which established the Georgia Public Defender Standards Council (GPDSC). One of the responsibilities of the council is to establish compensation rates for court-appointed attorneys. As of January 2006, the Montana Public Defender Commission, created in the 2005 legislative session, assumed responsibility for setting rates for court-appointed attorneys, among other responsibilities. Prior to the establishment of the statewide system in Montana, the compensation rates paid to court-

appointed attorneys in capital trials varied from county to county. In Oregon, court rule dictated the rates of compensation for court-appointed counsel prior to July 2003. Since then the Oregon Public Defense Services Commission, established in 2001, has assumed the responsibility of setting the hourly rate of compensation for court-appointed attorneys.

A comprehensive classification and explanation of the different methods for determining rates of compensation follows. When necessary, a detailed description of states' method for compensating counsel in capital cases at trial is given. Otherwise, please refer to the accompanying table for state-specified compensation rates.

Statutory Hourly Rate

In five states (Alabama, Florida, Illinois, Nevada, and South Carolina) rates of compensation for court-appointed attorneys are set by statute. Thus, the determination of compensation rates for court-appointed attorneys in capital cases is a legislative matter. The accompanying table includes the statutes which set compensation rates paid to court-appointed counsel in capital cases at trial.

Alabama

In Alabama, compensation rates for court-appointed attorneys are set by statute. In October of 2000, the rates were increased from \$30 for out-of-court work and \$50 for in-court work to \$40 for out-of-court work and \$60 for in-court work. The language in the statute also calls for the reimbursement of "reasonably incurred" expenses. In *James W. May v. State*, the Alabama Court of Criminal Appeals ordered that the court pay an additional amount for overhead; the presumptive hourly overhead in Alabama is \$30.⁷ In February of 2005, the Alabama Attorney General issued an opinion conflicting with the *May* decision, and from February 2005 to December 2006 the State Comptroller refused to pay overhead fees. The Alabama Supreme Court ordered the Comptroller to resume payment overhead costs in *Wright v. Childree* (2006).⁸ While the average hourly overhead is \$30, the overhead rate varies from case to case, and counsel must seek prior approval for the overhead expenses.

Florida

Each of Florida's twenty local circuit public defender offices handles capital trials; many offices have capital divisions. During the 2007 legislative session, the Florida General Assembly passed legislation that created five regional offices of conflict counsel to handle primary conflicts of the public defender offices. The legislation provides that private attorneys can still handle secondary and tertiary conflict cases, although they will no longer be administered by circuit indigent defense services committees. The legislation states that flat fees will be yearly

⁷ *May v. State*, 672 So. 2d 1307 (Ala. Crim. App. 1993), cert. denied, *May v. State*, 672 So. 2d 1310 (Ala. 1995).

⁸ *Wright v. Childree*, CV-05-1544 (2006).

by the General Appropriations Act. According to the General Appropriations Act of 2007, the maximum flat fee paid in capital murder cases is \$15,000 per attorney; in capital sexual battery cases, the maximum flat fee is \$2,000. According to the legislation, a \$15,000 maximum can be waived up to 200 percent or more if the flat fee in a particular case “would be confiscatory.”

Illinois

The majority of Illinois’ 102 counties have county-funded public defender offices. In conflict cases, the circuit court judge appoints counsel. During the 1999 legislative session, Illinois legislators approved a bill that set the rate of compensation for private attorneys representing an indigent client charged with a capital offense at \$125 per hour. This statutory rate is adjusted every year according to the state’s consumer price index. As of January 2007, the rate was \$145.39. Additionally, in 2002, the legislature created the Capital Litigation Trust Fund to assist counties in the prosecution and defense of capital cases, but this is the only state money available for trial level indigent defense services in Illinois.

Administrative or Court Rule

The rates of compensation are set by either administrative or court rule in nine states: Colorado; Delaware; Indiana; New Hampshire; New York; South Dakota; Tennessee; Virginia; and Wyoming. Generally, the state’s Supreme Court sets a rate, which is either written into the state’s rules of criminal procedure or a Supreme Court directive or rule.

New York

In New York, the Capital Defender Office (CDO) was created by statute to provide representation and to support and assist at all stages of capital litigation. The CDO, along with an administrative board of the New York Judicial Conference, recommends compensation rates for court-appointed attorneys which New York’s highest court, the Court of Appeals, must approve. Compensation rates for appointed counsel in capital trials were first set at \$175 per hour for lead counsel and \$150 per hour for co-counsel. However, the Court reduced these rates in December 1998, simultaneously altering the rate structure so that payment varies depending on whether the work was done before or after the prosecution announced its intent to seek the death penalty. Lead attorneys in capital cases are now reimbursed at a rate of \$125 per hour for their work after the prosecution has given notice of intent to seek the death penalty, and \$100 per hour before notice is given. Co-counsel receives \$100 per hour after notice, and \$75 per hour before notice.

The Court of Appeals declared New York’s death penalty statute unconstitutional in 2004.⁹ The ruling in *People v. LaValle* invalidated the death penalty in New York citing that the state’s jury instructions were unconstitutional. The next year, the General Assembly Codes Committee voted against legislation reinstating the death penalty.

⁹ *People v. LaValle*, *supra* note 6, at 3.

Virginia

In 2002, the Virginia legislature authorized the creation of four regional capital defender offices. The Virginia Indigent Defense Commission oversees the four offices and establishes standards for court-appointed counsel in capital cases. Each capital case in the capital defender offices is assigned to two attorneys, one of whom (lead chair) is a salaried employee of the capital defender office. The Virginia Supreme Court has set a rate for court-appointed attorneys at \$125 per hour with no limit.

Public Defender

The state public defender office determines the compensation rates for court-appointed attorneys in five states: Connecticut; Maryland; Kentucky; New Jersey; and New Mexico.

Kentucky

Kentucky's Department of Public Advocacy (DPA) has a Capital Trial Branch with seven experienced, well-trained attorneys. The Louisville Metro Public Defender also has a specialized death penalty unit consisting of four attorneys. The DPA limits the number of cases its capital branch attorneys can take at one time, and attorneys in the DPA field offices also handle capital cases. The DPA sets the compensation rate for court-appointed attorneys in conflict and overflow cases. The rate is currently \$75 per hour with a maximum of \$30,000 per attorney in any given case; the maximum can be waived in extraordinary circumstances.

New Mexico

New Mexico uses a request for proposals contract system in which attorneys are awarded cases on a rotating basis. The contractors are paid flat fees on an event-based schedule and according to whether they are lead or co-counsel. Lead counsel earns \$5,000 for a first degree murder trial. Once the state files to seek the death penalty, lead counsel earns an additional \$11,500. When the case goes to trial, lead counsel earns an additional \$4,500, bringing the maximum that an attorney can earn from a capital case in New Mexico to \$24,500. If co-counsel is assigned to a first degree murder case, that contractor will be paid a flat rate of \$6,000. If the state seeks the death penalty as punishment, the co-counsel earns an additional \$2,000; if the case goes to trial, the co-counsel receives \$4,500. The maximum amount earned by co-counsel in capital cases in New Mexico is \$12,500. In extraordinary circumstances, the maximum rates can be waived. Also, the flat rates listed above do not include overhead expenses, which are tracked by the contractor and paid by the state public defender.

State Commission on Indigent Defense

In seven states (Arkansas, Georgia, Kansas, Missouri, Montana, North Carolina, and Oregon) compensation for court-appointed attorneys is determined by a statewide indigent defense commission or board.

Kansas

The Kansas Board of Indigent Defense Services (KSBIDS) has the authority to enter into contracts with court-appointed attorneys. The rate for court-appointed counsel in capital cases is \$150 per hour with no per case maximum. However, KSBIDS has an in-house capital defense unit so contracting with counsel in capital cases is very rare.

North Carolina

The North Carolina Office of Indigent Defense Services (IDS) sets court-appointed counsel fees in North Carolina. The IDS Office has a specialized capital unit with regional offices. The rate set by the office for capital trials is \$95 per hour. Each county also has standby attorneys who protect a defendant's rights between arrest and determination of indigency. These attorneys, referred to as "provisional attorneys," receive \$85 per hour in capital cases. There are no maximum amounts paid per case.

Oregon

In Oregon, most capital trial cases are handled by attorneys working under contract with the Public Defense Services Commission. These contracts range from approximately \$144,000 to \$169,000 per year (based on a certain number of cases as allowed in the contract) per full-time equivalent attorney, which includes overhead and support staff. For those cases not handled by contract counsel, compensation for appointed counsel is set by the Public Defense Services Commission at \$55 for lead counsel and \$40 for co-counsel. These rates do not include routine expenses, such as photocopying, telephone, mileage, etc.

Reasonable Compensation

In nine states (Arizona, California, Idaho, Louisiana, Mississippi, Nebraska, Pennsylvania, Texas, and Washington) the establishment of compensation rates for court-appointed attorneys is left up to a locality. In most cases, the local court or judge determines the rate of compensation for counsel. Because the rate of compensation is decided at the local level, compensation rates in this category generally vary from county to county or district to district. In Ohio, while the Ohio Public Defender recommends an hourly rate, it has no binding effect and like other "reasonable compensation" states, the actual rate of compensation varies according to locality.

Idaho

Idaho's indigent defense system is determined on a county-by-county basis; therefore, compensation rates and methods vary widely. In Idaho's most populated county, rates are negotiated for private counsel in conflict cases. The rates for capital conflict counsel in Ada County (Boise) generally range from \$90 to \$150 per hour both in- and out-of-court. There are no maximum fee caps in Idaho.

Louisiana

In Louisiana, most capital trial cases are handled by parish public defenders or contract counsel. Many public defender offices pay contract counsel an hourly rate for conflict cases. These rates vary widely throughout Louisiana; New Orleans, for example, pays an hourly rate of \$110 for contract counsel while Caddo Parish (Shreveport) pays an hourly rate of \$75.

To deal with conflict and overload cases, the Louisiana Indigent Defense Assistance Board (LIDAB) created four regional programs in which LIDAB contracts with non-profit groups in four regions to handle conflict capital cases. Because LIDAB contracts with non-profit groups, the attorneys handling conflict cases are generally salaried employees. However, LIDAB limits the number of the cases assigned through its regional contract programs.

Mississippi

Compensation rates for court-appointed counsel are set by local judges in Mississippi. Compensation rates vary from county to county, but by statute (as interpreted in *Wilson v. State*)¹⁰ total compensation for trial work cannot exceed \$2,000 per case in capital cases plus overhead expenses, which are set at a presumptive rate of \$25 per hour. In practice, courts do not strictly follow the statutory limits, and hourly rates vary from court to court throughout Mississippi.

The Mississippi Office of Capital Defense Counsel began taking cases in 2001. Currently, the office has twenty open cases, sixteen of which employ county-funded co-counsel. The Office of Capital Defense Counsel has never received a sufficient appropriation to make appointments in all capital indigent defense cases. According to the Office's website, for example, there are 50-60 new cases per year needing court-appointed counsel. However, the Office of Capital Defense Counsel only has the resources for 20 cases per year. The remaining cases are handled by county-funded court-appointed counsel.

Nebraska

Judges set the rates of compensation in each district of Nebraska. Hourly rates of compensation for court-appointed counsel in capital cases range from \$60 to \$100; however the

¹⁰ *Wilson v. State*, *supra* note 3, at 2.

most frequently occurring rates in Nebraska are in the range of \$70 per hour to \$75 per hour. Lancaster County (Lincoln) pays assigned counsel \$85 per hour for work both in- and out-of-court in capital cases. Most counties follow the model of paying the same rate for in- and out-of-court work. Douglas County (Omaha) is one notable exception; court-appointed attorneys from Douglas County earn \$65 per hour for out-of-court work and \$80 per hour for in-court work. Additionally, while most districts assign an hourly rate of compensation for court-appointed attorneys, many districts negotiate their compensation rate with court-appointed attorneys.

In 1995, the Nebraska legislature created and funded the Nebraska Commission on Public Advocacy, which provides legal services and state resources to assist counties in providing effective assistance to indigent persons through its capital litigation, appellate and felony case divisions. The Commission is structured to help those small rural counties that would have difficulty financing the defense in a capital case. Therefore, rather than assigning an hourly rate of compensation, some counties use the Commission on Public Advocacy for their capital cases.

Ohio

The Ohio Public Defender has a specialized death penalty division which deals with each stage of capital proceedings, including trial. Trial attorneys within the death penalty division also provide representation to indigent clients for conflict cases. In addition, the death penalty division public defenders assist and advise court-appointed capital attorneys.

The Ohio Public Defender Commission requires each county in Ohio to have a fee schedule for court-appointed counsel. In addition, the Ohio Public Defender sets a non-binding, recommended maximum fee schedule for appointed counsel. The Public Defender's recommended rate for court-appointed attorneys in capital cases is \$95 per hour for both in- and out-of-court work. The maximum rate at which the Public Defender will provide reimbursement is \$75,000. Most counties that handle death penalty cases pay a lower rate than the suggested \$95 per hour.

The Ohio Public Defender Commission's 2005 Annual Report lists the hourly rates paid in each county for felonies, misdemeanors, juvenile, appeals, death penalty and other cases. The average hourly rate for capital felonies paid among the counties in FY 2005 was \$46, although this does not include expenses (such as travel, printing, copying, etc.).

Pennsylvania

Because local judges determine the rates of compensation for court-appointed attorneys, rates vary widely throughout Pennsylvania. In Philadelphia, the local criminal court adopted a "Modified Guaranteed Fee System" in March of 1997 under which attorneys are paid flat preparation fees and per diem in-court fees. The fees are payable as follows:

Preparation Fees:

- Disposition after arraignment but prior to trial: \$1,133
- Disposition at trial: \$1,700

- Mitigation appointment: \$1,700

Per Diem Fees (at trial):

- Half day, 3 hours or less: \$200
- Full day, more than 3 hours: \$400
- Mitigation, half day: \$100
- Mitigation, full day: \$200

In Allegheny County (Pittsburgh), court-appointed attorneys are paid \$50 per hour plus office expenses. They can also opt to get paid a flat rate of \$250 for a half day and \$500 for a full day of in-court work.

Texas

Each of Texas' 254 counties organizes and funds its own indigent defense delivery system. Before the Texas Fair Defense Act was signed into law in 2001, there was no systemic way of tracking the different assigned counsel compensation plans across the state. Now counties must develop and publish their plans for indigent defense systems to meet criteria set by the Texas Fair Defense Act.

Compensation rates for court-appointed counsel are established by district court judges and vary from county to county. The hourly compensation rates in capital cases range from \$50-\$200 both in- and out-of-court.¹¹ However, many counties do not rely solely on hourly rates. Many counties use fixed rates, and some, including Harris County (Houston), use a combination of fixed and hourly rates. Harris County pays an hourly rate for out-of-court work and a fixed daily rate for in-court work. Lead counsel earns \$100 per hour for out-of-court work with a cap of \$12,000, and co-counsel earns \$80 per hour with a \$9,600 cap. In-court daily fixed rates are event-based. Both lead counsel and co-counsel earn \$400 per day for non-trial court appearances. For the in-court voir dire process, lead counsel earns \$600 per day and co-counsel earns \$500 per day. Finally, for in-court trials, lead counsel earns \$800 per day while co-counsel earns \$700 per day.

Combination System

In two states, Oklahoma and Utah, a combination of the aforementioned systems for determining the compensation rates is used. Both of these states employ an indigent defense system (capital or otherwise) that not all counties are required to follow. Local courts set the rate of compensation in those counties that are not part of the indigent defense system in these states.

¹¹ Based on the figures reported to the Texas Task Force on Indigent Defense. For county-by-county rates, please refer to <http://tfid.tamu.edu/IDPlans/Feeddocuments.asp>.

Oklahoma

The Oklahoma Indigent Defense System (OIDS) is the statewide program responsible for indigent defense representation in 75 of Oklahoma's 77 counties. The majority of cases within the system are handled by attorneys who contract with OIDS. Fifteen counties within the system are part of satellite offices that use salaried staff attorneys. Additionally, OIDS has a specialized division to handle capital cases at trial. For conflict and overload cases, the Executive Director of OIDS sets a statutory rate of compensation and per-case maximums. In capital cases, lead counsel earns an hourly rate of \$60 for out-of-court work and \$80 for in-court work with a maximum per case of \$20,000. Co-counsel earns the hourly rate of \$50 for out-of-court work and \$70 for in-court work with a maximum per case of \$5,000. The per-case maximums can be waived in extraordinary circumstances.

The two counties that do not participate in the Oklahoma Indigent Defense System are Oklahoma County and Tulsa County. Each of those two counties has its own public defender program, and the local courts set the compensation rate for attorneys appointed when the public defender cannot take the case. Tulsa County aligns itself closely with the rates established by OIDS, paying capital counsel \$60 for out-of-court work and \$80 for in-court work, with maximums of \$20,000 for lead counsel and \$5,000 for co-counsel. Oklahoma County also pays its court-appointed lead counsel a maximum of \$20,000. However, counsel in Oklahoma County earn \$50 for out-of-court work and \$65 for in-court work. In cases with extraordinary circumstances, the Oklahoma County Public Defender recommends to the judge that additional funds beyond the maximum be allocated to court-appointed counsel.

Utah

Utah's indigent defense system is determined on a county-by-county basis. Counties elect to set up a public defender system run by the county, contract with individual attorneys, or contract with a legal organization. Currently, all counties in Utah have opted to use some sort of contract model for indigent defense services. Additionally, Utah's Indigent Defense Act allows counties to opt in to the Indigent Capital Defense Trust Fund.¹² As of 2007, 23 of Utah's 29 counties have chosen to participate in the fund. According to Rule 8 of Utah's Rules of Criminal Procedure, at least two attorneys must serve in capital cases. In cases in which the death penalty is a possible punishment but is not sought, the fund pays \$60,000 to be split between counsel; in cases in which the death penalty is sought, the fund pays \$100,000 to be split between counsel. The compensation of attorneys that are part of this system is determined by the Board of the Indigent Capital Defense Trust Fund.

The Federal Model: the Criminal Justice Act

At the federal level, the Criminal Justice Act of 1964 (18 U.S.C. § 3006A) authorizes payment for representation of indigent defendants accused of committing crimes. Under the act,

¹² Two other states – South Dakota and Idaho – have a similar trust fund that counties have the option of paying into for capital (or complex) cases.

each United States District Court is required to develop a plan for furnishing counsel and investigative, expert and other services necessary for adequate representation in trial and appellate proceedings. The Criminal Justice Act (CJA) authorizes three methods for a court to provide counsel to indigent defendants: a Federal Public Defender Organization, a Community Defender Organization (CDO), and a panel of private attorneys.

CJA panel attorneys serve every district in the federal court system. In those districts where there is a Federal Public Defender Organization or a Community Defender Organization, panel attorneys are appointed to handle those cases in which the institutional defender has a conflict of interest -- approximately 25% of all cases. They handle all of the indigent defendant cases in those districts without a CDO or Federal Public Defender Organization.

Pursuant to 18 U.S.C. § 3005, two attorneys must be appointed to federal death penalty trial cases. The compensation of CJA panel attorneys is addressed by 21 U.S.C. § 848(q)(10)(A), which establishes the maximum compensation rate for work in and out of court at \$125. The statute allows for a yearly increase in the rate to be determined by the Judicial Conference. The current rate set by the federal Judicial Conference is \$163 per hour. According to the CJA Guidelines, there is no maximum amount that CJA panel attorneys can earn in capital proceedings.

Conclusion

In 1989, the American Bar Association adopted the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*. The Guidelines were revised in February 2003 to reflect changes in the law and ABA policy. The more current version embodies the current consensus about what is required to provide effective representation in capital cases. The ABA adopted the Guidelines in order to “set forth a national standard of practice for the defense in capital cases in order to ensure high quality legal representation for all persons facing the possible imposition or execution of a death sentence by any jurisdiction.” The revised edition of the Guidelines is available online at: <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/deathpenaltyguidelines2003.pdf>.

Guideline 9.1, which concerns compensation of court-appointed counsel in capital trial cases, is printed below.

GUIDELINE 9.1- FUNDING AND COMPENSATION

- A. The Legal Representation Plan must ensure funding for the full cost of high quality legal representation, as defined by these Guidelines, by the defense team and outside experts selected by counsel.

- B. Counsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation.
 - 1. Flat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases.
 - 2. Attorneys employed by defender organizations should be compensated according to the salary scale of the prosecutor's office in the jurisdiction.
 - 3. Appointed counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with the prevailing rates for similar services performed by retained counsel in the jurisdiction, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.

- C. Non-attorney members of the defense team should be fully compensated at a rate that is commensurate with the provision of legal representation and reflects the specialized skills needed by those who assist counsel with the litigation of death penalty cases.
 - 1. Investigators employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor's office in the jurisdiction.
 - 2. Mitigation specialists and experts employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale for comparable expert services in the private sector.
 - 3. Members of the defense team assisting private counsel should be fully compensated for actual time and services performed at an hourly rate commensurate with prevailing rates paid by retained counsel in the jurisdiction for similar services, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.

- D. Additional compensation should be provided in unusually protracted or extraordinary cases.
- E. Counsel and members of the defense team should be fully reimbursed for reasonable incidental expenses.

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Rates of Compensation for Court Appointed Counsel in Capital Cases at Trial, 2007

State	Hourly Rate		Per Case Maximum	Is Maximum Waivable?	Flat Fee	Authority
	Out of Court	In Court				
Alabama ¹	\$40	\$60	None			Alabama Code § 15-12-21(d).
Arizona	Varies Maricopa County: \$125 Pima County: Lead Counsel: \$75 Co-counsel: \$60		Varies Maricopa County: None Pima County: Lead Counsel: \$15,000 Co-counsel: \$7,500	Yes		Arizona Revised Statute Ann. § 13-4013 (A) grants authority to local court.
Arkansas	\$90-\$110		None			Arkansas Code Ann. § 16-87-211 authorizes the Public Defender Commission to set the rates.
California	Varies Los Angeles: Varies Sacramento: \$150 San Mateo: Lead Counsel: \$125 Co-counsel: \$115		None			California Penal Code § 987.2 grants authority to local courts.
Colorado	\$85 ²		\$15,000	Yes		Rates set by Chief Justice Directive 04-04, per Colo. Rev. Stat. § 21-2-105.
Connecticut	\$75		None			Conn. Gen. Stat. § 51-291(12) grants authority to the State Public Defender.
Delaware	\$60		None			Delaware Code Ann. 29§4065 grants authority to court; Rule 44 of Rules of Criminal Procedure.

¹ In addition to the hourly rate set by statute, pursuant to the *May v. State* counsel may also request an hourly overhead for "expenses reasonably incurred." The average and presumptive hourly rate for overhead costs is \$30, which is almost always granted by the judge.

² This hourly rate excludes travel, which is paid at \$54 per hour plus \$0.33 per mile.

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	Out of Court	In Court				
Florida	N/A		\$15,000	Yes	Yes	Fla. Stat. § 27.5304 sets maximums and states that flat fee amounts “shall be established annually in the General Appropriations Act.”
Georgia	\$95 ³		None			Official Code of Georgia § 17-12-8(b)(9) grants authority to the Georgia Public Defender Standards Council.
Idaho	Varies Ada County (Boise): \$40 \$50		None			Idaho Code § 19-860(b) grants authority to local judge.
Illinois	\$145.39 ⁴		None			725 Illinois Compiled Statutes 124/10
Indiana	\$101		None			Indiana Rules of Criminal Procedure Rule 24.
Kansas	\$150		None			K.S.A. 22-4501 et. Seq. grants authority to Kansas Board of Indigents’ Defense Services.
Kentucky	\$75		\$30,000 per attorney	Yes		Kentucky Rev. Stat. Ann § 31.235 grants authority to the Department of Public Advocacy.

³ Hourly rate may be raised to previous rate of \$125 given sufficient funding.

⁴ While the Illinois Compiled Statutes sets the maximum hourly compensation rate at \$125, it allows that the rate “shall be automatically increased or decreased, as applicable, by a percentage equal to the percentage change in the consumer price index-u during the preceding 12-month calendar year.”

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	Out of Court	In Court				
Louisiana	Varies New Orleans: \$110 Caddo Parish: \$75		None			Louisiana Revised Statutes § 15-144 et. seq.
Maryland	\$50		None			Ann. Code of Maryland Art. 27 § 6(d) grants Public Defender authority to promulgate administrative law.
Mississippi	Varies		\$2,000 plus overhead which are presumptively set at \$25 per hour ⁵	No	Varies	Miss. Code. Ann. § 99-15-17 authorizes local judge; <i>Wilson v. State</i> , 574 So.2d 1338 (1990)
Missouri	N/A ⁶		None			Missouri Rev. Stat. § 600.017 allows PD Commission to approve fee schedule.
Montana	\$120		None			Administrative Rules of Montana Title 2.69.601 authorizes PD Commission to establish rates.
Nebraska	Varies. Range is from \$60-\$100. Douglas County (Omaha): \$65 \$80 Lancaster County (Lincoln): \$85		None			Nebraska Revised Statutes § 29-3905 grants authority to local judge.
Nevada	\$125		\$20,000	Yes		Nevada Rev. Stat. § 7.125

⁵ In practice, judges do not strictly follow the statutory maximum.

⁶ The Missouri State Public Defender has a separate death penalty unit that handles the majority of capital cases. When a conflict arises, the case is transferred to another regional public defender office.

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	Out of Court	In Court				
New Hampshire	\$60 ⁷		\$15,000	Yes		N.H. Constitution Part II, Art. 73A grants authority to the State Supreme Court; New Hampshire Supreme Court Rule 47.
New Jersey	\$75		None			N.J. Statutes Ann. § 2A:158A-7(h) authorizes Public Defender to set rates.
New Mexico	N/A		Lead counsel: \$24,500; Co-counsel: \$12,500	Yes	Yes	New Mexico Statutes Ann. § 31-15-7(11) authorizes Chief Public Defender to formulate a fee schedule.
New York⁸	Pre-notice: Lead counsel: \$100, Co-counsel: \$75; Post-notice: Lead counsel: \$125, Co-counsel: \$100 ⁹		None			December 1998 Order of the New York Court of Appeals, pursuant to N.Y. Judiciary Law § 35-b (5)(a)

⁷ Because the death penalty is pursued so infrequently in New Hampshire, a separate rate for assigned counsel handling capital cases is not established. The rate listed in the table is the same as the assigned counsel rate in felony cases.

⁸ Existing death penalty statute declared unconstitutional by New York's high court in 2004.

⁹ Rates vary depending on whether work is done before the prosecutor announces his/her intention to seek the death penalty (pre-notice), or if the work is done after the prosecutor's decision to seek the death penalty (post-notice).

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State	Hourly Rate		Per Case Maximum	Is Maximum Waivable?	Flat Fee	Authority
	Out of Court	In Court				
North Carolina	Provisional counsel: \$85; All other counsel: \$95		None			General Statutes of North Carolina § 7A-498.5 grants authority to the Office of Indigent Defense Services.
Ohio	Varies State public defender recommends: \$95		\$75,000 ¹⁰	Yes		Ohio Revised Code Ann. § 120.33 grants local board of county commissioners authority to set rate; Ohio Revised Code Ann. § 120.04 authorizes public defender to recommend rates and set per case maximum.
Oklahoma ¹¹	Lead counsel: \$60 Co-counsel: \$50	Lead counsel: \$80 Co-counsel: \$70	Lead counsel: \$20,000 Co-counsel: \$5,000	Yes		22 Oklahoma Statutes § 1355.4 grants authority to the Executive Director of the Oklahoma Indigent Defense System.
Oregon ¹²	Lead counsel: \$55; Co-counsel: \$40		None			Oregon Rev. Statutes § 151.216(f)(C) grants authority to the Public Defense Services Commission.

¹⁰ The maximum rate set by the Ohio Public Defender is the rate at which the office will provide some reimbursement.

¹¹ Rates and maximums apply only to conflict and overload cases within the Oklahoma Indigent Defense System. Tulsa County and Oklahoma County have separate public defender programs.

¹² Rates apply only to cases that do not use contract attorneys; contractors handle the majority of cases in Oregon.

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	Out of Court	In Court				
Pennsylvania	Varies		Varies	Varies	Varies	16 Penn. Statutes § 9960.7 grants authority to trial court judge.
South Carolina ¹³	\$50	\$75	\$25,000	Yes		South Carolina Code § 16-3-26
South Dakota	\$78		None			South Dakota Supreme Court sets rates, which are then incorporated into statute. S.D.C.L. § 23A-40-8
Tennessee	Lead counsel: \$75; Co-counsel: \$60	Lead counsel: \$100; Co-counsel: \$80	None			Tennessee Supreme Court Rule 13 § 3.
Texas	Varies		Varies		Varies	Texas Code of Criminal Procedure Art. 26.05 grants authority to local judge.
	Bexar County (San Antonio): Out of court: \$80; Lead counsel (trial): \$150, Co-counsel (trial): \$140 Dallas County: \$100 El Paso County: Lead counsel (trial): \$50 out of court, \$125 in court; Co-counsel (trial): \$50 out of court, \$100 in court					
Utah	Varies ¹⁴		Varies		\$100,000 per case for attorneys in risk pool	Utah Code Ann. § 77-32-304.5 grants authority to county/municipality.

¹³ While compensation rates are set by statute, judges often raise rates to \$90-\$110 and waive the maximum for “good cause shown.”

¹⁴ All counties in Utah use some sort of contract system for appointment of counsel. Counties also have the option of paying into a risk pool, the Indigent Capital Defense Trust Fund.

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State	Hourly Rate		Per Case Maximum	Is Maximum Waivable?	Flat Fee	Authority
	Out of Court	In Court				
Virginia	\$125		None			Virginia Supreme Court sets rate.
Washington	Varies Recommended by State Bar Committee on Public Defense: no less than \$125 King County: \$75 Pierce County: \$90		Varies	Varies	Varies	RCW § 36.26.090 grants authority to court; RCW § 10.101.030 requires counties to adopt standards including rates of compensation.
Wyoming	Varies: Up to \$60, no less than \$35	Varies: Up to \$100	None			Wyoming Rules of Criminal Procedure Rule 44(e) sets range; Wyoming Code § 7-6-109 grants authority to court.
U.S. Government	\$163		None			21 U.S.C. § 848(q)(10)(A)