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Lancaster County Indigent Defense Advisory Committee: Report on the Costs of Legal Representation

Objective Advantage, LLC

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Table of Contents

I. INTRODUCTION	4
II. COSTS OF LEGAL REPRESENTATION.....	5
INCREASING COSTS.....	5
FACTORS INFLUENCING COSTS.....	5
BREAKDOWN OF FY 2011 COSTS.....	5
III. IMPROVING THE COURT APPOINTMENT PROCESS	7
PROCESS FOR APPOINTING COUNSEL	7
FEES AND COMPENSATION	9
RECOMMENDATIONS	11
IV. OPTIONS FOR CONTROLLING THE FRONT GATES.....	13
IMPROVED INDIGENCE AND ELIGIBILITY DETERMINATIONS	13
DIVERTING CASES.....	17
RECOMMENDATIONS	18
V. OPTIONS FOR ALTERNATE FUNDING STREAMS.....	20
RECOUPMENT AND APPLICATION FEES	20
THE STATE’S CONTRIBUTION TO INDIGENT DEFENSE	22
FILING FEES	24
RECOMMENDATIONS	25
VI. LEGAL SERVICE DELIVERY OPTIONS.....	26
EXPAND THE LANCASTER COUNTY PUBLIC DEFENDER OFFICE	26
ESTABLISH A FELONY CONFLICT OFFICE.....	27
CONTRACTS FOR CIVIL CASES.....	28
ESTABLISH AN OFFICE OF GUARDIAN AD LITEM.....	29
EXPAND THE CONTRACT WITH LEGAL AID OF NEBRASKA.....	30
ESTABLISH A CONTRACT SYSTEM FOR 3(A) PARENT REPRESENTATION	31
RECOMMENDATIONS	31
VII. OPTIONS FOR IMPROVING/CASE MANAGEMENT	32
DISTRICT COURT	32
DISTRICT AND COUNTY COURT	33
JUVENILE COURT	34
RECOMMENDATIONS	37
VIII. SUMMARY OF RECOMMENDATIONS.....	40
PROCESS OF APPOINTING COUNSEL.....	40
CONTROLLONG THE FRONT GATES	41
ALTERNATIVE FUNDING STREAMS	43

LEGAL SERVICE DELIVERY OPTIONS.....43
CASE PROCESSING/CASE MANAGEMENT43
IMPLEMENTATION/EVALUATION.....45
APPENDICES46

I. INTRODUCTION

Lancaster County understands how fundamentally important quality legal services are to the administration of justice, and is committed to providing the quality legal services mandated by our constitution and statutes. The County would also like to provide these services in the most cost effective way. In 2011, the Lancaster County Indigent Defense Advisory Committee was charged with undertaking an assessment of the cost of legal services in Lancaster County.

Recognizing that there are a variety of factors that influence the costs of indigent defense, the Advisory Committee's took a five-part approach to the assessment:

- Identify strategies to improve the court appointment process and the quality of representation.
- Identify strategies to reduce the number of court appointments.
- Identify strategies to expand financial support for indigent defense from other sources.
- Identify cost effective alternate service delivery models.
- Identify and reduce unnecessary inefficiencies in case processing/case management practices.

To identify both the factors that contribute to the rising costs of indigent defense and ways in which the justice system can control costs, focus group discussions were conducted with a variety of justice system stakeholders including: those currently (and formerly) receiving court appointments in Lancaster County; public defenders; city prosecutors; county attorneys; Juvenile Court Judges; County Court Judges; and District Court Judges. The Advisory Committee then reviewed the factors and strategies identified through focus group discussions. When applicable and available, the Advisory Committee compiled and reviewed relevant data and national research regarding proposed cost reduction strategies.

II. COSTS OF LEGAL REPRESENTATION

Increasing Costs

Lancaster County's costs for legal representation are rising. The table below presents Lancaster County expenditures on legal representation from FY 2007 through FY 2011. Total expenditures over the past five years have increased by 19.3%. The 37.2% reduction in the costs of contracts is explained by the fact that in FY 2010, the Lancaster County Juvenile Court ended the majority of their contracts for legal representation for juveniles. While the reduction in juvenile court contracts was expected to cause an increase in the amount spent on legal representation by the Lancaster County Juvenile Court, these costs have surpassed expectations, increasing by 178.5% over the past five years. During the same time period, costs for legal representation in the Lancaster County Court have increased by 10.9% and costs for the Lancaster District Court have increased by 42.5%, while the Lancaster County Public Defender's costs have increased by 13.9%.

Table 1: Lancaster County FY 2007-2011 Costs for Legal Representation

	FY 2007	FY 2008	FY 2009	FY 2010	FY 2011	FY 2007-11 Difference	FY 2007-11 % Change
Contracts	\$1,047,773	\$1,147,698	\$1,242,843	\$975,783	\$657,786	-\$389,987	-37.2%
Juvenile Court	\$440,392	\$367,460	\$338,003	\$682,008	\$1,226,377	\$785,985	178.5%
County Court	\$198,515	\$183,718	\$228,349	\$273,082	\$220,150	\$21,635	10.9%
District Court	\$276,290	\$276,090	\$306,104	\$304,889	\$393,609	\$117,319	42.5%
Public Defender	\$2,902,906	\$3,062,029	\$3,172,603	\$3,252,756	\$3,308,457	\$405,551	13.9%
Total	\$4,865,876	\$5,036,995	\$5,287,902	\$5,488,518	\$5,806,379	\$940,503	19.3%

Factors Influencing Costs

As discussed throughout the report, a variety of factors influence the cost of indigent defense: the number and type of filings (see Appendix A), the number of cases diverted, caseload standards for the Lancaster County Public Defender Office, new crimes created and increased penalties established by the Legislature, the number of people determined indigent, the number of people who waive their right to counsel, the efficiency of court processes, diminishing community mental health resources, relocation of detention facilities, etc. Of most recent concern, is the significant impact that privatization of the child welfare system has had on the amount of time necessary for attorneys representing youth in 3 (a) cases.

Breakdown of FY 2011 Costs

In an effort to better inform this assessment, the Advisory Committee used available data to calculate an approximate cost per case. The table below provides a detailed breakdown of FY

2011 expenditures by level of court and type of case. As a caveat, these tables reflect the costs for cases *invoiced* in 2011 (many cases span over a one year time period). In addition to attorney time, the cost per case also includes costs billed by attorneys (mileage, postage, court reporters, collect calls, interpreters, depositions, etc.). Lancaster District Court paid \$393,609 in expenses for legal representation in FY 2011. \$342,775.32 was spent on 279 criminal cases,¹ representing an average cost per case of \$1,228.59. \$50,833.68 was spent on 70 civil cases representing an average cost per case of \$726.20.

Lancaster County Court paid \$220,150 in expenses for legal representation in FY 2011. \$62,704.51 was spent on 271 felony cases, representing an average cost per case of \$231.38. \$60,054.58 was spent on 197 county misdemeanors, representing an average cost per case of \$304.85. \$55,922.39 was spent on 267 city misdemeanors, representing an average cost per case of \$209.45. \$35,932.22 was spent on cases where a guardian ad litem (GAL) was appointed (102), representing an average cost per case of \$352.28.

Lancaster County Juvenile Court paid \$1,226,377 in expenses for legal representation in FY 2011. \$1,135,883.67 was spent on 953 3(a) cases, representing an average cost per case of \$1,191.90. \$23,679.90 was spent on 3(b) cases, representing an average cost of \$260.22 per case. \$66,768.12 was spent on law violation cases, representing an average cost of \$250.07 per case.

Table 2: FY 2011 Average Costs Per Case

Court	Case Type	Number of Cases	Costs	Average Cost Per Case
District				
	Criminal	279	\$342,775.32	\$1,228.59
	Civil	70	\$50,833.68	\$726.20
	Total	349	\$393,609	\$1,127.82
County				
	Felony	271	\$62,704.51	\$231.38
	County Misdemeanor	197	\$60,054.58	\$304.85
	City Misdemeanor	267	\$55,922.39	\$209.45
	GAL Cases	102	\$35,932.22	\$352.28
	Other	-	\$5,536.67	--
	Total	837	\$220,150	\$263.02
Juvenile				
	3(a)	953	\$1,135,883.67	\$1,191.90 ²
	3(b)	91	\$23,679.90	\$260.22
	Law Violations	267	\$66,768.12	\$250.07
	Total	1,211	\$1,226,377.00	\$1,012.70

¹ Criminal cases include felonies, revocations of probation and post-conviction representation.

² There is an average of 1.5 attorneys per 3(a) case. The average cost per case, per attorneys is \$794.60.

III. IMPROVING THE COURT APPOINTMENT PROCESS

PROCESS FOR APPOINTING COUNSEL

Options discussed in this section attempt to identify ways to improve the court appointment process and quality of legal representation provided in Lancaster County.

Systematic Appointment Process: The majority of court appointed attorneys who participated in focus group discussions described the court appointment process as not transparent or “a complete mystery.” It is not clear how attorneys get on the list (or whether there is a list) or under what circumstances attorneys are removed from the list. At the same time, some appointed attorneys described the system as open to favoritism (the perception that certain attorneys are only appointed by certain judges, or that some attorneys receive a substantial number of appointments while others receive only occasional appointments). Although attorneys indicated that the current system is neither transparent nor systematic, attorneys continually affirmed that judges need discretion in order to appoint attorneys appropriately suited for certain cases.

Data regarding court appointments does suggest room for improvement. For example, seventy-nine attorneys were appointed by the Lancaster County Court in 2011, however, there was a large difference in the number of attorneys appointed by each Judge (see Table below), indicating that Judges may not be operating from the same list of attorneys.

Table 3: FY 2011 Lancaster County Court Appointments

Judge	Number of Appointments	Number of Attorneys Receiving Appointments
Doyle	192	55
Foster	124	46
Lovell	82	39
Pokorny	155	30
Strong	14	9
Yardley	160	53
Rouse	8	8
Total	735	79

When comparing who received County Court appointments with the “list” of attorneys eligible for court appointment (provided by the Lancaster County Clerk Magistrate), there were nineteen attorneys on the list who did not receive a County Court appointment in 2011, and nine attorneys who were not on the list, but received County Court appointments in 2011. This finding may suggest the need for a more systematic method in the implementation of the court appointment process.

Table 4: To what extent do appointments coincide with the “list” for County Court?

Number of Attorneys on the List Who Were Never Appointed	19
Number Appointed Who Were Not on the List	9

Indeed, the need for a more transparent court appointment process has been documented as a statewide issue.³ In November of 2011, the Nebraska Supreme Court and Nebraska State Bar Association established a Joint Ad-Hoc Committee on Court Appointments to develop statewide rules establishing an objective, transparent and systematic process of court appointments, to ensure effective counsel for those unable to afford an attorney. This Ad-Hoc Committee will conclude its work in 2012, at which time, Lancaster County’s Indigent Defense Advisory Committee should review any proposed rules and provide relevant feedback.

Collaboration on Felony Appointments: The majority of felony court appointments are made by the Lancaster County Court Judges but then many of these cases are bound over to the District Court. According to focus group interviews, there are some instances in which an attorney appointed by the County Court is removed by the District Court due to concerns about an attorney’s ability to provide effective representation. Or more commonly, the District Court bench will communicate with the County Court bench, discouraging future appointments of particular attorneys for certain felony matters. Stakeholders agreed with the recommendation that the District Court Judges should work with the County Court Judges on the development of a list of attorneys approved for appointment in felony cases.

Independence of Judiciary from the Court Appointed Process: Some court appointed attorneys suggested that the Judiciary should be removed from the court appointment process for varying reasons: 1) a perception among attorneys that if they appeal their bill, they will no longer get court appointments; 2) a perception among attorneys that if they work too hard (and submit too large of a bill) they will not continue to get court appointments; and 3) a perception among attorneys that some attorneys continually make certain placement recommendations (in an effort to please a judge), in order to continue receiving court appointments.

This recommendation is consistent with the first principle of the American Bar Association’s *Ten Principles of a Public Defense Delivery System*: “The public defense function, including the selection, funding, and payment of defense counsel is independent. The public defense function should be independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel. To safeguard independence and to promote efficiency and quality of services, a nonpartisan board should oversee defender, assigned counsel, or contract systems. Removing oversight from the

³ *Report to the Nebraska Supreme Court on Indigent Defense Systems and Fee Structures*. (2006). Nebraska Minority Justice Committee.

judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense.”⁴

Nebraska’s statutory framework, however, clearly places the selection and payment of defense counsel as the responsibility of the Judiciary, thereby limiting Nebraska’s ability to fully comply with this principle (although some duties are occasionally delegated).

FEES AND COMPENSATION

Hourly Rates for Appointed Counsel: The District Court rate of \$75 per hour has been in place since 2005. The County Court rate of \$50 per hour has been in place since 1989. The Juvenile Court rate of \$65 per hour has been in place since 1998. There is strong consensus among appointed counsel, public defenders, prosecutors and judges that the current rates paid in Juvenile, County and District court are not adequate (e.g. attorneys appointed in County Court make as much as court interpreters per hour). Furthermore, practitioners noted that by making attorneys pay some costs out-of-pocket, the hourly rate is even lower than stated. Several practitioners argued that if the rates were improved, the pool of attorneys willing to take court appointments would improve.⁵ When asked, Judges, indicate that while low, the current rates have yielded a pool of competent attorneys willing to accept appointments. Given the current economic climate, it is not recommended that the hourly rate be increased at this time. However, if additional funding became available (e.g., if the state contribution towards indigent defense were increased), rates should be increased to a reasonable level.

In-Court vs. Out-of-Court Hourly Rates: Some jurisdictions utilize different rates for in-court vs. out-of-court attorney time (for example, \$70 for in-court time and \$50 for out-of-court time). There was some support for this concept among the Juvenile Court Judges, who perceive there to be an increased amount of out-of-court time for attorneys caused by privatization of the child welfare system. It was suggested that raising the hourly rate for in-court work and decreasing the hourly rate for out-of-court work could create substantial savings.

The National Legal Aid and Defender Association’s *Standards for the Administration of Assigned Counsel Systems* specifically states that, “Attorneys should be compensated at an hourly rate, with no distinction between rates for services performed in and outside of court.”⁶ Stakeholders suggested that the adoption of different rates for in-court vs. out-of-court work might motivate some attorneys to spend more time in court on matters that could be handled outside of the courtroom or to spend less time on out-of-court matters, thereby

⁴ American Bar Association. (2002) *Ten Principles of a Public Defense Delivery System*.

⁵ The assertion that hourly rates impact the pool of competent attorneys accepting appointments and the quality of work provided is supported by research by the Bureau of Justice Assistance (2000).

⁶ National Legal Aid and Defender Association. *Standards for the Administration of Assigned Counsel Systems: Standard 4.7.4 Method of Compensation*.

effecting the quality of representation. Given the consensus among stakeholders that the hourly rates currently paid in Lancaster County are not adequate, the Advisory Committee does not recommend adoption of an in-court vs. out-of-court rate.

Billing Guidelines: Currently, there are no clear guidelines (nor continuity from the County to District Courts) regarding the activities for which the courts will reimburse appointed counsel (travel time, wait time, etc.) and which ancillary services or costs (mileage, postage, court reporters, collect calls, interpreters, depositions, etc.) are reimbursable or require prior approval. Judges recognized that these “costs” billed by attorneys to the county are a small percentage of total costs (and are therefore not a target as a cost savings measure);⁷ however, Judges believe that providing guidelines (agreed upon by the County and District Judges) would be more fair to attorneys and may save judicial time in reviewing bills.⁸

Reviewing of Bills: Very few of the attorneys participating in focus group discussions had had their bills reduced by a judge. However, the perception exists that there are likely a few attorneys manufacturing bills/“milking the system.” Judges reported that bill reductions are typically in reaction to bills from new attorneys who are billing the court for their “learning curve,” or for obvious instances where attorneys spent more time than necessary. Juvenile court practitioners reported feeling that their bills are now more heavily scrutinized in juvenile court (e.g., the perception that three different staff members are reviewing each bill) and questioned whether these efforts were cost efficient. Juvenile court judges indicated that the different levels of bill review have been effective in identifying miscalculations and questionable charges.

Billing Software: Case management systems are being used by other jurisdictions to manage court appointments. The software allows attorneys to submit invoices electronically and allows the County to pay them electronically. The system would also provide greater uniformity to billing practices; reduce staff time spent on reviewing bills (the system would remove the potential for calculation errors, and could flag any duplicate billings or instances where fees appear high for particular types of cases); and improve court administrators’ ability to identify trends, project costs, and estimate the impact of policy changes. Currently, it is even difficult to identify the number and types of cases the County is being invoiced for each fiscal year for court appointed legal representation.

Justice Works, the company that built the Lancaster County Attorney and Lancaster County Public Defender’s Case Management Systems, provides this service. Justice Works could

⁷ For example, an analysis of FY 2011 District Court expenditures indicates that these “other/ancillary costs” comprise only 4% of total expenditures.

⁸ Billing guidelines were recently adopted for Lancaster County Juvenile Court. Practitioners expressed dissatisfaction with the way their new billing guidelines were communicated. Should the County and District Courts adopt guidelines, thought should be given to including appointed counsel in the development of the guidelines and/or how the guidelines will be communicated to the pool of attorneys accepting court appointments.

work with each level of court to build a system specific to Lancaster County's needs, assist with conversion of currently open cases, provide training, and provide an unrestricted number of installations with its license.

A preliminary estimate from Justice Works indicated that it would cost \$4,000 to build the system for Lancaster County. In year one, there would be a \$3 cost per case for converting active cases to the case management system. There would also be a \$3 cost per case for each new case filed (estimated at between 2,000 and 2,500 new cases per year, representing an on-going cost to the County of between and \$6,000 and \$7,500 per year).⁹

Recommendations

1. Once available, the Lancaster County Indigent Defense Advisory Committee should review the Nebraska Supreme Court and Nebraska State Bar Association Joint Ad Hoc Committee's proposed rules for establishing an objective transparent and systematic appointment process.

Following that review, each court should establish a list of attorneys to be considered for appointment and a process by which names will be added or removed from the list. Once the lists are established, assignments should be made in an orderly way to avoid patronage or its appearance, and to assure the fair distribution of appointments among all attorneys deemed qualified and willing to accept appointments. Where the nature of the charges or other circumstances warrant, judges should appoint an attorney based on his or her special qualifications to serve in the case. That is, discretion should be used when it will protect the defendant's constitutional right to the effective assistance of counsel and when it is in the interest of the efficient administration of assignments.

In the interim, District Court Judges should provide feedback to the County Court Judges on establishing a list of attorneys approved for appointment in felony cases.

2. In an effort to improve transparency (rather than as a cost savings measure), the County and District Court Judges should develop billing guidelines (for continuity across their levels of court) regarding what activities (wait time, travel time, etc.) and what ancillary services or other costs (depositions, experts, etc.) the courts will reimburse for, or require prior approval for reimbursement. Billing guidance may also be used to encourage/provide guidance on the use of paralegals.

⁹ Douglas County is also considering case management/billing software. If Lancaster and Douglas County collectively approached Justice Works, the counties may be eligible for a price break on the cost per case that occurs when a jurisdiction reaches a certain amount of cases.

3. The current rates for court appointed counsel paid in Lancaster County Juvenile, County and District Court are not adequate. Given the current economic climate, it is not recommended that the hourly rate be increased at this time. However, if additional funding became available (e.g., if the state contribution towards indigent defense were increased), priority should be given to increase the rates to a reasonable level, as recommended by the Lancaster County Indigent Defense Advisory Committee.
4. It is not recommended that the County adopt an in-court vs. out-of-court rate for assigned counsel.
5. Lancaster County should acquire billing software for its appointed counsel system in order to allow for: electronic invoicing and payment, greater uniformity in billing practices; a reduction in staff time spent on reviewing bills; a reduction in the time that attorneys wait from submission to payment; and improvement of the courts' ability to identify trends, project costs, and estimate the impact of policy changes.¹⁰

¹⁰ Billing software can be built to comply with any billing guidelines that might be adopted (see Recommendation 2).

IV. OPTIONS FOR CONTROLLING THE FRONT GATES

Options discussed in this section attempt to identify ways to reduce the need for legal representation/court appointed counsel by improving indigence and eligibility determinations, clarifying the right to counsel for custodians, and diverting cases.

IMPROVED INDIGENCE AND ELIGIBILITY DETERMINATIONS

Determining Indigence: Stakeholders indicated that the “front gates” could be controlled by improved indigence determinations. Prosecutors and defense counsel indicated that the majority of judges do a good job of only appointing counsel in cases where there is a potential for jail time, but felt that there is no clear mechanism in place to make an informed decision about indigence, leading to the perception that a percentage of defendants who receive counsel would not “qualify” if standards were in place.

Many stakeholders recalled Lancaster County’s Indigency Screener Project (circa 2002), noting that there is a cost/benefit component to enhancing efforts to make informed indigence determinations (both the administrative costs of a formal system, and the increased time in court if judges were to apply additional effort to determining indigence).¹¹ While institutionalizing a formal screener position is not recommended, it is recommended that a form to assist with indigence determinations be piloted, relying on several simple questions that would automatically qualify someone as indigent (e.g., if they are receiving state aid, are at 125% of the federal poverty guidelines, etc.) or flag someone for further questioning by the Judge (see Appendix B).

Concerns have been voiced about how much additional court time it would take to implement even a brief indigence determination form. In discussions with the County Court Judges, dissemination and collection of the form could potentially be handled by the bailiff, but should be piloted in one courtroom first to assess the impact and identify any barriers to successful implementation. Questions have also been posed about implementation of the indigence determination form for in-custody defendants, and the need to coordinate implementation with jail staff.

In addition to better informing indigence determinations, the adoption of an indigence determination form may improve the County’s efforts to recoup fees in instances where it is later determined that a defendant has the means to pay for their representation (see Chapter V). Adoption of a uniform indigence determination form may also enhance trust and confidence in the courts by adding uniformity (judges asking the same questions of defendants) and transparency to this subjective process. Currently, County Court Judges are

¹¹ Neeley and Tomkins (2007). “*Evaluating Court Processes for Determining Indigency*.” *Court Review: The Journal of the American Judges Association*, 43.

appointing counsel at very different rates, from 11.2% to 26.1% (see Table below).

Table 5: County Court Appointments by Judge

Judge	Felony	County Misdemeanor	City Misdemeanor	Total Number of Appointments	Percentage of Total Appointments
Doyle	76	19	97	192	26.1%
Foster	67	15	42	124	16.9%
Lovell	44	9	29	82	11.2%
Pokorny	13	130	12	155	21.1%
Strong	1	0	13	14	1.9%
Yardley	68	23	69	160	21.8%
Rouse	2	1	5	8	1.1%
Total	271	197	267	735	
Percentage	36.9%	26.8%	36.3%		100%

It is difficult to estimate the impact that improved indigence determinations will have on the number of court appointments (because we do not currently know at what rate defendants in Lancaster County who request court appointed counsel receive it). Prior national research estimates that 90% of people who apply for indigence status are found to be indigent.¹² Based on FY 2011 statistics, if 10% of those receiving court appointed attorneys were instead found ineligible, it would represent approximately \$48,000 in savings across the county and district court).¹³

Requesting Jail Time: County Court Judges indicated that their ability to make determinations regarding court appointed counsel would be improved if city prosecutors knew at the time of arraignment whether or not they would be asking for jail time. When this option was discussed with the City Prosecutor’s Office it was explained that the decision of whether or not to request jail time is not always made by the time of arraignment because often the charging attorney is different than the attorney who ultimately prosecutes the case. However, the City Prosecutor’s office indicated that by having the criminal history available at the time of review and by adopting a form to indicate the likelihood of jail time (e.g., three options: jail time likely, jail time a possibility, and no jail time) their office could prompt prosecutors to have these decisions ready at the time of arraignment. Judges would not appoint counsel if jail time is not likely (understanding that if circumstances change, counsel could be provided at a later date).

Jail Sentences/Waiverable Offenses: When an offense carries the possibility of jail time, the right to a court appointed attorney is triggered. Some jurisdictions have reviewed low-level

¹² National Center for State Courts, 2007 and Washington Office of Public Defense (2007).

¹³ The Lancaster County Juvenile Court utilizes a form to assess indigence in 3(a) parent representation and for representation in law violations and 3(b) cases.

misdemeanor crimes and city infractions to reconsider whether jail time is still an appropriate penalty.¹⁴ Other jurisdictions have examined these low level offenses and opted to make them waivable. Specific crimes identified during these discussions included: leaving the scene of an accident, maintaining a disorderly house, minor in possession, open container in public, trespassing, unsightly furniture on porch, dog at large, and loud party.

Among defense counsel there is support for examining whether certain offenses should be reviewed to determine if they could be made waivable or whether they should be punishable by jail time. Defense counsel indicated that two important considerations should inform this process: 1) whether these offenses are enhance-able or non-enhance-able; and 2) whether or not these offenses have collateral consequences about which defendants need to be advised. The City Prosecutor's Office indicated that with many of these low level offenses, jail time is very unlikely and so counsel should perhaps not be appointed in the first place.

These discussions prompted the question of whether the municipal code could be re-written so that jail time would not be a possible sanction. Under this scenario, if a charge was filed by the city prosecutor there would not be a possibility for jail time, and counsel would not be appointed. If the charge was filed by the county attorney and jail time was a possibility, counsel would be appointed if the defendant was determined indigent. The legality of this concept, however, is not clear.

Right to Counsel for Non-Custodial Parents and Parents Against Whom There are No Allegations Made: Nebraska statutes are unclear about whether there is a right to counsel for non-custodial parents in abuse and neglect cases or parents against whom no allegations are made in the petition. More specifically, Neb. Rev. Stat §43-279.01 states that "(1) When the petition alleges the juvenile to be within the provisions of subdivision (3)(a) of section 43-247 or when termination of parental rights is sought pursuant to subdivision (6) or (7) of section 43-247 and the parent or custodian appears with or without counsel, the court shall inform the parties of the: (a) Nature of the proceedings and the possible consequences or dispositions pursuant to sections 43-284, 43-285, and 43-288 to 43-295; (b) Right to engage counsel of their choice at their own expense or to have counsel appointed if unable to afford to hire a lawyer;" And Neb. Rev. Stat §43-245 indicates that: (14) Parent means one or both parents or a stepparent when such stepparent is married to the custodial parent as of the filing of the petition; (15) Parties means the juvenile as described in section 43-247 and his or her parent, guardian, or custodian." Stakeholders questioned whether a statutory change should be explored to clarify whether (or under what circumstances) non-custodial parents have a right to a court appointed attorney or if someone is not the "father" but the mother's boyfriend and there are allegations made against that person as a custodian of the child or children. For example, should counsel be appointed for an alleged parent when paternity has

¹⁴ National Association of Criminal Defense Lawyers. (2009). *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts*.

not been established? Should counsel be appointed when there are no allegations against the parent (non-custodial or otherwise)? It is estimated that this type of appointment occurs in approximately 250+ cases per year. If statutory clarification reduced the need for these types of appointments in even half of those cases, it is estimated that this legislative change could save the County approximately \$148,875 (125 fewer appointments * \$1,191 average expense in parent representation over the life of the case in 3(a) cases = \$148,875).

3b/Ungovernable Cases: In addition to cases assigned to the Lancaster County Public Defender and private contractors, Lancaster County spent \$23,679.90 on appointed counsel for 3(b) cases (\$16,631.15 in attorney representation and \$7,048.75 in GAL representation). While the statute is clear that counsel should be provided in these cases (Neb. Rev. Stat. §43-279), several stakeholders questioned whether a statutory change should be explored to exclude these cases from being eligible for court-appointed counsel.

Table 6: Number of 3(b) filings from 2001-2011

2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	Percentage Increase
107	94	153	177	180	147	206	309	226	304	469	338%

Many stakeholders voiced opposition to this proposal because although considered less serious than a law violation, status offenders can receive placements outside the home and in staff secure settings (in fact by removing the right to counsel in these cases, the County could potentially see increased costs for out-of-home and staff secure placements). Moreover, “ungovernable” cases are typically filed by request of the parent, presenting at the outset, a situation where the parent and juvenile are at conflict, making it fundamentally unfair to deprive a juvenile of an advocate in those type cases. It is therefore, not recommended that the County explore this type of statutory change.

The number of truancy filings has increased drastically in recent years due to a law change requiring schools to refer youth with 20 absences to the County Attorney.¹⁵ Some stakeholders suggested that rather than denying counsel in these cases, more could be done to screen out (e.g., in instances where youth reach 20 absences due to documented health reasons) or divert cases,¹⁶ so that attention could be focused on cases where absenteeism truly requires court involvement.

¹⁵ LB 800 (2010).

¹⁶ The Lancaster County Attorney’s Office indicated that they are currently exploring diversion options for truancy cases.

DIVERTING CASES

Increasing Pretrial Diversion: Over the past four years, admissions to adult pretrial diversion have decreased by 14.4% and have decreased by 20.8% for juvenile diversion. When asked about the decreased use of diversion, the Lancaster County Attorney's Office indicated that the diversion assessment process that was recently established at the juvenile court level has decreased juvenile diversion by screening out youth with risk scores so low, that diversion was not necessary.

Table 7 Admissions to Pretrial Diversion

	2008	2009	2010	2011	Percent Change
Adult	2,034	1,941	1,652	1,742	-14.4%
Juvenile	891	762	680	705	-20.8%

Stakeholders uniformly agree that Lancaster County offers strong diversion programming. Cases that are offered pre-trial diversion do not require legal representation (either a public defender or appointed counsel). Stakeholders urged the Lancaster County Attorney's Office to expand diversion opportunities by considering the following:

- The minimum financial limit of \$10,000 in restitution was set years ago and should be adjusted for inflation.¹⁷
- The current approach to diversion is "one bite at the apple". Several stakeholders urged consideration of any/all of the following:
 - allowing diversion once at the misdemeanor level and once at the felony level (as was the former policy of the Lancaster County Attorney's Office);¹⁸
 - allowing diversion a second time if sufficient time had passed and if the category of offense is different.
- Most non-violent offenses should be considered for diversion.
- Mental health and truancy diversion options should be developed.¹⁹

If 100 more cases were diverted per year at the juvenile and adult levels, this would represent approximately \$56,000 in savings for the county. Approximately \$26,000 in attorney fees at the juvenile court level (the typical juvenile law violation case takes 4 hours of attorney time * \$65 per hour * 100 cases = \$26,000) and approximately \$30,000 in attorney fees at the county court level (the typical county filed misdemeanor requires 6 hours of attorney time * \$50 per hour * 100 cases = \$30,000).

DUI Diversion: Several stakeholders indicated that a DUI diversion program would save the County considerable resources (not only in reduced costs for legal representation but diversion would result in fewer jury trials, leading to additional cost savings and system

¹⁷ The Lancaster County Attorney's Office indicated that the current rate is reasonable, citing the fact that Douglas County's financial limit for diversion is only \$6,000.

¹⁸ It is estimated that 80% of juvenile diversion programs allow youth to participate in diversion more than once.

¹⁹ Representatives from the Lancaster County Attorney's Office indicated that they are currently exploring the possibility of truancy diversion.

efficiencies). Unfortunately, this type of diversion program is now prohibited by law.²⁰ Many stakeholders described the success of Sarpy County's DUI diversion program (which was grandfathered in and was therefore not dissolved by the statutory change), heralding its effectiveness and ability to achieve cost-savings for the County.

Supporting Community Mental Health Resources: The majority of justice system stakeholders agree that a decrease in community mental health services will directly lead to an increase in juvenile and criminal justice system filings.²¹ It is therefore recommended that Lancaster County support mental health resources in the community as a way to decrease (or prevent an increase) in justice system filings.

Recommendations

1. A form to assist with indigence determinations should be piloted, relying on several simple questions that would automatically qualify someone as indigent (e.g., if they are receiving state aid, or are at 125% of the federal poverty guidelines, etc.) or flag someone for further questioning by the Judge. In County Court, the form would be disseminated by the bailiff (or County Corrections for in-custody defendants participating in video arraignments) and filled out, signed and sworn to by the defendant. In addition to better informing indigence determinations, the adoption of an indigence determination form may enhance trust and confidence in the courts by adding uniformity (judges asking the same questions of defendants) and transparency to this subjective process and may improve the County's efforts to recoup fees when appropriate. Implementation of the form should be piloted in one courtroom initially, to assess the impact and identify any barriers to successful implementation (thought will also need to be given regarding in-custody defendants).
2. The City Prosecutor's Office should adopt a process by which criminal history is available at the time of initial review and charging and adopt a form to prompt prosecutors to indicate the likelihood of jail time (jail time likely, jail time a possibility, and no jail time) so that the decision about whether to request jail time is ready at the time of arraignment. Judges would not appoint on cases where jail time is not likely (with the understanding that if circumstances change, appointment of counsel could be reassessed).
3. The County should explore a statutory change to clarify whether (or under what

²⁰ Neb. Rev. Stat §29-3604.

²¹ Research has established a link between mental health resources and the criminal/juvenile justice system involvement. See Grisso, Thomas (June, 2007). "Progress and Perils in the Juvenile Justice and Mental Health Movement." *American Academy of Psychiatric Law* 35:2:158-167. Indiana State Bar Association Civil Rights of Children Committee (2004). *Official Report and Recommendations Children, Mental Health and the Law Summit*. Kutcher, Stanley and Ainslie McDougall. (2009). "Problems with access to adolescent mental health care can lead to dealings with the criminal justice system." *Pediatric Child Health*, 14(1): 15-18.

circumstances) non-custodial parents, parents against whom there are no allegations filed, or even custodians of children who have no legal relationship to the children should have a right to a court appointed attorney.²²

4. The County should ask the Nebraska Legislature and the Lincoln City Council to study the penalties for low-level misdemeanor crimes and city ordinance violations to determine whether jail time is a necessary penalty to protect public safety, or if the offense could effectively be addressed as a waiverable offense or by a fine.
5. The Lancaster County Attorney's Office is encouraged to expand diversion opportunities by considering the following:
 - The minimum financial limit of \$10,000 in restitution was set years ago and should be adjusted for inflation.
 - The current approach to diversion is "one bite at the apple". Based on stakeholder feedback it is recommended that the County Attorney's Office consider the following:
 - Allow diversion once at the misdemeanor level and once at the felony level (as was the former policy of the Lancaster County Attorney's Office);
 - Allow diversion a second time if sufficient time had passed and if the category of offense is different.
 - Expand eligibility so that most non-violent offenses are considered.
 - Mental health diversion and truancy diversion should be established.
6. The Lancaster County Board should examine the utility/feasibility of asking the Nebraska Legislature to revise Neb. Rev. Stat. § 29-3604 to allow counties (other than Sarpy) to offer DUI diversion as a way to both enhance public safety and provide substantial cost savings for the County.
7. Lancaster County should support community mental health resources as a way to reduce justice system filings.

²² It is estimated that these type of appointments occur in approximately 250+ cases per year.

V. OPTIONS FOR ALTERNATE FUNDING STREAMS

Recoupment and Application Fees

Since the 1990s, many states have tried to trim their criminal defense budgets by shifting the costs of such services back to the consumers: indigent criminal defendants. Today, cost recovery mechanisms take two primary forms: (1) recoupment, a court order imposed at the conclusion of a case for the defendant to pay an amount reflecting the actual cost of attorney's fees, and (2) contribution (sometimes referred to as "application fees," "co-pays," "user fees," or "administrative" or "registration" fees), a fixed sum imposed at the time of appointment.²³

Recoupment

"Recoupment" means that the defendant, respondent, or some responsible person is ordered at the termination of the court proceedings to repay the County for the representation that was provided. In Lancaster County this happens only occasionally, when it has been determined that a defendant, who was appointed counsel, actually has the means to pay for their representation.

While all of the Lancaster County stakeholders could recall instances of a defendant receiving court appointed counsel when it was likely that they would be able to pay, recoupment occurs only occasionally because: 1) no system stakeholder is actively looking for these cases; and 2) there is no clear mechanism in place for initiating the process when it does come to light -- neither judges, prosecutors, public defenders nor appointed counsel feel that it is appropriate for them to initiate this process (for example, it would be unethical for prosecutors to deny a defendant of their right to counsel, it would be inappropriate for public defenders/appointed counsel to either inform the court or initiate a recoupment process given their attorney/client relationship, etc.).

Recoupment, by definition, should not be sought until the conclusion of the case and should not exceed the amount spent by the County to provide representation. Information indicating that a defendant may have the means to pay typically comes to light from the pre-sentence investigations conducted by probation. When information regarding the ability to pay comes to light, a process to initiate recoupment should be in place. It has been suggested that at the conclusion of the case, civil attorneys from the Lancaster County Attorney's Office could seek recoupment from the judge. Or that judges themselves could order recoupment.

The Committee is not suggesting that administrative time be devoted to "seeking out" defendants with the ability to pay, as the savings created by recouped costs must be weighed

²³ Wright, Ronald F. and Logan, Wayne A., "The Political Economy of Up-Front Fees for Indigent Criminal Defense." *William & Mary Law Review*, Vol. 47, 2006; FSU College of Law, Public Law Research Paper No. 237; Wake Forest Univ. Legal Studies Paper No. 05-19; William Mitchell Legal Studies Research Paper No. 27. Available at SSRN: <http://ssrn.com/abstract=805426>

against the increase in administrative time. However, a mechanism should be in place to recoup costs when appropriate. As is discussed in previous chapters, the need to recoup the costs of legal representation will likely be diminished by improving the indigency determination process on the front end. Additionally, the adoption of an eligibility form whereby defendants swear to their financial status will provide grounds for recovering costs, when documentation of adequate resources comes to light.

Application Fees

Currently, laws in many U.S. jurisdictions authorize or compel judges to impose a fee on indigent criminal defendants who seek appointed counsel. The laws condition appointment of counsel on payment of a fee, in amounts ranging from approximately \$10 to \$500. Depending on statutory specifics, the fee is collected by the court, or the public defender or other entity that screens defendants for counsel eligibility. Consistent with accepted constitutional limits, none of the application fee provisions permit counsel to be denied if a defendant fails to pay the required fee, and the great majority of states allow trial judges to waive fees when a defendant is unable to pay.²⁴

States are also free, however, to condition appointment of counsel on future payment of the application fee and to inform defendants how collection of that fee will happen. In Delaware, for instance, a defendant who is unable to pay the prescribed \$50 fee must report to the Commissioner of Corrections for directions on how to discharge the amount by means of work.²⁵ In Minnesota, the fee is subject to the Revenue Recapture Act, allowing the state to garnish wages, seize property, file adverse credit bureau reports, and impound vehicles.²⁶ Other coercive collection techniques include both the threatened revocation of probation and the possibility of sentence enhancement in the event of nonpayment.²⁷

The adoption of application fees is often controversial. In focus group discussions, Lancaster County justice system stakeholders were divided on the issue, identifying the reasons most cited by the literature nationally.²⁸ Opponents of the application fee argued that:

- The application fee would have a chilling effect on the right to counsel—that the imposition of a fee will discourage some from seeking court appointed counsel, thereby increasing the number of defendants/juveniles proceeding without counsel (which arguably makes the judicial system less efficient and is not in the interest of the fair administration of justice).
- The total revenue that could be recovered under such a program would be negligible, particularly if additional administrative costs are necessary to assess indigence and

²⁴ *Supra*, note 23.

²⁵ DEL. CODE ANN. tit. 29, § 4607.

²⁶ MINN. STAT. § 270.A.03.

²⁷ Southern Center for Human Rights, *“If You Cannot Afford a Lawyer...”: A Report on Georgia’s Failed Indigent Defense System*, 41-42 (2003).

²⁸ *Supra*, note 23.

collect revenue.

- The perception that defendants are already being “nickel and dimed” with other court costs, probation fees, etc. Stakeholders would prefer that the defendant could pay the required fees or restitution.
- The perception that if fees were in place, that they would constantly be waived, thereby not generating the revenues that would be expected.
- Establishing an application fee would require a statutory change, and therefore the debate on application fees would become a statewide rather than countywide issue.

Proponents of the application fee argued that:

- As long as there is a waiver provision for those who clearly cannot afford the fee, there will be no chilling effect on the right to counsel.
- Although the majority of clients could not afford an attorney, a substantial percentage could likely partially contribute to their representation.
- The application fee may generate substantial sums and should be explored.
- Clients may be more invested in the process if they are contributing to the cost of their representation (and allay the unfounded fear that he or she is not being provided with a “real lawyer”).

Research by the Spangenberg Group (2002) on the effectiveness of application fees as a revenue source for indigent defense has produced mixed results. Of the 28 jurisdictions reviewed, those programs which had data on fee collection rates reported collection rates from only 6 to 20%, suggesting, that “application fees should not be implemented with the expectation that the revenue they produce will be a panacea for indigent defense underfunding problems.”²⁹

The State’s Contribution to Indigent Defense

Nebraska assesses an “indigent defense fee” as part of the court-filing fee through Neb. Rev. Statue §33-156, which requires that \$3 on each case filed be remitted to the State Treasurer and credited to the Nebraska Commission on Public Advocacy Operations Cash Fund. The Nebraska Commission on Public Advocacy was created in 1995, pursuant to LB 646, to provide property tax relief to counties by having the state pay the majority of the legal costs for indigent defendants, including juveniles, who are charged with first-degree murder, violent felonies and drug offenses, at trial, on direct appeal, and in post-conviction actions.³⁰ The Commission is court appointed in counties that have no public defender, that have a conflict in their public defender office, or in counties needing assistance in representation. Counties pay nothing for legal services and related expenses when the Commission is appointed which, in turn, results in property tax relief to such counties. It is estimated that in 2010, the Commission on Public Advocacy saved over \$7,500,000 in local property tax dollars

²⁹ The Spangenberg Group (2002). *Public Defender Application Fees: 2011 Update*. Prepared on behalf of the American Bar Association at page 31.

³⁰ *The 2010/2011 Annual Report of the Nebraska Commission on Public Advocacy*.

on murder cases alone and approximately \$1,100,00 in fees and expenses for representation in serious violent and/or drug related felonies.³¹ The Commission on Public Advocacy is certainly a valuable asset for counties (including Lancaster) and should continue to be supported.

Funding for the Nebraska Commission on Public Advocacy is currently the only state contribution towards indigent defense (estimated at 5% of all funds spent on indigent defense statewide). Compared to other states, the state of Nebraska contributes very little to indigent defense. Nationally, there are 25 states whose indigent defense systems are 100% funded by the state, 5 states receive more than 50% of their funding from the state, 2 states are 100% county funded, and 18 states are more than 50% county funded (including Nebraska).³²

Table 8: 2008 State and County Expenditures on Indigent Defense

100% State Funded	More than 50% State Funded	100% County Funded	More than 50% County Funded
25 States	5 States	2 States	18 States

In fact, there are only 4 states where the state contribution to indigent defense is less than Nebraska's: Utah (0%) and Pennsylvania (0%) which are 100% county-funded systems, and Arizona (1%), and Nevada (0.7%).³³

Table 9: Rank of the 18 States Where the State Contribution to Indigent Defense is Less than 50%

State	Percent State Funding	Rank of State Contribution in states that are primarily County Funded
Arizona	1%	17
California	10.3%	11
Georgia	37.2%	2
Idaho	11.4%	10
Illinois	19.7%	7
Indiana	23.6%	6
Kentucky	5.2%	15
Louisiana	33.7%	3
Michigan	7.6%	14
Minnesota	9.5%	12
Mississippi	28.8%	5
Nebraska	5.0%	16
Nevada	.7%	18
New York	37.3%	1
Ohio	32.5%	4
South Dakota	9.1%	13
Texas	12.3%	9
Washington	19.7%	8

³¹ Id.

³² The Spangenberg Group (2002). *Public Defender Application Fees: 2011 Update*. Prepared on behalf of the American Bar Association.

³³ Id.

For future consideration, counties should protect and seek to expand the state contribution to indigent defense, either by expanding the work of the Commission on Public Advocacy, or by taking on other funding obligations (for example there have been prior legislative bills granting the state of Nebraska oversight and financial responsibility of providing GAL representation for the child welfare system),³⁴ or by exploring an addition to the existing “indigent defense fee” to be reimbursed to counties in support of indigent defense (discussed below).

Filing Fees

A statutory revision that would add to the “Indigent Defense Fee” currently collected as part of the court filing fee,³⁵ to be reimbursed to counties as a state contribution to the cost of indigent defense, would generate substantial revenue for indigent defense per year in Lancaster County (see estimates in the Table below).³⁶ In fact, a provision for reimbursing counties for indigent defense expenditures for felony representation already exists in Neb. Rev. Stat. §29-3933.

Table 10: Lancaster County Estimated Revenue from an Addition to the Court Filing

Court	2010 Filings	\$1	\$2	\$3	\$4	\$5
District	6,763	\$6,763	\$13,526	\$20,289	\$27,052	\$33,815
County	65,793	\$65,793	\$131,586	\$197,379	\$263,172	\$328,965
Juvenile	1,610	\$1,610	\$3,220	\$4,830	\$6,440	\$8,050
Total	74,166	\$74,166	\$148,332	\$222,498	\$296,664	\$370,830

Of these 74,166 total filings it is estimated that in 14,506 of these cases the fees were waived (19.5%). When waived for the defendant, the non-waiverable fees then become a county or city expense. County waived fees occurred in approximately 10,307 cases (13.9%) (1,610 juvenile cases, 5,295 county court cases, and 3,402 district court cases). City waived fees occurred in approximately 4,199 cases (5.6%). The table below estimates the revenue for Lancaster County based on a filing fee increase, after taking into account what the county would pay for covering these non-waiverable fees.

³⁴ LB 1099 (2012) makes the financial responsibility of juvenile representation the responsibility of the state rather than the county.

³⁵ Neb. Rev. Stat. §33-156.

³⁶ The estimates in the table are low-ball estimates. The indigent defense fee is also assessed on cases filed with the Supreme Court and Court of Appeals and many civil cases, which are not included in the table. For a complete list see: <http://court.nol.org/community/fees.shtml>. Filings provided by the Administrative Office of the Courts Annual Caseload Reports available: <http://www.supremecourt.ne.gov/community/adminreports/2010caseloadreportAllCourts/10-caseload.shtml>

**Table 11: Lancaster County Estimated Revenue from an Addition to the Court Filing:
Accounting for the Impact of Non-Waiverable Fees**

Court	2010 Filings	\$1	\$2	\$3	\$4	\$5
Potential Revenue	74,166	\$74,166	\$148,332	\$222,498	\$296,664	\$370,830
County Waived Fees	10,307	\$10,307	\$20,614	\$30,921	\$41,228	\$51,535
City Waived Fees	4,199	\$4,199	\$8,398	\$12,597	\$16,796	\$20,995
Net	--	\$59,660	\$119,320	\$178,980	\$238,640	\$298,300

Recommendations

1. Establish a clear process for recoupment when it is determined that a defendant has the means to pay for their legal representation.
2. Counties should protect and, when opportunities present themselves, support the expansion of the state contribution toward indigent defense (including the services of the Commission on Public Advocacy).
3. It is not recommended that the County adopt an application fee for indigent defense services.
4. Counties should explore an addition to the existing “indigent defense fee” (currently collected as part of the court-filing fee), to be reimbursed to counties as a state contribution to the cost of indigent defense (See Neb. Rev. Stat. §33-156 and § 29-3933.). An addition to the filing fee is a more attractive option than an application fee because it is assessed on every case filed, negating the need for an administrative process to determine ability to pay, and a collection process in order to collect.

VI. LEGAL SERVICE DELIVERY OPTIONS

The Indigent Defense Advisory Committee explored the following service delivery options at the adult level:

- Expanding the Lancaster County Public Defender Office
- Establishing a Felony Conflict Office
- Contracts for Civil Cases

The Committee explored the following service delivery options at the juvenile level:

- Expanding the current contract with Legal Aid of Nebraska
- Establishing an Office of Guardian ad Litem
- Exploring a contract system for 3(a) parent representation

Expand the Lancaster County Public Defender Office

One alternative legal service delivery option would be to expand the Lancaster County Public Defender's Office. That, however, is not advisable in this situation. By way of background, the majority of court appointments in the District and County Courts occur because the Lancaster County Public Defender's Office has a conflict and cannot ethically provide representation to the defendant. The Lancaster County Public Defender Office also "conflicts" out of cases when attorneys have reached the caseload maximums adopted in 2008.³⁷ The table below presents the number of conflicts and caseload standard overages that the office has had from FY 2007-2011. The number of caseload overages is minimal and does not warrant additional resources. Moreover, adding attorneys to the Lancaster County Public Defender Office will not reduce the number of ethical conflicts declared by the office and therefore adding attorneys to the Office would not reduce court appointments.

³⁷ Neeley, Elizabeth. (2008). *Lancaster County Public Defender Workload Assessment*. Available online at: [http://ppc.nebraska.edu/userfiles/file/Documents/projects/Public Defender/Public Defender Workload Assessment.pdf](http://ppc.nebraska.edu/userfiles/file/Documents/projects/Public%20Defender/Public%20Defender%20Workload%20Assessment.pdf)

**Table 11: Lancaster County Public Defender’s Office
Conflicts and Caseload Standard Overages FY07-FY11**

	FY07	FY 08	FY09	FY 10	FY 11
Felony Conflict	318	326	363	386	399
Felony Overage	0	1	30	2	63
Total Felony	318	327	393	388	462
Misdemeanor Conflict	511	557	501	522	592
Misdemeanor Overage	0	0	273	161	15
Total Misdemeanor	511	557	774	683	607
Juvenile Conflict	193	213	187	166	155
Juvenile Overage ³⁸	0	19	42	35	16
Total Juvenile	193	232	226	201	171
All Other	30	39	46	38	33
Total	1,052	1,155	1,448	1,310	1,273

Establish a Felony Conflict Office

A second alternative legal service delivery model would be to establish a conflict defender office for felony representation. To determine the cost efficiency of such an office, a number of estimates were produced. (Estimates for misdemeanor level attorneys were not calculated because the caseload does not merit a full-time attorney).

Estimates for a felony conflict office were developed for an office with 1 Director Attorney and 1 Staff Attorney (both at the Attorney II classification which requires 5 years of experience) and one paralegal and one client support worker. Salary ranges for staff were based upon the Lancaster County Public Defender salary schedule. For the attorney positions, a 1.5% salary increase was assumed for each year. For support staff positions, we used the Lancaster County salary step increase. Fringe and benefits were figured at the maximum using a 32% figure. The budget assumed that office space could be rented from the City/County Public Building Commission at \$10.50 per sq. ft. One-time furniture and equipment purchases to open the office and to add staff were not included in the budget. The Lancaster County Public Defender’s caseload standards were applied. The caseload limit for an office this size would be set at 275 new cases per year (the following year it would be anticipated that along with 275 new cases the office would handle approximately 206 pending cases). Year one expenses are calculated at \$356,567. (The full calculations for this Conflict Office are presented in Appendix C).

³⁸ As discussed in the following chapter, the number of juvenile cases in which the Lancaster County Public Defender Office declares a conflict due to case overload, is not entirely accurate due to the need for an improved communication mechanism between the Juvenile Court and the Lancaster County Public Defender Office.

Is establishing a felony conflict office a cost effective alternative? Based on the distribution of felony cases for FY 2011, we would expect that of 275 felony appointments, 130 would be handled by the County Court and 145 will be handled at the District Court level. On average, felonies at the County Court level cost, on average, \$232 per case. At the district court level, felonies on average cost \$1,229 per case. The cost for assigning these felonies to privately assigned counsel would be approximately \$208,365 compared to \$356,567 for a felony conflict office (in year 1).

Table 12: Difference between Privately Assigned Felonies and a Felony Conflict Office in Year 1

	Privately Assigned Counsel	Conflict Office in Year 1
275 Cases		
County Court (130 *\$232)	\$30,160	--
District Court (145* \$1,229)	\$178,205	--
Total	\$208,365	\$356,567

A conflict office would become more cost effective in year two, because in addition to the 275 new cases per year, it could also handle around 206 pending cases.

Table 13: Difference between Privately Assigned Felonies and a Felony Conflict Office in Year 2

	Privately Assigned Counsel	Conflict Office in Year 2
481 Cases		
County Court (236 *\$232)	\$54,752	--
District Court (245* \$1,229)	\$301,105	--
Total	\$355,857	\$356,567

While the costs are comparable to the appointed counsel system, the costs of a felony conflict office would likely grow over time with salary increases. Establishing a felony conflict office should remain an option for future consideration (especially if further review would adjust the budget assumptions presented in Appendix C). The adoption of billing software (see Chapter III) would assist in making more accurate budget predictions, and it is therefore recommended that a decision to establish a conflict office be delayed until billing software can help inform budget estimates.

Contracts for Civil Cases

The District Court currently has a contract with the firm, Demars Gordon Olson and Zalewski, for child support cases in District Court (spending approximately \$145.35 per case). While the child support contract is not an “apples to apples” comparison to other civil cases in District Court (which on average cost \$675.34 per case), other contracts for civil representation could be explored, although they would not likely represent a substantial cost savings for the County, given that only \$47,274.06 total was spent on civil representation in the District Court. More specifically, the District Court spent \$23,754.50 in attorney costs and \$12,892 in GAL costs. Separated by case type, \$17,020.75 was spent on paternity cases, \$9,208.25 was spent on divorce cases, and \$10,417.50 was spent on other case types. If

expansion of the Demars Gordon contract or an additional contract for civil cases were developed, those contracts would need to be set at a more cost effective rate than the current costs per case (provided below).

Table 14: District Court Cost Per Case by Attorney of GAL

	Attorney Cases	GAL Cases
Civil Cases	48	22
Costs in Attorney/GAL Fees	\$23,754.50	\$12,892
Cost Per Case	\$494.86	\$586

Table 15: District Court Costs Per Case by Type of Civil Case

	Paternity	Divorce	Other
Civil Cases	31	28	11
Costs in Attorney/GAL Fees	\$17,020.75	\$9,208.25	\$10,417.50
Cost Per Case	\$549.05	\$328.87	\$947.05

Establish an Office of Guardian Ad Litem

In 2008, the National Association of Counsel for Children (NACC) conducted an assessment of the quality of legal representation provided by Nebraska’s child welfare system.³⁹ Their report indicated that because of its ability to provide economies of scale; ensure appropriate training and supervision; develop units of expertise in sub-specialties; offer interdisciplinary services; and provide programmatic accountability to the court, other stakeholders, and the public, establishing a Child Welfare Law Office (CWLO) is generally considered a superior legal service delivery model to an assigned counsel system.

According to the NACC, two extraordinarily successful examples of CWLOs are the Legal Aid Society’s Juvenile Rights Practice (in New York City) and the Children’s Law Center of Los Angeles. Each agency is a 501(c)(3) non-profit organization and has a contract with the court system to be the primary source of court appointed attorneys for children in dependency matters. Unless there is a conflict of interest, the court will appoint the CWLO for every child; the CWLO in turn has its own system of individual case assignment to its staff attorneys. Staff attorneys are provided a salary and other standard employment benefits. They participate in organized, regularized training programs before being assigned their first cases and ongoing, advanced trainings are offered (and sometimes required) as a matter of course. Formal supervision is provided to new attorneys, and ad hoc supervision is available to all attorneys regardless of experience level. A sample budget to establish an Office of Guardian ad Litem was developed for Lancaster County with feedback from the National Association for the Counsel of Children (see Appendix D).

³⁹ Pitchal, Erik, Madelyn D. Freundlich and Corene Kendrick. (2009). *Evaluation of the Guardian ad Litem System in Nebraska*. National Association for the Counsel of Children.

Caseload limits were set at 100 new cases per attorney the first year, and 50 new cases with 100 pending cases thereafter.⁴⁰ The budget is based on an office that would start with one Director and a Staff Attorney and adding one Staff Attorney every year over the next four years. Salary ranges for staff were based upon a modified version of the salary system for Legal Aid of Nebraska.

Table 16: Five Year Cost and Caseload for an Office of Guardian Ad Litem

	Year 1	Year 2	Year 3	Year 4	Year 5
Cost	\$255,374	\$366,165	\$466,804	\$540,766	\$656,797
Number of Attorneys	2	3	4	5	6
Number of New Cases	300	200	250	300	350
Number of Pending Cases		200	300	400	500
Number of Total Cases	300	400	550	700	850
Cost Per Case	\$851.25	\$915.41	\$848.735	\$772.523	\$772.70

According to currently available data, the cost per 3(a) case per year, per attorney is \$794.60. By year four, it appears that establishing an Office of Guardian ad Litem may be a cost effective alternative. Establishing an Office of the Guardian Ad Litem should remain an option for future consideration (especially if further review would adjust the budget assumptions presented in Appendix D). The adoption of billing software (see Chapter III) would assist in making more accurate budget predictions, and it is therefore recommended that a decision to establish an Office of Guardian Ad Litem be delayed until billing software can help inform budget estimates.

Expand the Contract with Legal Aid of Nebraska

Although technically not a CLWO, Legal Aid is a non-profit currently providing juvenile legal representation by contract in Lancaster County Juvenile Court. On average, Lancaster County files 382 new 3(a) appointments per year. Legal Aid of Nebraska currently accepts 133 3(a) appointments per year and is willing to expand to accept 266 new appointments per year.

To be cost effective, an expansion of the Contract with Legal Aid would need to be done at a rate at least comparable to the costs of the assigned counsel system or lower. Juvenile Court Judges are pleased with the quality of representation provided by Legal Aid of Nebraska in child welfare cases, and feel that high quality representation provided under a non-profit model, has other intangible benefits to the system (such as reaching resolution quicker in the case).

⁴⁰ In February of 2012, the Nebraska Supreme Court put out for comment, a proposed rule which would limit the number of juveniles who can be represented by a guardian ad litem in all juvenile court proceedings at any one time to 60. The comment period is open until June 1, 2012. If this caseload standard was adopted, it would have a great impact on the cost/benefit analysis of an Office of Guardian ad Litem.

Establish a Contract System for 3(a) Parent Representation

For-profit contracts for 3(a) representation were ended in Lancaster County Juvenile Court in 2010. In 2009, the National Association for the Counsel of Children (NACC) conducted an analysis of the legal representation provided in Nebraska's child welfare system. The report strongly criticized the contract system noting that the inherent flaw with these types of contracts is that the every time an attorney does more than the minimum required for their client, it affects their bottom line. In short, there is a financial disincentive to zealously represent the client, and children in the welfare system are the least likely to be able to complain about the quality of representation that they are receiving. As articulated in the NACC report "[Under the contract system], it was becoming an easy place for them [the contract firms] to make money and shortchange clients because it was not like the children are calling them or complaining to them like their adult clients would."⁴¹

Focus group discussions with stakeholders indicated that while contracts for legal representation would not be appropriate for children in the child welfare system, contracts may be acceptable for parent representation in 3(a) cases. To this end, the Advisory Committee attempted to develop a proposal for a contract system for parent representation in 3(a) cases that would address all the concerns identified with the prior contract system: caseloads, courtroom coverage, oversight and quality assurance, the need to continually develop expertise among the private bar in 3(a) cases, an improved contractor selection process, etc. (see Appendix E).

While the proposal was expected to save approximately \$50,000 in expenses in Year 1, it was ultimately not supported due to the fact that the contracts would: inhibit flexibility and discretion in appointments, institutionalize the practice of "judge shopping" by assigning contractors to certain courtrooms, unfairly limit the number of other appointments contractors could receive, present difficulties in providing vertical representation when contractors reached their caseload limit and supplemental petitions were filed, etc.

Recommendations

1. Explore expansion of the current contract with Legal Aid of Nebraska for 3(a) GAL representation from 133 appointments per year to 266 new appointments per year.
2. Use information obtained from acquiring billing software to collect more accurate data regarding the costs of legal representation. Information should be used to explore establishment of a Felony Conflict Office and an Office of Guardian ad Litem.

⁴¹ Pitchal, Erik, Madelyn D. Freundlich and Corene Kendrick. (2009). *Evaluation of the Guardian ad Litem System in Nebraska*. National Association for the Counsel of Children., page 57.

VII. OPTIONS FOR IMPROVING/CASE MANAGEMENT

This section attempts to identify inefficiencies in the system and outline how these system points could be improved to reduce unnecessary delays and appearances by appointed counsel.

District Court

Waiving Presentence Investigations: In some instances, defense counsel feel that presentence investigations are not necessary and it would be appropriate to request that their client's presentence investigation (PSI) be waived. District court judges agreed that waiving presentence investigations could create savings by eliminating time for: appointed attorneys to read the presentence investigation, discuss it with their client, and make an additional appearance. However, judges felt strongly that the information contained in the presentence investigations is necessary when making sentencing decisions, particularly for felony cases. Participating judges indicated that they would consider waiving the PSI on misdemeanors and class IV felonies but only if appointed counsel would notify the Judge in advance that they would like to waive the PSI and then provide information such as the criminal history and prior dispositions (this could even be done via mail).

Prosecutors indicated that generally speaking, when there is a victim, prosecutors like to make the victim impact statement contained in the presentence investigation available; however, they agreed that presentence investigations could be waived on a number of misdemeanor cases. Prosecutors also suggested that waiving presentence investigations on misdemeanor cases would likely result in efficiencies for probation.⁴²

Swearing to a Bond in District Court: Lancaster County District Court Judges currently require defendants to swear to a bond in person. Other counties allow this to be done by signing a form. This option has the potential to reduce a formal court appearance, and transportation costs of in-custody defendants (an expense expected to increase when the new jail is in place). District Court Judges indicated that this option will be explored by their bench.

Requesting Delayed Sentencing/Restitution Payments: As described by appointed counsel there is some "game playing" on their part with continuances. There are a number of hearings continued (speedy trial waived, etc.) so that their client can complete treatment/restitution before sentencing. They would prefer to be upfront about their intent and just ask the judge to delay sentencing until after treatment/restitution can be made. For

⁴² In 2011, there were 1,050 total investigations conducted by probation on misdemeanor cases (695 presentence investigations, 126 presentence reports, 154 court requested informations and 75 unknown requests).

example, for restitution cases, the attorney would ask for sentencing to be delayed based on the amount of time the client would require to come up with the necessary funds.

Judges indicated that this made sense to them, that it would save on costs for several appearances, and that it would also save the Judge and prosecutors' time. This option would need to be discussed by all of the judges (the judges who participated in the focus group discussion indicated that others on the bench may be less agreeable to this option, but that it would be worth discussing).

Often times these court appearances help facilitate restitution payments. When discussed with prosecutors, they agreed that the option was worth exploring and that perhaps something could be done administratively to keep defendants up to date on payments. In 2012, the eleventh judicial district will be piloting a court reminder program regarding probation fines and fees. If the pilot proves successful, a court reminder program which successfully prompts court restitution payments may be more cost effective than requiring court appearances.

Jury Docket Calls: The current system of jury docket calls in Lancaster County District Court is described by both attorneys and by some judges as inefficient from the perspective of attorneys. Judges estimated that an average docket call involves fifty cases and takes 1.5 minutes of actual time per case (the rest of the time is spent waiting for your case(s) to be called). Stakeholders suggested that the District Court explore the option of setting different start times for jury docket calls for cases where the public defender is providing representation and for cases where assigned counsel or private attorneys are providing representation (this should not impact the efficiency of the judicial process, but will reduce wait time for both public defenders and assigned counsel). District Court Judges were not sure that the strategy would produce much in terms of time/cost savings but expressed a willingness to consider piloting the approach.

District and County Court

New Jail Capabilities: Currently defendants in jail can call their attorneys but the attorneys cannot call and talk to their clients (like they can at the Lancaster County Youth Services Center). Often when a defendant returns the call, their attorney is out of the office or in court. Many attorneys reported that when they leave a message for their clients to call them, the client seldom gets the message.

The new jail will force attorneys to travel farther to see their clients, and will increase attorney time and the county's costs for legal representation. The ability for attorneys to securely and confidentially discuss matters with their clients via phone in the new jail facility is imperative to controlling attorney fees once the jail transitions to its new location. It is strongly recommended that the video-conferencing/telephone conferencing technology that

is acquired for the new jail facility, be obtained in consultation with all justice system stakeholders, including defense counsel.⁴³

Multiple Counsel per Client: On occasion, a defendant will commit a new offense and be appointed different counsel. Having multiple private attorneys represent the same client on different charges is not efficient. Some speculated that this happens in part because judges are not appointing from a list of attorneys.

First Offense DUI Cases: It has been suggested by a number of stakeholders that first offense DUI cases should solely be handled by the City Prosecutor's Office. Currently, first-offense DUI cases handled by the Lincoln Police Department are prosecuted by the City Prosecutor and cases handled by the Sheriff or Nebraska State Patrol are prosecuted by the Lancaster County Attorney's Office. When prosecuted by the County Attorney there is a right to a jury trial which increases the costs substantially (in terms of attorney fees, juror fees, jail time, etc.).

Discussions regarding the prosecution of DUI cases (as well as Juvenile Cases discussed below) prompted broader discussions about the jurisdiction of the City Attorney's Office and the County Attorney's Office. Stakeholders indicated that system efficiencies could potentially be achieved by re-organizing the jurisdiction of these offices. These Offices together with the County Board and City Council should explore this issue further.

Juvenile Court

Reducing Supplemental Petitions in Juvenile Court: According to defense counsel in juvenile law violation cases, where the court already has jurisdiction over the juvenile, prosecutors frequently file supplemental petitions (there will occasionally be up to six or seven supplemental filings when they already have jurisdiction). The question was posed, why can't the new issue (e.g. stealing a pack of gum) be taken up with the existing case? More specifically, if a child admits to the first petition and later: 1) a charge that pre-dates the first petition is filed; or 2) a separate offense is known by all parties at the time of an admission and is considered by the judge, why does it have to be filed? And 3) if a new offense occurs after a child has admitted, why can it not be held back and everyone agree that the judge can consider it at disposition?

Juvenile Court Judges suggested several options: 1) prosecutors could communicate better with probation about the youth's status/progress (and then the issue could perhaps be addressed with graduated sanctions if necessary); 2) require prosecutors to attend dispositional hearings; and/or 3) ask prosecutors to shorten their timeline for filing (file within a week rather than 3-6 months down the road).

⁴³ The Administrative Office of the Courts has indicated that the state court system will be expanding its video technology capacity via Tandberg's Movi equipment.

When discussed with the Lancaster County Attorney's Office, prosecutors indicated that they do not follow a case through disposition, and that supplemental petitions are sometimes filed when they need new jurisdiction. However, they did indicate that additional effort could be taken to make sure that revocations of probation and new law violations could be filed together, and have subsequently adopted this practice.

In addition to reducing court and attorney time, reducing the number of supplemental petitions will also achieve savings by decreasing the likelihood that the Lancaster County Public Defender's Office will conflict out of cases due to reaching their maximum caseload standards (as discussed below, supplemental petitions are counted as new cases), thereby reducing the number of court appointments.⁴⁴

Reducing the Number of Continuances in Juvenile Court: Stakeholders have indicated that there are an extremely large number of continuances in juvenile court. As one GAL described it, "We show up for the first hearing and the parents haven't been served so the case is continued. At the second hearing the parents have been served but don't have counsel so the case is continued. At the third hearing they have counsel but haven't met so the case is continued. As GALs we show up for 3-4 hearings before we even do anything. Sometimes there are multiple attorneys showing up for all of these hearings and the county is paying for all of these appearances."

When asked if anything could be done administratively to reduce the number of front-end continuances, the following suggestions were made: 1) examine whether these cases are being set for hearing too soon; 2) examine whether the Sheriff's office has enough time to effectuate service; and 3) ask the Sheriff to provide parents with the form informing them of their right to obtain counsel at the time of service.

Focus group participants indicated that judges in some counties appoint counsel the moment the case is filed, which gives plenty of time for parties to be served and provides attorneys adequate time to meet with their clients. Juvenile Court Judges indicated that automatically appointing counsel on the front end would only increase costs.

Coordination on Prosecution of Juvenile Cases: Juvenile Court Judges reported that occasionally attorneys from both the City and County Attorney's Office appear and dually prosecute a youth. This complicates representation by appointed counsel who then have to deal with two rather than one prosecutor, and a communication mechanism should be established to reduce this occurrence (see also discussion above regarding DUI cases).

⁴⁴ As a baseline, there were 521 supplemental petitions filed in juvenile court on law violations in FY 2011 (during the first 6 months of FY 2011, Lancaster County filed more than three times the amount of supplemental petitions than Douglas County Juvenile Court) (statistics provided by JUSTICE).

Assign a Prosecutor to a Courtroom(s): Several stakeholders suggested that assigning a County Attorney to each courtroom (as is done by the City Attorneys at the County Court level) would create substantial system efficiencies. County Attorneys are opposed to the concept for several reasons. Just as the Juvenile Court Judges have adopted a vertical approach, whereby the same judge handles all matters related to one youth/family, the Lancaster County Attorney's Office practices "vertical prosecution" whereby the same prosecutor handles the case from beginning to end. Assigning a prosecutor to a courtroom to handle the cases heard therein, inhibits the Lancaster County Attorney's Office to provide vertical representation (the charging decision is made prior to the case being assigned to a courtroom). The Office also has concerns that having a prosecutor assigned to each courtroom could lead to the public perception that there is not a clear division between the prosecutor and judge. Judges did not voice the same ethical concern. The Juvenile Court Judges' thoughts were that prosecutors oppose this option because it would limit prosecutors' professional development by only practicing in front of one Judge. Judges indicated that prosecutors could share two courtrooms or devise a rotation system to address this concern.

Public Defender Coverage in Juvenile Court: Stakeholders indicated that there are currently three juvenile public defenders and four juvenile courtrooms. The three juvenile public defenders share the fourth courtroom, but some stakeholders feel that they do not effectively cover for each other, causing considerable delays (and delay in one courtroom creates delays in the other courtrooms). The Lancaster County Public Defender's Office should establish a plan to improve public defender coverage in the fourth courtroom (caseload statistics do not support the addition of a fourth juvenile court public defender).

Lancaster County Public Defender's Caseload Standards: In 2008, the Lancaster County Public Defender Office adopted time-based caseload standards.⁴⁵ When attorneys in the Lancaster County Public Defender Office reach those caseload maximums, the Office stops accepting appointments to ensure that attorneys can reasonably handle their cases in a competent manner, providing each client with their constitutional right to effective assistance of counsel.

Communication between the Lancaster County Public Defender's Office and the Lancaster County Juvenile Court Judges needs to be improved regarding when the Office is approaching/has reached its caseload standards. Occasionally, juvenile court judges will stop appointing the public defender at the end of the month rather than checking to see if they have reached their caseload limit. This practice inhibits the Office's ability to accurately track the number of cases it must conflict out of each year due to case overload. It also means that there are cases for which counsel is being appointed when the public defender's office could have potentially taken the case. Also, occasionally a judge will appoint a public defender on only one of a client's three cases (see discussion on multiple counsel per client).

⁴⁵ Supra, note 37.

Conversely, Judges do not want to appoint the public defender just so that they can conflict out of the case as it creates more work for court staff and confusion for the families. Also, Judges are sometimes told that the Lancaster County Public Defender's Office is full but they are "holding" a few spots for certain cases (and it is not clear about what is meant by that). The Lancaster County Public Defender's Office has since explained that the office will hold a spot in the event that a supplemental petition is filed on one of their clients, so that they will not have to conflict out of case for a client that they are already representing.

Juvenile court judges also encouraged the Lancaster County Public Defender's Office to review how cases are counted under their caseload standards. For example, should review cases be counted as separate cases? Judges also indicated that if a petition is filed with two charges, it will count as one case, yet if a petition is filed, and then a supplemental petition is made, it will count as two cases,⁴⁶ this concern may be negated by efforts to reduce the number of supplemental petitions filed by the Lancaster County Attorney's Office (see discussion above). In summary, a better communication mechanism regarding the caseload standards between the Lancaster County Public Defender's Office and Juvenile Court Judges would be appropriate.

Successful Reforms: Focus group discussions indicated that the Lancaster County Juvenile Court has made some recent changes that have improved the efficiency of the court system: implementing attorney-only docket calls, granting attorney requests to withdraw as counsel in cases where the parent has not had contract with the appointed attorney over a prolonged period, and moving towards six month reviews for juvenile cases unless there is a need to check progress sooner.

RECOMMENDATIONS

1. When appropriate, allow waiver of presentence investigations in misdemeanor cases.
2. The Lancaster County District Court will explore adoption of a form in lieu of requiring defendants to swear to a bond in person.
3. Explore administrative options to prompt defendants' restitution payments without requiring a court appearance.
4. Explore the option of setting different start times for jury docket calls in the Lancaster County District Court for cases where the public defender is providing representation from where assigned counsel is providing representation (this should not impact the

⁴⁶ Time spent on supplemental petitions are addressed in the *Lancaster County Public Defender Workload Assessment (2008)*, *Supra* note 37.

efficiency of the judicial process, but will reduce wait time for both public defenders and assigned counsel).

5. The ability of attorneys to initiate a call to their clients and quickly, securely and confidentially discuss matters with their clients via phone in the new jail facility is imperative to controlling attorney fees once the jail transitions to its new location.
6. Explore steps to ensure multiple counsel are not appointed per client.
7. Explore options that would allow all first offense DUI Cases to be prosecuted by the City Attorney's Office.
8. The Lancaster County Attorney's Office should develop a plan designed to reduce the number of supplemental petitions in juvenile court (e.g., filing revocations of probation and new law violations together, improve communication with probation administration and handle issues through graduated sanctions, require prosecutors to attend dispositional hearings, and/or shorten the timeline for filing petitions, etc.).
9. In an effort to reduce the number of continuances in juvenile court, a plan/mechanism should be developed to: 1) examine whether these cases are being set for hearing too soon; 2) examine whether the Sheriff's office has enough time to effectuate service; and 3) ask the Sheriff to provide parents with the form informing them of their right to obtain counsel at the time of service.
10. The City Attorney's Office and the County Attorney's Office should develop a communication mechanism to avoid the dual prosecution of juveniles.
11. The Lancaster County Public Defender's Office should establish a plan to improve public defender coverage in the fourth juvenile court courtroom.
12. Communication between the Lancaster County Public Defender's Office and the Lancaster County Juvenile Court Judges needs to be improved regarding caseload standards.
13. The Lancaster County Public Defender's Office should review its caseload standards regarding whether review hearings or supplemental petitions should be considered "new cases."
14. Juvenile court judges should continue the practice of attorney only docket calls.

15. Juvenile court judges should continue to encourage and grant requests to withdraw as counsel in cases where the parent has not had contact with the appointed attorney over a prolonged period.
16. Juvenile court judges should continue to move towards six month reviews for juvenile cases unless there is a need to check progress sooner.

VIII. SUMMARY OF RECOMMENDATIONS

PROCESS OF APPOINTING COUNSEL

1. Once available, the Lancaster County Indigent Defense Advisory Committee should review the Nebraska Supreme Court and Nebraska State Bar Association Joint Ad Hoc Committee's proposed rules for establishing an objective transparent and systematic appointment process.

Following that review, each court should establish a list of attorneys to be considered for appointment and a process by which names will be added or removed from the list. Once the lists are established, assignments should be made in an orderly way to avoid patronage or its appearance, and to assure the fair distribution of appointments among all attorneys deemed qualified and willing to accept appointments. Where the nature of the charges or other circumstances warrant, judges should appoint an attorney based on his or her special qualifications to serve in the case. That is, discretion should be used when it will protect the defendant's constitutional right to the effective assistance of counsel and when it is in the interest of the efficient administration of assignments.

In the interim, District Court Judges should provide feedback to the County Court Judges on establishing a list of attorneys approved for appointment in felony cases.

2. In an effort to improve transparency (rather than as a cost savings measure), the County and District Court Judges should develop billing guidelines (for continuity across their levels of court) regarding what activities (wait time, travel time, etc.) and what ancillary services or other costs (depositions, experts, etc.) the courts will reimburse for or require prior approval for reimbursement. Billing guidance may also be used to encourage/provide guidance on the use of paralegals.
3. The current rates for court appointed counsel paid in Lancaster County Juvenile, County and District Court are not adequate. Given the current economic climate, it is not recommended that the hourly rate be increased at this time. However, if additional funding became available (e.g., if the state contribution towards county indigent defense were increased), priority should be given to increase the

rates to a reasonable level, as recommended by the Lancaster County Indigent Defense Advisory Committee.

4. It is not recommended that the County adopt an in-court vs. out-of-court rate for assigned counsel.
5. Lancaster County should acquire billing software for its appointed counsel system in order to allow for: electronic invoicing and payment, greater uniformity in billing practices, a reduction in staff time spent on reviewing bills, a reduction in the time that attorneys wait from submission to payment, and improvement of the courts' ability to identify trends, project costs, and estimate the impact of policy changes.⁴⁷

CONTROLLING THE FRONT GATES

6. A form should be piloted to assist with indigence determinations, relying on several simple questions that would automatically qualify someone as indigent (e.g., if they are receiving state aid, or are at 125% of the federal poverty guidelines, etc.) or flag someone for further questioning by the Judge. In County Court, the form would be disseminated by the bailiff and filled out, signed and sworn to by the defendant. If the client is in custody and is appearing via video, Lancaster County Corrections should be responsible for disseminating the form and providing it to the Judge. In addition to better informing indigence determinations, the adoption of an indigence determination form may enhance trust and confidence in the courts by adding uniformity (judges asking the same questions of defendants) and transparency to this subjective process and may improve the County's efforts to recoup fees when appropriate. Implementation of the form should be piloted in one courtroom initially, to assess the impact and identify any barriers to successful implementation (thought will also need to be given regarding in-custody defendants).
7. The City Prosecutor's Office should adopt a process by which criminal history is available at the time of initial review and charging and adopt a form to prompt prosecutors to indicate the likelihood of jail time (jail time likely, jail time a possibility, and no jail time) so that the decision about whether to request jail time is ready at the time of arraignment. Judges would not appoint on cases

⁴⁷ Billing software can be built to comply with any billing guidelines that might be adopted (see Recommendation 2).

where jail time is not likely (with the understanding that if circumstances change, appointment of counsel could be reassessed).

8. The County should explore a statutory change to clarify whether (or under what circumstances) non-custodial parents, parents against whom there are no allegations filed, or even custodians of children who have no legal relationship to the children should have a right to a court appointed attorney.
9. The County should ask the Nebraska Legislature and the Lincoln City Council to study the penalties for low-level misdemeanor crimes and city ordinance violations to determine whether jail time is a necessary penalty to protect public safety, or if the offense could effectively be addressed as a waivable offense or by a fine.
10. The Lancaster County Attorney's Office is encouraged to expand diversion opportunities by considering the following:
 - The minimum financial limit of \$10,000 in restitution was set years ago and should be adjusted for inflation.
 - The current approach to diversion is "one bite at the apple". Based on stakeholder feedback it is recommended that the County Attorney's Office consider the following:
 - Allow diversion once at the misdemeanor level and once at the felony level (as was the former policy of the Lancaster County Attorney's Office);
 - Allow diversion a second time if sufficient time had passed and if the category of offense is different.
 - Expand eligibility so that most non-violent offenses are considered.
 - Mental health diversion and truancy diversion should be established.
11. The Lancaster County Board should examine the utility/feasibility of asking the Nebraska Legislature to revise Neb. Rev. Stat. § 29-3604 to allow counties (other than Sarpy) to offer DUI diversion as a way to both enhance public safety and provide substantial cost savings for the County.
12. Lancaster County should support community mental health resources as a way to reduce justice system filings.

ALTERNATIVE FUNDING STREAMS

13. Establish a clear process for recoupment when it is determined that a defendant has the means to pay for their legal representation.
14. Counties should protect and, when opportunities present themselves, support the expansion of the state contribution toward indigent defense (including the services of the Commission on Public Advocacy).
15. It is not recommended that the County adopt an application fee for indigent defense services.
16. Counties should explore an addition to the existing “indigent defense fee” (currently collected as part of the court-filing fee), to be reimbursed to counties as a state contribution to the cost of indigent defense (See Neb. Rev. Stat. §33-156 and § 29-3933.). An addition to the filing fee is a more attractive option than an application fee because it is assessed on every case filed, negating the need for an administrative process to determine ability to pay, and a collection process in order to collect.

LEGAL SERVICE DELIVERY OPTIONS

17. Explore expansion of the current contract with Legal Aid of Nebraska for 3(a) GAL representation from 133 appointments per year to 266 new appointments per year.
18. Use information obtained from acquiring billing software to collect more accurate data regarding the costs of legal representation. Information should be used to explore establishment of a Conflict Defender Office and an Office of Guardian ad Litem.

CASE PROCESSING/CASE MANAGEMENT

19. When appropriate, allow waiver of presentence investigations in misdemeanor cases.
20. The Lancaster County District Court will explore adoption of a form in lieu of requiring defendants to swear to a bond in person.

21. Explore administrative options to prompt defendants' restitution payments without requiring a court appearance.
22. Explore the option of setting different start times for jury docket calls in the Lancaster County District Court for cases where the public defender is providing representation from where assigned counsel is providing representation (this should not impact the efficiency of the judicial process, but will reduce wait time for both public defenders and assigned counsel).
23. The ability of attorneys to initiate a call to their clients and quickly, securely and confidentially discuss matters with their clients via phone in the new jail facility is imperative to controlling attorney fees once the jail transitions to its new location.
24. Explore steps to ensure multiple counsel are not appointed per client.
25. Explore options that would allow all first offense DUI Cases to be prosecuted by the City Attorney's Office.
26. The Lancaster County Attorney's Office should develop a plan designed to reduce the number of supplemental petitions in juvenile court (e.g., filing revocations of probation and new law violations together, improve communication with probation administration and handle issues through graduated sanctions, require prosecutors to attend dispositional hearings, and/or shorten the timeline for filing petitions, etc.).
27. In an effort to reduce the number of continuances in juvenile court, a plan/mechanism should be developed to: 1) examine whether these cases are being set for hearing too soon; 2) examine whether the Sheriff's office has enough time to effectuate service; and 3) ask the Sheriff to provide parents with the form informing them of their right to obtain counsel at the time of service.
28. The City Attorney's Office and the County Attorney's Office should develop a communication mechanism to avoid the dual prosecution of juveniles.
29. The Lancaster County Public Defender's Office should establish a plan to improve public defender coverage in the fourth juvenile court courtroom.

30. Communication between the Lancaster County Public Defender's Office and the Lancaster County Juvenile Court Judges needs to be improved regarding caseload standards.
31. The Lancaster County Public Defender's Office should review its caseload standards regarding whether review hearings or supplemental petitions should be considered "new cases."
32. Juvenile court judges should continue the practice of attorney only docket calls.
33. Juvenile court judges should continue to encourage and grant requests to withdraw as counsel in cases where the parent has not had contact with the appointed attorney over a prolonged period.
34. Juvenile court judges should continue to move towards six month reviews for juvenile cases unless there is a need to check progress sooner.

IMPLEMENTATION/EVALUATION

35. The Lancaster County Indigent Defense Advisory Committee should be charged to assist with the development and implementation of the recommendations herein, reporting back to the Lancaster County Board on areas of improvement and the impact of implemented recommendations.

Appendices

Appendix A: Lancaster County Annual Filings (Calendar Year)

Lancaster County Juvenile Court

	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	Average
City (1)	181	243	159	209	224	309	341	356	318	355	311	296	262	274.2
City Sup (1)	91	113	82	105	132	0	0	60	181	233	222	179	171	120.7
County (1)	661	641	619	562	544	889	897	842	624	482	446	444	376	617.5
County Sup (1)	352	263	307	276	235	0	0	102	272	326	320	277	263	230.2
County (2)	135	104	102	126	74	153	132	129	83	110	64	57	72	103.2
County Sup (2)	97	79	70	72	61	0	0	0	61	71	40	44	51	49.7
County (4)	3	11	4	5	2	1	4	4	10	4	5	6	7	5.3
Transfer LV	10	12	17	20	15	17	41	35	32	34	29	31	31	24.9
Subtotal	1530	1466	1360	1375	1287	1369	1415	1528	1581	1615	1440	1334	1233	1425.6
3a	161	167	177	219	188	338	335	339	294	386	344	415	342	285.0
Sup 3a	21	26	24	57	52	0	0	0	0	0	0	0	0	13.8
Transfer 3a	0	0	8	5	10	20	11	8	6	12	6	9	5	7.7
8	2	1	0	0	0	1	0	0	0	0	1	0	0	.4
9												1	0	.5
Adoption	8	19	23	31	24	32	52	36	57	94	90	70	63	46.1
Guardianship	1	5	6	22	16	20	24	18	16	22	20	2	5	13.6
Paternity	1	3	0	3	0	0	0	1	1	7	27	35	69	11.3
Subtotal	194	221	238	337	290	411	422	402	374	521	488	532	484	378.0
3b	110	78	107	94	153	177	180	147	206	309	226	304	469	196.9
Sup 3b	1	5	3	1	3	0	0	0	0	0	0	0	0	1
Transfer 3b	0	0	3	3	2	10	4	3	3	2	6	2	9	3.6
3c	0	0	0	0	0	0	0	0	0	0	0	0	0	0.0
Transfer 3c	0	0	0	0	0	0	0	0	0	0	0	0	0	0.0
TOTAL	1835	1770	1711	1810	1735	1967	2021	2080	2164	2447	2160	2172	2195	2005.2

	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	Average
City MRP	3	17	24	34	35	39	19	27	33	46	52	46	50	32.7
City Sup MRP	0	1	0	0	1	0	0	0	3	1	5	5	3	1.5
County MRP	129	138	133	107	137	140	116	123	138	95	90	89	70	115.8
County Sup MRP	31	34	36	21	35	42	27	28	28	27	10	26	25	28.5
Transfer MRP	0	0	0	0	0	0	0	0	0	0	0	0	0	0.0
TPR	27	25	14	24	33	49	46	53	83	107	89	78	88	55.1
Sup TPR	0	0	2	3	5	2	0	0	0	0	0	0	0	.9
Complaint	0	0	1	0	1	0	0	73	4	9	7	4	2	7.7.88
TOTAL	2025	1985	1921	1999	1982	2239	2229	2384	2453	2732	2413	2420	2433	2247.3

Lancaster District Court

	2002	2003	2004	2005	2006	2007	2008	2009	2010	Average
Criminal	1,040	1,184	1,086	1,164	1,107	1,137	1,272	1,306	1,290	1,176
Regular Civil	1,056	1,098	1,079	1,020	1,078	981	1,089	947	972	1,036
Domestic Relations	2,719	3,106	3,193	3,258	3,177	3,413	3,264	3,251	3,360	3,193
Appellate Action	301	243	232	303	257	227	222	199	179	240
Total	5,116	5,631	5,590	5,745	5,619	5,758	5,847	5,703	5,801	5,646

Lancaster County Court

	2002	2003	2004	2005	2006	2007	2008	2009	2010	Average
Misd/Ord Traffic	24,802	21,236	23,123	27,470	26,046	25,931	29,400	26,667	24,530	25,467
Misd/Ord/Non-Traffic	21,728	20,969	22,050	21,751	19,454	18,813	24,199	22,991	20,911	21,430
Felony	1,816	1,741	1,782	1,865	1,941	1,974	1,981	1,889	1,951	1,882
Civil	8,834	10,230	10,289	11,029	12,031	14,156	15,622	16,539	16,609	12,815
Small Claims	966	948	892	757	746	729	719	753	694	800
Probate/Inher Tax	695	623	642	606	607	664	712	657	607	646
Guard Cons	268	256	290	315	259	298	321	283	344	293
Adoption	125	96	145	148	127	156	189	164	147	144
Juvenile	0	0	0	0	0	0	0	0	0	0
Total	59,234	56,099	59,213	63,941	61,211	62,721	73,143	69,943	65,793	63,478

**APPENDIX B: REQUEST FOR COURT APPOINTED LAWYER,
STATEMENT OF FINANCIAL STATUS,
AND AUTHORIZATION FOR RELEASE OF INFORMATION**

Court: _____ Case No. _____

I hereby request that the Court appoint a lawyer to represent me because I cannot afford to hire a private attorney.

I.

- A. Full Name: _____
- B. Current Address: _____

- C. Phone: _____
- D. Date of Birth: _____

II. I currently receive the following forms of public assistance.

- A. ___ Aid to Families With Dependent Children (AFDC)
- B. ___ Emergency Aid to Elderly, Disabled & Children
- C. ___ Poverty Related Veteran's Benefits
- D. ___ Food Stamps
- E. ___ Medicaid
- F. ___ Supplemental Security Income
- G. ___ Refugee Resettlement Benefits
- H. ___ County General Assistance

III. I work at _____.
I earn \$ _____ per _____ hr/wk/mo/year

Number of Family Members

- A. ___ Self
- B. ___ Write "1" if married and spouse lives with you.
- C. ___ Write the number of your children that live with you.
- D. ___ Total (add A, B, & C)

___ If Line "D" is 1 and your annual income is \$13,612 or less, check here.

___ If Line "D" is 2 and your annual income is \$18,377 or less, check here.

___ If Line "D" is 3 and your annual income is \$23,167 or less, check here.

___ If Line "D" is 4 and your annual income is \$27,937 or less, check here.

___ If Line "D" is 5 and your annual income is \$32,712 or less, check here.

___ If Line "D" is 6 and your annual income is \$37,487 or less, check here.

(This is 125% of the 2011 Poverty Guidelines. For each additional person add \$3,820)

I swear or affirm, under penalty of perjury, that the information listed above is true and accurate.

Your signature

Signed and sworn to before me on _____.

Judge/Notary Public

APPENDIX C: FIVE YEAR BUDGET FOR A FELONY CONFLICT OFFICE

Assumptions

- The Office would start with a 1 Director attorney and 1 staff attorney for felonies, both at the Attorney II classification which requires 5 years of experience and 1 staff attorney at the entry level position for the misdemeanor docket. In addition the office would have a paralegal and a client support worker.
- Salary Ranges for staff are based upon Lancaster County’s salary schedule. For the attorney positions, we have assumed a 1.5% salary increase each year. For support staff positions, we use the Lancaster County salary step increase.
- Fringe and benefits are figured at the maximum using a 32% figure.
- Caseload standards would be applied based upon the study of the Lancaster County public Defender’s Office.
- Office Director will carry a 90% caseload since there will only be 2 attorneys to supervise.
- One time furniture and equipment purchases to open the office and to add staff are not included in the budget.
- The budget assumes that office space can be rented from the City/County Public Building Commission at \$10.50 per sq. ft.
- The office should be started as a paperless office from the beginning with all of the necessary advanced technology to provide for that in order to make the office the most efficient it can be and to make supervision easier.

Description	Year 1	Year 2	Year 3	Year 4	Year 5
Director’s Salary	\$80,000	\$81,315	\$82,535	\$83,773	\$85,030
Attorney II Salary	\$65,000	\$65,975	\$66,965	\$67,969	\$68,989
Paralegal I Salary	\$38,663	\$40,056	\$41,496	\$42,989	\$44,537
Client Support Worker	\$30,185	\$31,273	\$32,394	\$33,563	\$34,773
FICA and Fringe Benefits	\$86,351	\$88,146	\$89,947	\$91,793	\$93,684
Office Supplies	\$2,512	\$2,537	\$2,562	\$2,587	\$2,612
Expert Witness Fund	\$3,150	\$3,150	\$3,150	\$3,500	\$3,500
IS Support	\$8,000	\$8,000	\$10,000	\$10,000	\$10,000

Training	\$4,500	\$4,500	\$4,500	\$4,500	\$4,500
Mileage	\$700	\$700	\$700	\$700	\$700
Telephone	\$3,000	\$3,000	\$3,000	\$3,000	\$3,000
Postage	\$830	\$830	\$830	\$830	\$830
Printing and Photocopying	\$1,440	\$1,440	\$1,440	\$1,440	\$1,440
Witness Fees/Court Costs	\$160	\$240	\$320	\$400	\$480
Memberships and Dues	\$2,000	\$2,000	\$2,000	\$2,000	\$2,000
Books and Subscriptions	\$250	\$250	\$500	\$500	\$1,000
Interpreter Fees	\$2,325	\$2,325	\$2,325	\$2,325	\$2,325
Transcripts and Depositions	\$5,500	\$5,500	\$5,500	\$5,500	\$5,500
Liability Insurance	\$2,000	\$2,000	\$2,000	\$2,000	\$2,000
Rent	\$20,000	\$20,000	\$20,000	\$20,000	\$20,000
Total	\$356,567	\$363,239	\$372,167	\$379,373	\$386,905
# of New Core Felony Cases	209	209	209	209	209
# of New Ancillary Felonies (Rev Of Prob, Appeals)	66	66	66	66	66
Total Felony and Ancillary	275	275	275	275	275
Estimated Felony and Ancillary Pending Start	0	206	206	206	206
Total New And Pending	275	481	481	481	481

APPENDIX D: FIVE YEAR BUDGET FOR A NON PROFIT OFFICE OF GUARDIAN AD LITEM

Assumptions

- Appointments would be phased in over time, so staff could be phased in over time The Office would start with a Director and staff attorney every year over the next 4 years.
- Salary Ranges for staff are based upon a modified version of the salary system for Nebraska Legal Aid.
- Caseload standards would be applied based upon available attorney time and avg time/case
- Office Director will start with a 100% caseload but will have caseload reduced 5%/year (Up to 25% as additional staff attorneys are hired and need to be supervised.
- One time furniture and equipment purchases to open the office and to add staff are not included in the budget.
- The budget assumes that office space can be rented from the City/County Public Building Commission at \$10.50 per square foot. Because the office will grow rapidly, the rent will be for space for 8-9 employees from year 1 to allow the growth.
- The office should be started as a paperless office from the beginning with all of the necessary advanced technology to provide for that in order to make the office the most efficient it can be and to make supervision easier.
- The initial support staff should include 1 Office Manager/Client Support Worker and 1 paralegal. Eventually, the office should have 1 Client Support Worker per ever 4 attorneys and 1 paralegal per every 3 attorneys.
- Paralegals will be allowed to do some of the statutorily required home visits and attend Team Meetings.
- GALs will not have as great a need for Expert Witness fees because the County Attorney and parents attorneys make most of these requests

Description	Year 1	Year 2	Year 3	Year 4	Year 5
Director's Salary	\$75,000	\$76,125	\$77,267	\$78,426	\$78,602
Attorney 1 Salary	\$45,000	\$90,675	\$137,035	\$184,090	\$231,850
Office Manager/Client Support	\$30,000	\$30,450	\$30,906	\$31,370	\$31,841
Client Support Worker	0	0	\$24,000	\$24,360	\$25,725
Paralegal	0	\$35,000	\$35,525	\$36,058	\$71,599
FICA and Fringe Benefits	\$42,000	\$65,030	\$85,325	\$99,205	\$122,812
Office Supplies	\$1,764	\$2,645	\$3,526	\$4,407	\$5,288
Expert Witness Fund	\$15,000	\$15,000	\$15,000	\$20,000	\$20,000
IS Support	\$6,000	\$6,000	\$8,000	\$8,000	\$10,000
Training	\$2,000	\$3,000	\$4,000	\$5,000	\$6,000
Mileage	\$500	\$750	\$1,000	\$1,250	\$1,500
Telephone	\$1,800	\$2,400	\$3,600	\$4,200	\$4,800
Postage	\$600	\$900	\$1,200	\$1,500	\$1,800
Printing and Photocopying	\$1,000	\$1,500	\$2,000	\$2,500	\$3,000
Witness Fees/Court Costs	\$160	\$240	\$320	\$400	\$480
Memberships and Dues	\$1,000	\$1,500	\$2,000	\$2,500	\$3,000
Books and Subscription	\$250	\$250	\$500	\$500	\$1,000
Interpreter Fees	\$1,000	\$1,500	\$1,500	\$2,000	\$2,500
Transcripts and Depositions	\$1,500	\$2,000	\$2,500	\$3,000	\$3,500
Liability Insurance	\$800	\$1,200	\$1,600	\$2,000	\$2,500
Rent	\$30,000	\$30,000	\$30,000	\$30,000	\$30,000
Total	\$255,374	\$366,165	\$466,804	\$540,766	\$656,797
#of New Cases/Year					
# of Pending Cases At Start					

APPENDIX E

Discussion on Contracts for 3(a) Parent Representation Points of Consideration/Clarification Addressed in New Format

- 3(a) representation should not solely be handled by contracts. A contract system (perhaps 25-50 cases per contract per courtroom) together with an assigned counsel system will be more effective in addressing conflicts of interest and in continuing to develop expertise in 3(a) representation among the private bar.
- Selection would take place by the Indigent Defense Advisory Committee, which will be supplemented to include more juvenile court expertise.
- The contracts must have provision for termination if they do not prove effective.
- Oversight of the contract system will be administered by a supervisory contract. The contract supervisor will require monthly reports from the contractor listing the new cases opened, the status of all open cases, the number of cases closed, the reason for closing, and the amount of attorney time expended on the cases. Contractors will also be subject to monthly random file reviews, in court observations by the supervising contractor. The supervising contractor will also handle client complaints and administer annual written evaluations regarding contract services.
- Contract language should specify which activities can and cannot be performed by paralegals.
- Contractors will indicate which courtroom(s) they would like to be considered for (recognizing that some courtrooms may have more applicants/competition than others).
- Applicants must present a coverage plan in the event that they are not able to appear in court.

Draft Language for a Contract for Services in the Separate Juvenile Court

The Lancaster County Board of Commissioners is seeking a law firm (or attorneys) interested in providing legal services for parent representation in 3(a) cases in the Separate Juvenile Court of Lancaster County.

A. The term of the contract will be for three years commencing on July 1, 2012 and ending on June 30, 2013.

B. Except in situations where a legal conflict of interest exists, the contractor must agree to provide legal services to parents assigned to the contractor by the Separate Juvenile Court of Lancaster County in cases arising under Neb. Rev. Stat. §43-247 (3)(a).

C. Contractor must agree to accept appointments in 25 new cases per year under Neb. Rev. Stat. §43-247 (3)(a).

D. Compensation for the contractor will be as follows:

25 cases *\$1,500 per case = \$37,500

E. The contractor must agree to maintain professional liability insurance covering the subject cases during the term of this agreement.

F. An Advisory Committee consisting of representatives of the Lancaster County Indigent Defense Advisory Committee and respected juvenile court practitioners will recommend the contractors to the Lancaster County Board of Commissioners.

G. Up to two separate contacts will be established to provide supervision of the contracts. The contract supervisor will require monthly reports from the contractor listing the new cases opened, the status of all open cases, the number of cases closed, the reason for closing, and the amount of attorney time expended on the cases. Contractors will also be subject to monthly random file reviews, in court observations by the supervising contractor. The supervising contractor will also handle client complaints and administer annual written evaluations regarding contract services.

H. Minimum qualifications include membership in the Nebraska State Bar Association and a minimum of five years of experience in the practice of law. CLE requirements must be met, and at least 75% of the mandatory CLE requirements must be juvenile specific training. Experience in the Separate Juvenile Court of Lancaster County will be considered. The contractor should also have displayed compliance with all legal and ethical requirements of attorneys in representing clients in these types of cases. The contractor must demonstrate competence in this area of practice.